# Cracks Appear in the Code's 'Jurisdictional' Time Provisions

**By Carlton M. Smith**


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The author wishes to thank the James B. Lewis Memorial Fund for its financial support in researching and writing this report, and professor Les Book of Villanova Law School for his helpful comments.

In this report, Smith discusses lower court cases in which the court has refused to call code time limits "jurisdictional," and he provides an update on how the government's argument is weakening.



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## I. Introduction

The tax code has lots of deadlines. Some run against taxpayers. Some run against the government. And some run against third parties. When equity requires, the judicial doctrine of equitable tolling can extend deadlines in limited circumstances. Common situations in which equitable tolling applies are when the defendant has actively misled the plaintiff regarding the plaintiff's cause of action; when the plaintiff in some extraordinary way has been prevented from asserting his rights; or when the plaintiff has mistakenly asserted his rights in the wrong forum.[1]

In 1990, in *Irwin v. Department of Veterans Affairs*,[2] the Supreme Court held that there is a rebuttable presumption that time periods in the U.S. code — even time periods involving the government itself — are subject to unstated equitable tolling exceptions. But that presumption can be overcome when it is clear that Congress intended that no equitable tolling be allowed. Those rigid time periods are ones that the Supreme Court and parties have sometimes called jurisdictional, although that terminology is now disfavored. The Court today prefers to limit the word "jurisdictional" to conditions on subject matter and personal jurisdiction, not "claim-processing rule" time limits.[3] In 1997, in *United States v. Brockamp*,[4] the Supreme Court held that the *Irwin* presumption of a judicial equitable tolling exception was overcome for the section 6511(a) period in which to file tax refund claims.

Since 1997, except when its own ox is gored,[5] the government has consistently taken the position (based in part on language in *Brockamp*) that any

[1] *Mannella v. Commissioner*, 631 F.3d 115, 125-126 (3d Cir. 2011), *Doc 2011-1183*, *2011 TNT 13-10*.

[2] 498 U.S. 89 (1990).

[3] In *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court said:
> Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court. "Jurisdiction," the Court has aptly observed, "is a word of many, too many, meanings. . . . [C]lassify[ing] time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'" can be confounding. Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

*Id*. at 454-455 (citations omitted). The Supreme Court's recent trend against calling some other procedural requirements "jurisdictional" has been noted in these pages. *See* Patrick J. Smith, "Is the Anti-Injunction Act Jurisdictional?" *Tax Notes*, Nov. 28, 2011, p. 1093, *Doc 2011-22319*, or *2011 TNT 229-7*.

[4] 519 U.S. 347 (1997), *Doc 97-4855*, *97 TNT 33-8*.

[5] In *Doe v. United States*, 398 F.3d 686 (5th Cir. 2005), *Doc 2005-1652*, *2005 TNT 17-11*, the government unsuccessfully argued that the time period to assess taxes under section 6501 could be equitably tolled in the IRS's favor.

time period in the code in any case that the government is litigating is rigid and not subject to equitable tolling. In each of the last two years, I have published articles in *Tax Notes* arguing that the government's position is wrong.[6] I contended that some time periods in the code may be equitably tolled — that is, that there is no per se rule. Indeed, based on recent nontax Supreme Court opinions, I believe that more and more time provisions in the code may be held tollable. That should include most simple, short time periods for which tolling would result in few or no adverse collateral consequences to the administration of tax collection and refunds — such as periods in which to file disclosure actions under section 6110, whistleblower award actions under section 7623(b)(4), and suits for attorney fees under section 7430(f)(2). Tolling of time periods should also be allowed when Congress has indicated a preference for equity in tax administration, such as the innocent spouse and collection due process time periods.

As of last year, I had little post-1997 case law to support my contention. About the only thing I could point to was that in 2010 and 2011, the Third Circuit in *Mannella v. Commissioner*,[7] and several Tax Court judges concurring in *Hall v. Commissioner*,[8] agreed that the two-year period established in reg. section 1.6015-5(b)(1) for filing for equitable innocent spouse relief under section 6015(f) was potentially subject to equitable tolling. But because the IRS abandoned that deadline in Notice 2011-70,[9] the question of equitable tolling for that time period is now moot.

Since my last *Tax Notes* article on tolling, published in May 2011, at least one other circuit has decided to analyze whether a particular code section may be equitably tolled. Further, several other courts have refused to call other code time limits jurisdictional. This report examines those cases and provides an update on how cracks are beginning to appear in the dike of the government's argument that all code time periods are jurisdictional. In discussing those opinions, I also criticize some of their reasoning — even though I agree with the circuit court's ultimate holding of no tolling. Unfortunately, I find that the parties and the courts do not always hew to the language and logic of the Supreme Court's recent nontax opinions when deciding tax cases. Finally, I alert readers to a pending Supreme Court case that will likely produce an opinion commenting on the scope and meaning of *Brockamp* in determining whether a Medicare time period may be equitably tolled.[10]

## II. Background Supreme Court Opinions

### A. *United States v. Brockamp* (1997)

*Brockamp* involved two companion cases decided by the Ninth Circuit in 1995, only a few years after *Irwin*. In both cases, the taxpayers had made payments to the IRS before their returns were due, but then did not file their returns on time. When original returns were filed many years after they were due, the returns showed overpayments. The taxpayers argued that the periods to file timely refund claims should be equitably tolled while they were effectively unable to act because of mental incapacity and alcoholism.[11]

Section 6511(a) provides that refund claims are timely if filed within the later of three years after the return is filed or two years after the tax is paid. Section 6511(a) is a look-forward rule. Section 6511(b) provides a two- or three-year lookback rule (depending on which timely filing period is used under section 6511(a)) to limit the amount of any refund to the tax paid within the relevant lookback period. In *Brockamp* and the companion case, *Scott v. United States*, the Ninth Circuit applied the *Irwin* presumption and held that the section 6511(a) period in which to timely file a refund claim was subject to equitable tolling.[12]

In 1997, in a short, unanimous opinion by Justice Stephen G. Breyer, the Supreme Court reversed the Ninth Circuit in a combined opinion in *Brockamp* and *Scott*. The opinion was devoid of the words "jurisdiction" or "jurisdictional." In partial support of its holding, the Court said:

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[6]Carlton M. Smith, "*Friedland*: Did the Tax Court Blow Its Whistleblower Jurisdiction?" *Tax Notes*, May 23, 2011, p. 843, *Doc 2011-9435*, *2011 TNT 100-10* (arguing that the 30-day period under section 7623(b)(4) to file a Tax Court petition to review IRS whistleblower awards is subject to equitable tolling); Smith, "Equitably Tolling Innocent Spouse and Collection Due Process Periods," *Tax Notes*, Mar. 1, 2010, p. 1106, *Doc 2010-3161*, *2010 TNT 41-8*.

[7]My clinic submitted an amicus brief in *Mannella* on the subject of equitable tolling. Brief of Amicus Curiae in Support of Petitioner-Appellee, *Manella*, 631 F.3d 115 (No. 10-1308), *Doc 2010-21166*, *2010 TNT 189-24*.

[8]135 T.C. 374, 383 (2010), *Doc 2010-20733*, *2010 TNT 184-11* (Wells, J., concurring, joined by Colvin, C.J., and Cohen, Goeke, Wherry, and Kroupa, JJs). For the statement that if the regulatory time period was valid, it should be subject to the doctrine of equitable tolling, *id.* at 387, n.5.

[9]2011-2 C.B. 135, *Doc 2011-16118*, *2011 TNT 143-9*.

[10]*Sebelius v. Auburn Regional Medical Center*, Sup. Ct. Dkt. No. 11-1231, *cert. granted* June 25, 2012, to review 642 F.3d 1145 (D.C. Cir. 2011).

[11]*Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995), *Doc 95-9410*, *95 TNT 199-15*; *Scott v. United States*, 1995 U.S. App. LEXIS 37932 (9th Cir. 1995), *Doc 95-9729*, *95 TNT 208-15*.

[12]*Brockamp*, 67 F.3d at 261-262; *Scott*, 1995 U.S. App. LEXIS 37932.

> 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. 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.[13]

In language that has since haunted tax lawyers and judges, the Supreme Court went on to talk specifically about tax law and the administrative problems that might ensue if these time periods were tollable:

> 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. See H.R. Conf. Rep. No. 356, 69th Cong., 1st Sess., 41 (1926) (deleting provision excusing tax deficiencies in the estates of insane or deceased individuals because of difficulties involved in defining incompetence). The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system. At the least it 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.[14]

With all due respect to the Supreme Court, while I can understand most of the first quote from *Brockamp* as providing good reasons for not allowing equitable tolling of section 6511(a)'s time period, I was disappointed that in the second quote, the Supreme Court did not recognize how much equity there already was in tax collection in 1997. I was also disappointed by how the Court stated its belief that tax collection does not generally involve equity. The opinion could be read as implying that lack of general equity in the code is a factor militating against the *Irwin* presumption. To my mind, even if an area of the law is completely lacking in equity, this should be only a neutral factor in the *Irwin* analysis, not a negative one. Otherwise, the lack of equity creates a presumption against tolling and thus makes the *Irwin* presumption in favor of tolling available only sporadically in the U.S. code. Most of the code involves matters that likely were not handled in the courts of equity at common law.

The Supreme Court should have known that tax collection, even before 1997, fairly regularly involved equity. Here are some examples:

> 1. The Court had long held that under the doctrine of equitable recoupment (applicable in district courts and the predecessor of the Court of Federal Claims), tax overpayments time-barred from refund under section 6511 may be used to offset other taxes timely asserted as due by the IRS if the taxpayer is being taxed inconsistently on the same transaction.[15]
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> 2. In 1983, in *United States v. Rodgers*,[16] the Court held that when non-taxpayers have

[13] 519 U.S. at 350-352 (citations omitted).

[14] *Id.* at 352-353.

[15] *Stone v. White*, 301 U.S. 532 (1937); *Bull v. United States*, 295 U.S. 247 (1935).

[16] 461 U.S. 677 (1983).

state homestead interests in property owned by delinquent taxpayers, ''district courts may exercise a degree of equitable discretion in section 7403 proceedings''[17] in deciding whether to compel a sale of the property to pay the taxes.

3. Section 6901(a) has long provided procedures for the government to assess and collect ''liability, at law or *in equity*, of a transferee of property'' (emphasis added).[18]

4. In 1971 Congress first enacted an innocent spouse provision to mandate relief from joint and several income tax liability.[19] Located in former section 6013(e), it directed relief if several conditions were met, one being that taking into account all the facts and circumstances, it would be ''inequitable'' to hold the spouse liable for the tax deficiency.

5. In 1984[20] Congress amended the estimated tax penalty to add a waiver for any underpayment ''to the extent the Secretary determines that by reason of casualty, disaster, or other unusual circumstance the imposition of such addition to tax would be *against equity and good conscience*'' (emphasis added).[21]

6. The late-filing and late-payment penalties each have long had ''reasonable cause and not willful neglect'' exceptions.[22] That these exceptions are essentially equitable was made clear in 1985 by *United States v. Boyle*,[23] in which the Supreme Court observed that the IRS usually did not impose the penalties in circumstances beyond the taxpayer's control, and the Court speculated that for disabled taxpayers, ''disability alone could be an acceptable excuse for late filing.''[24]

7. The IRS has long had statutory power to grant extensions to file[25] and to meet election deadlines (including those set out in statutes and those established administratively). The current regulations[26] governing those extension requests, reg. section 301.9100-1 et seq., list reasons for needing an extension. One reason, which is essentially a blanket equitable exception, reads: ''Failed to make the election because of intervening events beyond the taxpayer's control.''[27] The regulations even provide for some automatic extensions. They include the 15-month rule for filing an exemption application for a section 501(c)(3) organization under section 508, the election to be treated as a homeowners association under section 528, and the election to adjust basis on partnership transfers and distributions under section 754.[28] Those applications and elections all change substantive tax calculations.

Further, the tax code has gotten much more equitable since 1997. No matter how one feels about the weakness of the Court's 1997 statement about the code and equity, in the ensuing years Congress has increasingly called on the IRS to make equitable determinations in both collection and liability matters — a trend criticized by professor Steve Johnson as significantly raising the Service's administrative costs merely to address the rare cases in which strict rules produce seemingly unfair results.[29] Courts today should not be imprisoned in the Supreme Court's view of how equitable the tax law was in 1997.

Here are some examples of where the code has been made more equitable since *Brockamp*:

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[17]*Id.* at 709.

[18]*See United States v. Bess*, 357 U.S. 51 (1958) (government's suit in equity successfully held a widow liable for the cash surrender value of the decedent husband's insurance policy at time of his death).

[19]P.L. 91-679, section 1.

[20]P.L. 98-369, section 411.

[21]Section 6654(e)(3)(A). The Tax Court has granted the waiver in cases of serious illness (AIDS) or mental disability. *Meyer v. Commissioner*, T.C. Memo. 2003-12, *Doc 2003-1297*, *2003 TNT 9-31*; *Shaffer v. Commissioner*, T.C. Memo. 1994-618, *Doc 94-11158*, *94 TNT 248-12*; *Carnahan v. Commissioner*, T.C. Memo. 1994-163, *Doc 94-4054*, *94 TNT 75-31*.

[22]Section 6651(a)(1), (2), and (3).

[23]469 U.S. 241 (1985).

[24]*Id.* at 248, n.6. Even before 1997, the Tax Court held that mental disabilities may give rise to reasonable cause for late-filing a tax return — holdings consistent with *Boyle*. *Shaffer*, T.C. Memo. 1994-618; *Carnahan*, T.C. Memo. 1994-163.

[25]*See, e.g.*, section 6081(a), allowing the IRS to extend the time to file tax returns.

[26]Adopted on December 31, 1997, by T.D. 8742, *Doc 98-371*, *97 TNT 251-7*.

[27]Reg. section 301.9100-3(b)(1)(ii).

[28]Reg. section 301.9100-2(a)(2).

[29]Steve Johnson, ''Symposium: Tax Compliance: Should Congress Reform the 1998 Reform Act: The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification,'' 51 *Kan. L. Rev.* 1013, 1059 (2003) (''Congress made the wrong choice in creating these grounds [for equitable relief in innocents spouse, CDP, and OICs]. It forgot that costs as well as benefits must be considered. As said, the benefits were expected to be and apparently have been, for the rare cases. In securing those rare benefits, there were costs in many more cases: expended administrative resources that could have been applied to much greater effect elsewhere in the tax system. In short, the game was not worth the candle. At a time when the IRS is otherwise squeezed for resources, it is unwise, on balance, to expend its available resources on these residual, equitable categories'').

1. In 1998 Congress enacted a statutory partial overruling of *Brockamp* in section 6511(h),[30] providing that ''the running of the periods specified in subsections (a), (b), and (c)[31] shall be suspended during the period of such individual's life that such individual is financially disabled.'' The subsection defines the term ''financially disabled'' as arising from a medically determinable physical or mental impairment meeting specified requirements.

2. In 1998, in addition to enacting section 6511(h), Congress repealed section 6013(e) and provided a greatly expanded innocent spouse provision under section 6015.[32] New section 6015(b) retained as one of its conditions that ''taking into account all the facts and circumstances, it is *inequitable* to hold the other individual liable for the deficiency in tax.''[33] A new section 6015(f) — applicable both to deficiencies in tax and underpayments of tax shown on the return — provided for even broader relief. Subsection (f) had no condition for relief other than the identical equitable language in new subsection (b). In her 2005 report to Congress, the national taxpayer advocate reported that the IRS was receiving roughly 50,000 requests for relief under section 6015 a year[34] — that is, a substantial amount of equitable tax collection determinations being made annually.

3. In 1998 Congress created CDP hearings at the IRS Office of Appeals. The hearings are offered at either of two critical times in the tax collection process: the issuance of a notice of intention to levy, or the notice of filing of a tax lien.[35] In a CDP hearing, the Appeals officer is charged not only with considering collection alternatives (such as a proposed installment payment agreement under section 6659 or an offer in compromise under section 7122), but also with taking 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.''[36] In the fiscal year that ended September 30, 2011, the Appeals Office held more than 50,000 CDP hearings.[37] That's more ''equitable'' tax collection hearings than the combined Tax Court cases, district court refund cases, and circuit court tax cases filed in that year.[38]

4. Although the IRA provisions deal with a substantive tax calculation time limit rather than a tax collection time limit, Congress in 2001 amended them to allow the IRS to waive the 60-day window in which to roll over an IRA distribution ''where the failure to waive such requirement would be *against equity or good conscience*, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.''[39]

5. In 2006 Congress resolved a circuit split and amended section 6214(b) to authorize the Tax Court to apply the doctrine of equitable recoupment in its proceedings.[40]

Finally, the code has been expanded to allow for several additional actions since 1997. One worth mentioning involves third parties and not tax collection in the traditional sense. In 2006 Congress added subsection (b) to section 7623,[41] which for the first time allows the Tax Court to hear appeals from adverse IRS determinations concerning whistleblower awards.

As the tax code grows, care must be shown in making generalizations about what it usually encompasses.

### B. *United States v. Young* (2002)

The Supreme Court has had a tax case involving jurisdiction or equitable tolling about once a year since *Brockamp*. I'll discuss three of them to provide an understanding of where things now stand for tolling in the tax code.

[30]P.L. 105-206, section 3202(a).

[31]Subsection (c) is involved when a taxpayer signs an extension to assess taxes and thereby also gets an extension to file refund claims.

[32]P.L. 105-206, section 3201(a). Section 6511(h) was enacted by section 3202 of the legislation, and those were the only two sections in the 3200s. Congress clearly saw the provisions as related by equity. *Hall v. Commissioner*, *supra*, 135 T.C. at 385-386 (Wells, J., concurring) (calling them ''companion statutory provisions'').

[33]Section 6015(b)(1)(D) (emphasis added).

[34]Nina Olson, ''National Taxpayer Advocate 2005 Annual Report to Congress,'' at 329 (Dec. 31, 2005), *Doc 2006-556*, *2006 TNT 9-26*.

[35]Sections 6320 and 6330, added by P.L. 105-206, section 3401.

[36]Section 6330(c)(3).

[37]IRS Data Book 2011, Table 21.

[38]*Id.* at Table 27.

[39]Section 408(d)(3)(I) (emphasis added), added by P.L. 107-16, section 644. In the conference committee report, the conferees listed examples of when they thought waivers would be appropriate, including ''errors committed by a financial institution, or in cases of inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country, or postal errors.'' H.R. Conf. Rep. 107-84 at 252-253, 2001-3 C.B. 123, 375-376.

[40]P.L. 109-280, section 858(a).

[41]P.L. 109-432, section 406(a)(1), Div. A.

None of the Supreme Court cases since *Brockamp* has dealt with whether a time limit in the IRC is jurisdictional or subject to equitable tolling. However, *United States v. Young*[42] is interesting, because it involves tax debts — at least as seen through the prism of the Bankruptcy Code. In *Young*, a debtor had twice filed for protection under the Bankruptcy Code (title 11) while owing income taxes to the IRS. The first time, the debtor filed under chapter 13 (an individual reorganization). The second time, he filed under chapter 7 (a complete liquidation). Income tax debts may be discharged in bankruptcy under some circumstances, one of which is that the tax debt relates to a tax year for which the filing due date is more than three years before the date the debtor filed for bankruptcy.[43] Since the chapter 7 bankruptcy was filed more than three years after the due date, the debtor argued that the tax debt was discharged when the chapter 7 proceeding concluded.

The IRS disagreed, arguing that during the earlier, chapter 13 bankruptcy proceeding, the IRS was precluded by the automatic stay from taking any collection action. The IRS asked that there be equitable tolling of the three-year period during the time the IRS was precluded from taking collection action because of the automatic stay arising from the chapter 13 proceeding. Noting that bankruptcy courts have "inherent equitable powers"[44] and that the Bankruptcy Code already contained statutory equitable exceptions to some time periods, the Supreme Court agreed with the IRS.[45]

### C. *Holland v. Florida* (2010)

*Holland v. Florida*[46] is the penultimate Supreme Court opinion dealing with whether a time period is subject to equitable tolling or is rigidly jurisdictional. Although it does not involve taxes, *Holland* is an important opinion to the tax world because it extensively discusses and distinguishes *Brockamp*.

*Holland* involved a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that imposes a one-year statute of limitations on the filing of federal habeas corpus petitions by state death row prisoners.[47] In *Holland*, a lawyer missed the deadline despite his client's repeated urging to file on time. Eventually the client learned of the event that triggered the running of the statute, and he filed a habeas petition himself — but it was five weeks late.

The Supreme Court, like all 11 circuits that had addressed the issue, concluded that equitable tolling could apply to the statute:

> First, the AEDPA "statute of limitations defense . . . is not 'jurisdictional.'" It does not set forth "an inflexible rule requiring dismissal whenever" its "clock has run."
>
> We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a "rebuttable presumption" in *favor* "of equitable tolling."
>
> In the case of AEDPA, the presumption's strength is reinforced by the fact that "equitable principles" have traditionally "governed" the substantive law of habeas corpus, for we will "not construe a statute to displace courts' traditional equitable authority absent the 'clearest command.'" The presumption's strength is yet further reinforced by the fact that Congress enacted AEDPA after this Court decided *Irwin* and therefore was likely aware that courts, when interpreting AEDPA's timing provisions, would apply the presumption.
>
> Second, the statute here differs significantly from the statutes at issue in *United States v. Brockamp*, 519 U.S. 347 (1997), and *United States v. Beggerly*, 524 U.S. 38 (1998), two cases in which we held that *Irwin*'s presumption had been overcome. In *Brockamp,* we interpreted a statute of limitations that was silent on the question of equitable tolling as foreclosing application of that doctrine. But in doing so we emphasized that the statute at issue (1) set forth "its time limitations in unusually emphatic form"; (2) used "highly detailed" and "technical" language "that, linguistically speaking, cannot easily be read as containing implicit exceptions"; (3) reiterated "its limitations several times in several different ways"; (4) related to an "underlying subject matter," nationwide tax collection, with respect to which the practical consequences of permitting tolling would have been substantial; and (5) would, if tolled, "require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery — a kind of tolling for which we . . . found no direct precedent." And in *Beggerly* we held that *Irwin*'s presumption was overcome where (1) the 12-year statute of limitations at issue was "unusually generous" and (2) the underlying claim dealt "with ownership of land" and thereby implicated landowners' need to

[42]535 U.S. 43 (2002).
[43]11 U.S.C. sections 507(a)(8)(A)(i) and 523(a)(1)(A).
[44]*Young*, 535 U.S. at 52.
[45]In 2005 Congress codified the *Young* result while also providing other statutory situations in which the three-year period (and other time periods) would be tolled. P.L. 109-8, section 705, amending 11 U.S.C. section 507(a)(8).
[46]130 S. Ct. 2549 (2010).
[47]28 U.S.C. section 2244(d)(1).

> ''know with certainty what their rights are, and the period during which those rights may be subject to challenge.''
>
> By way of contrast, AEDPA's statute of limitations, unlike the statute at issue in *Brockamp*, does not contain language that is ''unusually emphatic,'' nor does it re-iterate its time limitation. Neither would application of equitable tolling here affect the ''substance'' of a petitioner's claim. Moreover, in contrast to the 12-year limitations period at issue in *Beggerly*, AEDPA's limitations period is not particularly long. And unlike the subject matters at issue in both *Brockamp* and *Beggerly* — tax collection and land claims — AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home. In short, AEDPA's 1-year limit reads like an ordinary, run-of-the-mill statute of limitations.[48]

Note how *Holland* repeats the argument that tax collection is not an area of the law where equity finds a comfortable home. But language in the early part of the above quote indicates that if a time period is found in an equitable area, ''the [*Irwin* tolling] presumption's strength is reinforced,'' not that a time period existing in an area not known for equity is not entitled to *Irwin*'s equitable tolling presumption. From this language, I conclude that the Supreme Court's position is that if an area is not equitable, this is merely a neutral, not adverse, factor in the tolling analysis. However, I wish the Court had been clearer on that point.

### D. *Henderson v. Shinseki* (2011)

*Henderson v. Shinseki*[49] is the most recent Supreme Court time limit case. It involved the untimely appeal from the Board of Veterans' Appeals (BVA), which had denied a claim for veterans' benefits. Before 1988 a denial by the BVA was not reviewable in court. However, in 1988 Congress created an Article I court named the Court of Appeals for Veterans Claims (the Veterans Court) to review BVA decisions adverse to veterans. A veteran must file a notice of appeal with that court within 120 days of the date the BVA's final decision is properly mailed.[50]

After the BVA denied David Henderson's claim for supplemental disability benefits, he filed a notice of appeal in the Veterans Court, missing the 120-day filing deadline by 15 days. Henderson argued that his failure to timely file should be excused under equitable tolling principles. While his appeal was pending, the Supreme Court decided *Bowles v. Russell*,[51] which held that a statutory 14-day limitation on extensions to file a notice of appeal from an Article III court was jurisdictional, so a party's failure to file within that period could not be extended or excused by the district court. Underpinning the Court's holding in *Bowles* was that for over a century, the Supreme Court had called this appellate time period jurisdictional, and it felt great pressure to accord its prior precedents *stare decisis*.[52]

The question in Henderson's case was whether a similar jurisdictional designation applied to the period in which to file an appeal in the recently created Veterans Court.

Writing for a unanimous Supreme Court, Justice Samuel A. Alito said:

> Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term. We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand.
>
> Among the types of rules that should not be described as jurisdictional are what we have called ''claim-processing rules.'' These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times. Filing deadlines, such as the 120-day filing deadline at issue here, are quintessential claim-processing rules. Accordingly, if we were simply to apply the strict definition of jurisdiction that we have recommended in our recent cases, we would reverse the decision of the Federal Circuit, and this opinion could end at this point.
>
> Unfortunately, the question before us is not quite that simple because Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule. The question here, therefore, is whether Congress mandated that

[48]130 S. Ct. at 2560-2561 (citations omitted; emphasis in original).

[49]131 S. Ct. 1197 (2011).

[50]38 U.S.C. section 7266(a).

[51]551 U.S. 205 (2007).

[52]*Accord John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 138 (2008) (''Specific statutory language, for example, could rebut the presumption [of equitable tolling] 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'' (emphasis added)).

> the 120-day deadline be ''jurisdictional.'' In *Arbaugh* [*v. Y & H Corp.*[53]], we applied a ''readily administrable bright line'' rule for deciding such questions. Under *Arbaugh*, we look to see if there is any ''clear'' indication that Congress wanted the rule to be ''jurisdictional.''[54]

As an initial matter, the Court did not consider *Bowles* or any other case involving a filing in an Article III court controlling: ''This case, by contrast, involves review by an Article I tribunal as part of a unique administrative scheme. Instead of applying a categorical rule regarding review of administrative decisions, we attempt to ascertain Congress' intent regarding the particular type of review at issue in this case.''[55]

After then noting that the sentence containing the 120-day time limit did not use the word ''jurisdiction'' and that it was located in a different subchapter from the jurisdictional grant, Alito wrote:

> While the terms and placement of section 7266 provide some indication of Congress' intent, what is most telling here are the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims. ''The solicitude of Congress for veterans is of long standing.'' And that solicitude is plainly reflected in the [Veterans' Judicial Review Act], as well as in subsequent laws that ''place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions.''
>
> The contrast between ordinary civil litigation — which provided the context of our decision in *Bowles* — and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic. In ordinary civil litigation, plaintiffs must generally commence their suits within the time specified in a statute of limitations, and the litigation is adversarial. Plaintiffs must gather the evidence that supports their claims and generally bear the burden of production and persuasion. Both parties may appeal an adverse trial-court decision, and a final judgment may be reopened only in narrow circumstances.
>
> By contrast, a veteran seeking benefits need not file an initial claim within any fixed period after the alleged onset of disability or separation from service. When a claim is filed, proceedings before the VA are informal and nonadversarial. The VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, the VA must give the veteran the benefit of any doubt. If a veteran is unsuccessful before a regional office, the veteran may obtain *de novo* review before the [BVA], and if the veteran loses before the [BVA], the veteran can obtain further review in the Veterans Court. A [BVA] decision in the veteran's favor, on the other hand, is final. And even if a veteran is denied benefits after exhausting all avenues of administrative and judicial review, a veteran may reopen a claim simply by presenting ''new and material evidence.'' Rigid jurisdictional treatment of the 120-day period for filing a notice of appeal in the Veterans Court would clash sharply with this scheme.
>
> We have long applied ''the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'' Particularly in light of this canon, we do not find any clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag.[56]

## III. Lower Court Tax Opinions Since *Henderson*

### A. Jurisdictional Holdings

In the tax world, the biggest effect of recent Supreme Court opinions like *Henderson* has been that at least some lower courts are no longer using the word ''jurisdictional'' in connection with mandatory IRC time periods.

One example is the D.C. Circuit's decision in *Keohane v. United States*[57] earlier this year. The taxpayer had sued the IRS in district court under section 7433 for damages from alleged wrongful tax collection actions. The IRS is permitted by section 6331(h), enacted in 1997,[58] to serve a continuing levy on 15 percent of Social Security benefits under the Federal Payment Levy Program (FPLP). Section 6331(e) provides that ''a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released.'' For all other levies,

[53]546 U.S. 500, 515-516 (2006).
[54]*Henderson*, 131 S. Ct. at 1202-1203 (citations omitted).
[55]*Id.* at 1204.
[56]*Id.* at 1205-1206 (citations omitted).
[57]669 F.3d 325 (D.C. Cir. 2012), *Doc 2012-3569*, *2012 TNT 35-34*.
[58]By P.L. 109-8, section 1024. I recollect that the IRS asked for the ability to levy 15 percent of Social Security benefits continuously because it believed it lacked that ability.

section 6331(b) provides that ''a levy shall extend only to property possessed and obligations existing at the time thereof'' — that is, that it is not continuous. In recent years, the IRS has maintained that it may do a continuous levy on Social Security benefits outside the FPLP simply by serving a paper levy as if the benefits were treated like wages. Although there is an exempt amount that a taxpayer is entitled to keep (under section 6334(d)), even from continuous wage levies, a wage levy is usually far over 15 percent of total wages. That was what happened in *Keohane*. Paul Keohane complained that the IRS had continuously taken about 40 percent of his monthly Social Security benefits, treating his benefits levy like a wage levy. Keohane alleged that because the IRS took more than 15 percent, he had incurred $373.55 in damages, most of which consisted of the district court filing fee.

*Keohane* was a test case to challenge the IRS's continuous levies on Social Security benefits outside the FPLP. Keohane was represented by professor Diana Leyden of the University of Connecticut's tax clinic and by lawyers from Skadden, Arps, Slate, Meagher & Flom LLP. Unfortunately, section 7433(d)(3) provides that an action for damages under the section ''may be brought only within 2 years after the date the right of action accrues.'' The district court dismissed the suit for lack of jurisdiction because Keohane had known for more than two years that his monthly Social Security benefits were being continuously levied on at more than 15 percent, and it held that Keohane could not count each excessive monthly levy as a new violation to come within the two-year statute.[59]

In affirming, the D.C. Circuit agreed with the district court's analysis of how to count the beginning of the two-year period, and it agreed that the suit was untimely. But the D.C. Circuit had one quibble:

> One final piece of housekeeping. The District Court interpreted the statute of limitations in section 7433(d)(3) as a jurisdictional bar. We don't think section 7433(d)(3) qualifies as jurisdictional under the Supreme Court's current tests. *See, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (''a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction''). . . . But because the Government raised the section 7433(d)(3) argument and because we are affirming dismissal on that basis, nothing in this case turns on the mistaken labeling.[60]

In other words, dismissal should have been based on Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim on which relief could be granted, not Rule 12(b)(1) for lack of jurisdiction. Although *Keohane* did not address whether section 7433(d)(3)'s time period could be equitably tolled, it is significant as being, as far as I can tell, the first appellate court opinion holding that an IRC time period is not jurisdictional under the Supreme Court's current definition of jurisdictional. That's a start. Given that the time period in section 7433 is simple and relatively short (at least compared with the 12-year limit in *Beggerly*) and that the suit is not a part of the tax collection process but instead deals only with reimbursement for damages from negligent IRS actions, I believe the two-year section 7433 time period should be subject to equitable tolling under the right facts.

The D.C. Circuit is not the only court to have recently held an IRC provision time period not to be jurisdictional. In two Court of Federal Claims opinions issued earlier this year, *Murdock v. United States*[61] and *Boeri v. United States*,[62] two different judges held that while *Brockamp* and other Supreme Court cases effectively held that the look-forward refund claim filing period in section 6511(a) was jurisdictional, the lookback tax amount periods in section 6511(b) were not jurisdictional. In both cases, late-filed original returns had sought refunds of taxes withheld during the relevant years. In both cases, the parties and the judges all agreed that the refund claims were timely under section 6511(a) because they appeared on the original returns and thus were filed within the three-year period after the returns were filed (that is, the claims and returns were filed the same day). But under section 6513(b)(1), the taxes withheld for the relevant years were all deemed paid on the April 15 following the close of each tax year. In both cases, the returns were filed more than three years late, so the payment amounts under the three-year lookback rules of section 6511(b) totaled zero. Thus, the court held that it had jurisdiction but that the taxpayers had failed to state a claim on which relief could be granted, and the cases were dismissed under Rule 12(b)(6).

In *Murdock* the court noted that prior holdings of the Court of Federal Claims had been inconsistent on whether the time periods in section 6511(b) were

[59]775 F. Supp.2d 87 (D.D.C. 2011), *Doc 2011-6964*, *2011 TNT 64-31*.

[60]*Keohane*, 669 F.3d at 330 (some citations omitted).

[61]103 Fed. Cl. 389 (2012), *Doc 2012-2732*, *2012 TNT 28-21*.

[62]2012 U.S. Claims LEXIS 72 (2012).

jurisdictional.[63] Because opinions by Court of Federal Claims judges are not precedential, it is the Federal Circuit that will have to resolve this split. In reaching its conclusion that the time periods in section 6511(b) were not jurisdictional, the *Murdock* opinion noted a 2011 Federal Circuit opinion that cited *Arbaugh v. Y & H Corp.*[64] — a 2006 nontax case in which the Supreme Court underscored its displeasure with courts (including itself) calling too many lawsuit requirements "jurisdictional."

The *Murdock* opinion also pointed out the differences between the two types of dismissals: "First, a dismissal on the merits, unlike a dismissal for lack of jurisdiction, typically carries res judicata effect. Second, disputed facts are reviewed differently under the two regimes."[65]

*Murdock* and *Boeri* represent progress in courts considering how nontax Supreme Court opinions affect the analysis of whether tax code sections contain jurisdictional time limits. However, there is still plenty of evidence that courts in tax cases have not yet gotten the Supreme Court's message on how to evaluate time deadlines. In August the Ninth Circuit, in *Reynoso v. United States*,[66] came to the opposite conclusion from *Murdock* and *Boeri* — holding that section 6511(b)'s time limits were jurisdictional.

The taxpayer in *Reynoso* had overpaid both his 1999 and 2000 income taxes. He did not file a timely claim for overpayment for 1999. Only in 2007, on a late original 1999 return, did he ask the IRS to credit a large 1999 overpayment to 2000. Violating the rules of section 6511, in 2009 the IRS credited that amount from the 1999 year to the 2000 year. Then, in 2009 the taxpayer requested a refund out of the 2000 year for the amount credited. The Ninth Circuit agreed with the parties that the 2000 year refund claim was timely under section 6511(a) because it was made within three years after the taxpayer had filed his original 2000 return (it had been late-filed in 2008). The court found that the deemed payment date of the 2000 overpayment, however, was April 15, 2000, because the 2000 overpayment derived from 1999 estimated tax payments.

One of the arguments the taxpayer made was that the IRS, through its crediting error, had waived the defense of noncompliance with the section 6511(b) payment amount rules. The Ninth Circuit, however, held that the IRS could not have made any waiver. The court cited its own 1996 opinion in *Zeier v. United States*,[67] in which it held that section 6511(b)'s limits are jurisdictional. It is hornbook law that parties cannot waive jurisdictional defects.

The Ninth Circuit's opinion in *Reynoso* is disappointing. By citing only a 1996 opinion of its own, the court failed to consider or discuss all the nontax Supreme Court opinions on jurisdiction that have been issued since 1996. At the very least, the Ninth Circuit should have reconsidered whether those opinions dictated overruling *Zeier*.

### B. Equitable Tolling Holdings

This section discusses two post-*Henderson* cases in which a party specifically requested the equitable tolling of a tax code time period. Although I agree with the ultimate holding in the first case, I take issue with both opinions' logic and fidelity to the Supreme Court case law. Later, this report recommends a more general framework for courts to use in evaluating the jurisdictional quality and "tollability" of other tax code time periods.

*A.I.M. Controls LLC v. Commissioner*[68] is a 2012 Fifth Circuit opinion denying equitable tolling of an IRC time period. The IRS had issued a notice of final partnership administrative adjustment finding the partnership to be a sham. Under section 6226(a), when an FPAA is issued, the tax matters partner (TMP) may, within 90 days, file a petition for readjustment of partnership items either in the Tax Court, the district court, or the Court of Federal Claims. If the TMP does not file within the 90-day period, notice partners can file in the same three courts during the following 60 days. If no partner files in any court within those periods, the adjustments in the FPAA are essentially final (except for some partners who might not have received notice) and cannot be relitigated elsewhere — even by later payment and a refund suit.[69] Either after the time to contest the FPAA is over or a court case involving the FPAA concludes, the IRS makes computational adjustments to all partners' income tax returns to assess the taxes that result from conforming those returns to the FPAA or court decision.[70]

In *A.I.M. Controls*, a partner purporting to be the TMP filed a timely petition in the district court, but he failed to make a jurisdictionally required deposit to continue the suit there. Accordingly, after some time, the district court dismissed his case for lack of jurisdiction (without deciding whether he was even really the TMP). Within 60 days of the dismissal — but 418 days after the FPAA was issued — a partner purporting to be a notice partner filed a petition in

[63]103 Fed. Cl. at 393 (collecting opinions).
[64]546 U.S. 500, 510 (2006).
[65]*Id.* at 392 (citations omitted).
[66]2012 U.S. App. LEXIS 18208 (9th Cir. 2012), *Doc 2012-18183*, *2012 TNT 168-7*.
[67]80 F.3d 1360 (9th Cir. 1996), *Doc 96-11047*, *96 TNT 73-13*.
[68]672 F.3d 390 (5th Cir. 2012), *Doc 2012-3981*, *2012 TNT 38-10*.
[69]Sections 6223(e) and 6225(c).
[70]Section 6230(c)(1) and (4).

the Tax Court. That second partner argued that the 60-day period in which a notice partner could file in the Tax Court began only after the suit in the district court was over or, alternatively, that the time period to file in the Tax Court should have been equitably tolled.

In *A.I.M. Controls*, the Tax Court issued an unpublished order in December 2010 (Dkt. No. 24659-09), finding that the notice partner's period was not statutorily extended by virtue of the district court suit. The order did not discuss the equitable tolling argument but simply dismissed the case for lack of jurisdiction.

The Tax Court's *A.I.M. Controls* order was appealed to the Fifth Circuit after the Supreme Court issued its opinion in *Henderson*. The Tax Court — like the Veterans Court involved in *Henderson* — is an Article I court.[71] The Fifth Circuit decided that before addressing the possible tolling issue, it had to first consider whether *Henderson* mandated that the section 6226 time period to file in the Tax Court was not jurisdictional.

The Fifth Circuit held that despite *Henderson*, the notice partner's period to file in the Tax Court was jurisdictional. It gave four reasons for that holding:

First, the language in section 6226 seemed to imply a jurisdictional time requirement even more strongly than the statute involved in *Henderson*, since the grant of jurisdiction to the court in subsection (f) of section 6226 began with the phrase: ''A court with which a petition is filed *in accordance with this section* shall have jurisdiction to determine'' (emphasis added).[72]

Second, the 60- and 90-day time periods of section 6226 apply not only to filings in Article I courts (the Tax Court and the Court of Federal Claims), but also to Article III district courts.[73]

Third, there was no special solicitude for veterans involved in an ordinary tax case. ''Section 6226's review process more closely resembles ordinary civil litigation than a claim for veteran benefits: it commands an adversarial process; either party may appeal an adverse decision; and the final judgment may be reopened only in narrow circumstances.''[74] The Fifth Circuit also quoted from *Brockamp* to support its observation that ''tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.''[75]

Fourth, in a footnote, the court expressed concern that a contrary holding would require it to overrule its long-standing precedent that similar 90-day periods to file in the Tax Court — including the period in section 6213(a) in which to file a deficiency petition — were jurisdictional.[76]

While I agree with the Fifth's Circuit's ultimate conclusion that the notice partner's filing period is jurisdictional, I do so for almost entirely different reasons.

First, it is clear that the time period for notice partners to file under section 6226(a) was a simple, short claims processing rule (and one with no statutory exceptions) for which the *Irwin* presumption would ordinarily dictate a holding that the time period was not jurisdictional and was subject to equitable tolling.

But under a proper analysis under the Supreme Court's current case law, this presumption could be overcome if Congress clearly indicated that it wished the time period to be jurisdictional. I believe Congress did so indicate.

As the court noted, the jurisdictional grant contains the words ''a court in which a petition is filed in accordance with this section shall have jurisdiction to determine.'' That is more emphatic jurisdictional language than appears in the typical statute of limitations.

Although the Fifth Circuit failed to note it, I think that more important than the wording argument is the fact that Congress has established a review structure for partnership items that could not function if late-filed petitions could be allowed to go forward in court (whether in the Tax Court or in the other two courts) under the guise of equitable tolling. That is, there would be huge administrative problems — a factor about which the Supreme Court was greatly concerned in *Brockamp*. Under the partnership audit provisions, after the expiration of the 60- and 90-day periods to file in court, if no petition has been filed, the Service makes computational adjustment assessments against all partners. If in such a case no partner had filed a petition but there was a notice partner who was in a coma when the FPAA was issued and she promptly filed a Tax Court petition when she emerged from the coma two years later, would the IRS have to undo all computational adjustment assessments against all the partners (including her) when the suit was allowed to go forward because the court equitably tolled the time period for her?[77] That would be a nightmare Congress would not want.

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[71]Section 7441.
[72]762 F.3d at 394.
[73]*Id.*
[74]*Id.*
[75]*Id.*

[76]*Id.* at 395, n.3.
[77]If any one partner files a Tax Court petition on time, all the other partners become a party to the suit. Section 6226(c).

Where did the Fifth Circuit's reasoning in *A.I.M. Controls* go wrong? First, the court essentially said that because the 60-day notice partner period could be used to file in both Article I and Article III courts, *Henderson*, which involved only an Article I court (like the Tax Court), was distinguishable. But in *Henderson* itself the Supreme Court acknowledged that it has sometimes held that time periods to file suit in Article III courts are non-jurisdictional and subject to equitable tolling.[78] The *Henderson* Court cited *Bowen v. City of New York*,[79] in which the Supreme Court held that the period to bring a district court suit challenging the denial of Social Security benefits was non-jurisdictional and subject to equitable tolling. Thus, just pointing out that section 6226 suits may also be brought in Article III district courts does not answer the question.

Second, the Fifth Circuit observed that Congress has a special solicitude for veterans and that tax law is not normally equitable. But those facts merely indicate that there should be no thumb on the scale enhancing the *Irwin* presumption in favor of equitable tolling for the section 6226 time period. It does not mean there is no equitable tolling in ordinary litigation or in all tax cases.

Finally, the Fifth Circuit expressed an unfounded fear that holding that the section 6226 period to file was not jurisdictional would require it to overrule its precedents that other 90-day filing periods in the Tax Court *were* jurisdictional — including the 90-day period under section 6213(a) to file a deficiency suit. That fear was unfounded because the Supreme Court's rule is that the *Irwin* presumption can be rebutted by *stare decisis* to long-standing Supreme Court interpretations holding a particular time period to be jurisdictional — not long-standing circuit court decisions inconsistent with the Supreme Court's modern views on what is jurisdictional. Thus, the Fifth Circuit should not be worrying about protecting its precedent on other Tax Court 90-day-filing time periods when the Supreme Court has no precedent on those time periods.

Moreover, the Fifth's Circuit's precedent under section 6213(a) would still survive because there is clear statutory evidence that Congress would want the 90-day period therein to file a suit challenging a notice of deficiency to be jurisdictional. If a person files a deficiency petition in the Tax Court beyond the 90-day period, the Tax Court dismisses the petition for lack of jurisdiction and suggests that the taxpayer can later challenge the deficiency in court by paying the tax, filing an administrative refund claim, and then suing for a refund in district court or the Court of Federal Claims. Congress clearly had that system in mind when it created the Board of Tax Appeals in 1924 as a voluntary prepayment forum. But if the Tax Court treated its dismissal of a late-filed petition in response to a notice of deficiency as a decision on the merits — that is, for failure to state a claim on which relief could be granted — section 7459(d) would make the Tax Court's dismissal res judicata, precluding any subsequent refund suit challenge to the deficiency. Section 7459(d) states: ''If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court . . . unless the dismissal is for lack of jurisdiction.''[80]

Some background is in order before turning to the second recent case in which a party argued for equitable tolling: *Volpicelli v. United States*.[81] If a person contends that the IRS improperly took his property to pay the tax debts of another, he may bring a wrongful levy suit under section 7426 in district court. Section 6532(c) provides that ''no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action,'' and the only statutory exception to that rule is an extension if an administrative claim is filed with the IRS regarding the levy.

In 1995 — the same year the Ninth Circuit decided *Brockamp* and its companion case, *Scott* — that court of appeals issued *Capital Tracing v. United States*[82] and *Supermail Cargo Inc. v. United States*,[83] in

[78]*Henderson*, 131 S. Ct. at 1204. *Irwin* itself involved a former employee of the Veterans Administration suing in district court and alleging that he was fired because of his race and disability.

[79]476 U.S. 467 (1986).

[80]There are other 90-day periods to file in Tax Court for other jurisdictions the court possesses, such as the 90-day period to file a stand-alone section 6015(e) petition asking the Tax Court to determine relief available from joint income tax liability as an innocent spouse under section 6015(b), (c), or (f). In *Terrell v. Commissioner*, 625 F.3d 254, 258, n.1 (5th Cir. 2010), *Doc 2010-23623*, *2010 TNT 212-8*, the Fifth Circuit avoided having to hold whether the section 6015(e) period was jurisdictional or subject to equitable tolling because the court found that the IRS failed to send the notice of determination to the taxpayer's last known address, which meant that the Tax Court petition was timely. My clinic had filed an amicus brief in the case arguing that the section 6015(e) 90-day time period was subject to equitable tolling under the current Supreme Court nontax case law. For more on that argument, see Smith, ''Equitably Tolling Innocent Spouse and Collection Due Process Periods,'' *Tax Notes*, Mar. 1, 2010, p. 1106, *Doc 2010-3161*, or *2010 TNT 41-8*.

[81]2011 U.S. Dist. LEXIS 140827 (D. Nev. 2011), *Doc 2011-25689*, *2011 TNT 237-16*.

[82]63 F.3d 859 (9th Cir. 1995), *Doc 95-8115*, *95 TNT 167-11*.

[83]68 F.3d 1204 (9th Cir. 1995), *Doc 95-9996*, *95 TNT 214-14*.

which it held that the *Irwin* presumption in favor of equitable tolling applied to the section 6532(c) limitations period. Those Ninth Circuit opinions have never been overruled, nor have they even been discussed since the Supreme Court released its *Brockamp* opinion finding that the section 6511(a) time period was not subject to equitable tolling. Both before and after the Supreme Court's *Brockamp* opinion, all other circuits to have faced the issue in wrongful levy suits have held that the section 6532(c) time period cannot be equitably tolled.[84]

Now to the facts: Logan Volpicelli was a minor in 2003 when the Reno police obtained a search warrant to look in the safe deposit box of his dad, Ferrill, who had been incarcerated. In the box the police found two large checks made out to Ferrill from Ferrill's parents. The police turned the checks over to the IRS, which applied the proceeds of the checks to Ferrill's tax debts. Within the nine-month period in section 6532(c), Ferrill brought a wrongful levy suit in the U.S. District Court for the District of Nevada on behalf of his son, arguing that the checks were intended to be gifts to Logan from his grandparents and that they had only been made out to Ferrill because Logan was a minor. In the Ninth Circuit, a parent cannot represent his minor child — a lawyer must — but Ferrill did not hire a lawyer (perhaps he lacked funds or was in jail). So the court dismissed the case.

In 2010, when Logan reached the age of majority (18), he promptly brought a new wrongful levy suit in the Nevada district court. Citing *Supermail Cargo*, Logan asked the court to toll the section 6532(c) time period. However, the court dismissed this second suit as untimely. After noting the single exception in section 6532(c)(2) for tolling the nine-month period, the court wrote: ''Because the limitations do not provide for an implicit reading of an equitable exception due to the age of majority, Plaintiff is barred by the statute of limitations pursuant to *Brockamp*.''[85]

Surprisingly, the district court did not mention either of the two Ninth Circuit opinions holding otherwise. Perhaps it believed they were implicitly overruled by *Brockamp*, although I don't see how. Unlike section 6511, section 6532(c) does not repeat its time limit, is not particularly emphatic, and does not have a substantive (amount) time period. And unlike tax refund claims, there are not 90 million wrongful levy suits brought each year. There are probably fewer than 100. And probably less than a handful of wrongful levy suits are both brought late and in situations in which the plaintiff has good factual grounds for a tolling argument. Tolling the section 6532(c) time period would therefore impose little administrative burden.

There is one concern that might incline a court to hold against the potential equitable tolling of the wrongful levy time period. In 2007, in *EC Term of Years Trust v. United States*,[86] the Supreme Court noted that there is a reason the time period to bring wrongful levy suits under section 6532(c) is shorter than the at-least-two-year period in which to bring refund suits under section 6532(a):

> The demand for greater haste when a third party contests a levy is no accident; as the Government explained in the hearings before passage of the Act, ''Since after seizure of property for nonpayment of taxes [an IRS] district director is likely to suspend further collection activities against the taxpayer, it is essential that he be advised promptly if he has seized property which does not belong to the taxpayer.''[87]

But that shorter period should not mean there can never be equitable tolling. It just means that in balancing the equities of allowing tolling in a particular case, the court should be free to consider the behavior of, and the effect of tolling on, the IRS. For example, the court might ask whether the IRS tried to collect any other assets from Ferrill, or if there were any other assets to collect, after he brought the defective wrongful levy suit in 2003 for return of the money to Logan. If Ferrill had no other assets and still doesn't, the IRS did not forgo any collection and it would be unharmed by returning the money to Logan at this late date (if it really is his money).

In any event, Logan has appealed the district court's dismissal to the Ninth Circuit, where the parties are in the midst of briefing.[88] If the Ninth Circuit sticks to its prior position, that will reaffirm a circuit split, and *Volpicelli* may turn into a vehicle for the Supreme Court to explore just how broadly to read its statements in *Brockamp* about the tax law not normally being characterized by case-specific exceptions reflecting individualized equities, and about how narrowly to read its statements about the particular, complicated refund claim statute of limitations involved therein. *Volpicelli* bears watching.

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[84]*See Becton Dickinson and Co. v. Wolkenhauer*, 215 F.3d 340, 352 (3d Cir. 2000) (collecting cases), *Doc 2000-16397*, *2000 TNT 115-8*.

[85]2011 U.S. Dist. LEXIS 140827 at *8.

[86]550 U.S. 429 (2007), *Doc 2007-10671*, *2007 TNT 84-18*.

[87]*Id.* at 431-432 (citations omitted).

[88]Ninth Cir. Dkt. No. 12-15029.

**IV. *Sebelius v. Auburn Regional Med. Center***

Also worth watching is a nontax equitable tolling case that will be heard by the Supreme Court this term, *Sebelius v. Auburn Regional Medical Center*.[89] The case is set for oral argument on December 4. The case seems destined to result in an opinion in which the Supreme Court comments on how broadly to read *Brockamp* to apply to the rest of the tax code's time limits.

*Auburn* involves a system for hospitals to receive pre-reimbursement from the Medicare program for rendering services to Medicare-eligible patients. The case stems from the discovery in an unrelated case that the Center for Medicare & Medicaid Services (CMS) had paid hospitals less than they were due because it had miscalculated the "disproportionate patient percentage" for fiscal years 1993 through 1996. A group of hospitals filed claims with the Provider Reimbursement Review Board (PRRB) in 2006 seeking full payments for fiscal years 1987 through 1994. The hospitals filed their claims more than a decade after the deadlines ran for challenging the amounts of the payments, but the hospitals argued that the limitations period for each claim should be equitably tolled because CMS knowingly and unlawfully failed to disclose that the payments had been understated.

Medicare providers annually submit cost reports to fiscal intermediaries that then determine the amount of Medicare reimbursement due, which is announced in a Notice of Provider Reimbursement. If a provider is dissatisfied, it may appeal that determination to the PRRB, but it must do so within 180 days of the notice under 42 U.S.C. section 1395*oo*(a). Under a regulation under 42 C.F.R section 405.1836, the 180-day period can be extended for up to three years for good cause if "the provider demonstrates in writing it could not reasonably be expected to file timely due to extraordinary circumstances beyond its control (such as a natural or other catastrophe, fire, or strike)." Because the claims to the PRRB in this case were filed more than a decade late, the regulation was of no help, so the hospitals sought to judicially toll the 180-day period under the doctrine of equitable tolling.

The government relied on *Brockamp* as support for not tolling the 180-day period. Over the last three pages of its opinion, the D.C. Circuit in *Auburn* distinguished the section 6511 time periods and statements made in *Brockamp*.

The D.C. Circuit pointed out that the language of the 180-day Medicare time limit resembled the 90-day time limit involved in *Irwin* to file a federal employment discrimination claim under 42 U.S.C. section 2000e-16(c) (suit must be filed within 90 days of receipt of notice of final Equal Employment Opportunity Commission action). The D.C. Circuit noted that the Supreme Court in *Brockamp* had called the *Irwin* time limit "fairly simple" in contrast to section 6511.[90]

And the D.C. Circuit noted that unlike section 6511, the Medicare time period (1) was not reiterated several times in several ways in the statute like in section 6511(a) and (b) and (2) did not contain multiple highly technical statutory exceptions such as those found at section 6511(d) for refunds from bad debts, worthless securities, or net operating loss carrybacks.[91]

The D.C. Circuit in *Auburn* mentioned that *Brockamp*'s result was partly because "in the detailed landscape of exceptions before the Court in *Brockamp*, there was no reference to equitable tolling — a fact the Court found particularly conspicuous given that tax law 'is not normally characterized by case-specific exceptions reflecting individualized equities.'"[92] Yet in deciding *Auburn*, the D.C. Circuit made no observation on whether Medicare is "normally characterized by case-specific exceptions reflecting individualized equities." Thus, I assume that the D.C. Circuit thinks that when an area of the law is not generally equitable, that is a neutral — not negative — factor, and so not particularly important to a court's analysis.

Finally, the D.C. Circuit stated:

> Contrary to the Secretary's suggestions, the Court's focus in *Brockamp* was not the complexity of tax law per se, but rather the complexity of the provisions governing whether and when a claim could be filed. It is true that as a general matter, the Medicare statute, like the Internal Revenue Code, is quite complex. But unlike the tax code, the Medicare statute does not create a detailed Jenga tower of deadlines and exceptions that equitable tolling might topple. Rather, its timing scheme is straightforward and readily amenable to tolling.
>
> Given that the factors emphasized in *Brockamp* do not apply to the facts presented here, and without any other reasons for rebutting the presumption of equitable tolling, we find that equitable tolling is available under section 1395*oo*(a).[93]

[89]Sup. Ct. Dkt. No. 11-1231, *cert. granted* June 25, 2012, to review 642 F.3d 1145 (D.C. Cir. 2011).

[90]*Auburn*, 642 F.3d at 1150.
[91]*Id.*
[92]*Id.* (citation omitted).
[93]*Id.* at 1150-1151 (citation omitted).

That last quoted language is reminiscent of a 1999 opinion by Judge Richard A. Posner in *Flight Attendants Against UAL Offset v. Commissioner*,[94] in which the Seventh Circuit refused to decide whether a 90-day period to file a Tax Court declaratory judgment petition on pension plan qualification under section 7476 could be subject to equitable tolling. Posner saw no good reason behind the petitioner filing on the 91st day, but he was skeptical of the government's argument that the specific period could not be tolled and that *Brockamp* prohibited the tolling of any time period in the tax code:

> The government asks us, on the authority of *Brockamp*, to broaden the exception to cover the entire tax code. But *Brockamp* is not broadly written. The Court pointed to emphatic statutory language not paralleled in the sections of the code at issue in this case indicating Congress's disinclination to permit any delays in the institution of tax refund litigation and to the administrative complexities that would ensue from injecting the complex, nuanced, case-by-case doctrine of equitable tolling into the assembly-line production of tax refunds in response to the enormous number of refund claims (more than a hundred million) filed every year.[95]

With at least two circuits declining to read *Brockamp* as broadly as the government, will the Supreme Court in *Auburn* finally clarify that *Brockamp*'s no-tolling holding is pretty much limited to section 6511? Hard to say. Indeed, after the solicitor general got the Supreme Court to grant the writ of certiorari in *Auburn*, the Court made clear that it wanted to consider all its options. On July 23 the Court requested that Harvard professor John F. Manning (a former clerk to Justice Antonin Scalia) file an amicus brief arguing that the 180-day period to file is jurisdictional. Because parties cannot waive jurisdictional requirements, Manning argues that the 180-day period is so rigid that even the regulation allowing the extension of that period for up to three years for good cause is invalid.

In an opening brief, the solicitor general defended the government's power to provide by regulation for an administrative tolling exception of three years, but argued against any possibility of a judicially-created longer or broader tolling exception. Regarding a judicial exception, the solicitor general stated that even if an *Irwin* presumption in favor of such an exception "were to apply, any . . . presumption would be substantially weakened in this context, where Congress enacted a time deadline eighteen years before this Court's decision in *Irwin*."[96] Further, the solicitor general stated, "Medicare Part A is far more analogous to the subject matter in *Brockamp* (tax collection) and *Beggerly* (land claims) than to the subject matter in *Holland* (habeus corpus) or *Irwin* (Title VII)."[97] I would take issue with both of these statements. I would argue that there is no such thing as a "weakened" *Irwin* presumption. No Supreme Court opinion has ever mentioned or implied the existence of a "weakened" *Irwin* presumption, and the solicitor general cites none. Indeed, this "weakened" presumption argument is new to the courts. In lower courts, the Department of Justice has been arguing the more extreme position that *Brockamp* prevents any tax code time limit from being tolled. In my view, the *Irwin* presumption exists as to all non-jurisdictional time limits in the U.S. Code, including Title 26, and can only be " under *Holland* in an equitable area. And regardless of what *Brockamp* may have erroneously stated, in many areas of tax collection, equity does find a comfortable home. At least parts of the tax law are more like *Holland* than the solicitor general seems to understand and so time periods within these equitable parts deserve that "reinforced" *Irwin* presumption in favor of tolling. And the tolling presumption is further "reinforced" under *Holland* where a statute — even a tax statute — was enacted after *Irwin* was issued in 1990. Briefing in *Auburn* should be completed by October 31.

## V. Conclusion

Last year, in *Mayo Foundation v. United States*, the Supreme Court said: "We are not inclined to carve out an approach to administrative review [of tax regulations] good for tax law only."[98] But just weeks later, in *Henderson*, the Court indicated that in the areas of jurisdiction and equitable tolling, it did not want a uniform rule: "Instead of applying a categorical rule regarding review of administrative decisions, we attempt to ascertain Congress' intent regarding the particular type of review at issue in this case."[99]

I think it is wrong to argue, as the government seems to, that large areas of the U.S. code — like Title 26 and the part of Title 42 involving Medicare

[94]165 F.3d 572 (7th Cir. 1999), *Doc 1999-2732*, *1999 TNT 12-30*.
[95]*Id.* at 577.
[96]Pet. Br. 14.
[97]Pet. Br. at 45.
[98]131 S. Ct. 704, 713 (2011).
[99]131 S. Ct. at 1204.

— are exempt from or only entitled to a ''weakened'' *Irwin* presumption. *Irwin* itself tolled a provision elsewhere in Title 42. And, as I have pointed out above regarding the tax law, Congress has a tendency of late to add equitable exceptions into laws that may not have traditionally been considered equitable.

As I read the Supreme Court opinions, even if an area of the law was known as equitable before the merger of law and equity, that fact should merely reinforce the *Irwin* presumption in favor of equitable tolling. If an area was not traditionally equitable, that should simply be a neutral factor in the analysis, not one that weakens the *Irwin* presumption or turns it into a presumption against — or causes an outright ban on — equitable tolling.

To me, each IRC filing scheme — whether administrative or judicial — should be reviewed on its own, with the goal first being to see whether Congress used jurisdictional language or created a system that would suffer significant administrative or legal problems if tolling were allowed.

Next, if the provision were not one going to jurisdiction, I would try to decide whether a time limit should be subject to tolling by looking at how detailed the exceptions were. That seemed to be the main focus of *Brockamp*, in which the word ''jurisdiction'' was not even uttered by the Court.

Beyond that, I would determine whether Congress infused equity into that portion of the IRC — such as in innocent spouse relief and CDP. In equitable areas in the code, the *Irwin* tolling presumption should be reinforced under *Holland*.

Finally, I would ask whether the time period was part of the core of the tax collection system. Peripheral issues such as disclosure suits, whistleblower suits, wrongful levy actions, suits for attorney fees under section 7430(f)(2), and suits to recover damages for wrongful collection actions are not part of the core of the tax assessment, collection, and refund process. Thus, those peripheral disputes are less likely to cause problems — either for a large number of taxpayers or for the IRS — if tolling of their time periods was permitted.

I hope the Supreme Court affirms the D.C. Circuit in *Auburn* and makes clear that what the Court said in *Brockamp* about the tax law and the complex workings of section 6511 is not meant to ban equitable tolling of all time periods in the IRC. To further my arguments and to help the Supreme Court see what the government has been saying about *Brockamp* in the tax world, my clinic — the Cardozo Tax Clinic — has just filed an amicus brief in *Auburn*.