1994

Reply Brief, Lundy v. I.R.S., 220 F.3d 1134 (Fourth Circuit Court of Appeals 1995) (94-1260)

Glenn P. Schwartz
John Marshall Law School

****

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

****

ROBERT F. LUNDY

Petitioner-Appellant

Case Number 94-1260

vs.

INTERNAL REVENUE SERVICE

Respondent-Appellee

****

REPLY BRIEF

****

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

HONORABLE HERBERT L. CHABOT, JUDGE

****

Lawrence J. Ross
Counsel for Appellant
1700 K Street, N.W.
Suite 1100
Washington, D.C. 20006
202-223-5100

Glenn P. Schwartz
Counsel for Appellant
John Marshall Law School
315 South Plymouth Court
Chicago, IL 60604
312-427-4843

TABLE OF CONTENTS

TABLE OF AUTHORITIES

page

Federal Statutes

Treasury Regulations

Legislative History

Cases

Secondary Authority

REPLY

The Brief of the IRS is Inadequate and Misleading: Taxpayer is frustrated by the IRS' response to his brief. Taxpayer took considerable effort to frame and analyze the issues involved in this case. As will be demonstrated, to the extent the IRS has responded at all, it has largely skirted the issues and failed to address Taxpayer's points. Some of Taxpayer's arguments have been dismissed with flippant remarks. More distressing, the IRS has simply ignored many of Taxpayer's most considered arguments. In so doing, the IRS has not only revealed the weakness of its position but has failed in its duty to this Court to analyze and discuss the issues.

For the IRS to prevail, it must persuade this Court that Section 6512(b)(3)(B) contains all of the following unexpressed concepts:

(1) the mailing of a notice of deficiency by the IRS constitutes a "deemed claim" for refund filed by the taxpayer;

(2) the "deemed claim" for refund is not in the form of a return, although the IRS does not articulate just what form this "deemed claim" takes;

(3) the "deemed claim" for refund of the taxpayer cannot be amended by the taxpayer or replaced by the taxpayer's actual return, even if filed within the general three-year limitation period.

Section 6512(b)(3)(B) Does Not Contain a "Deemed Claim" Concept: Taxpayer argued that section 6512(b)(3)(B) does not contain a "deemed claim" concept. (TP Br. 15-

16)[1] The IRS repeatedly states that the plain language of section 6512 means that the mailing of a notice of deficiency by the IRS constitutes a "deemed claim" for refund filed by the Taxpayer. (IRS Br. 10, 13-16,19,21). The flaw in this conclusion is that there is no express reference in the statute to a "deemed claim." Its existence is not required by the plain meaning of the statute. The IRS did not address the fact that Congress has copiously employed the word "deemed" elsewhere in the Code, including in the sections immediately preceding and following, making it unlikely that Congress inadvertently failed to use the term in section 6512. (TP Br. 16). Taxpayer can only conclude that the IRS has no response.

Any Deemed Claim Must Also be Deemed to be in the Form of a Return:

Alternatively, Taxpayer argued that if Congress intended that a notice of deficiency mailed by the IRS be a "deemed claim" for refund filed by the taxpayer, the "deemed claim" be treated as a valid claim and therefore in the form of a return. (TP Br. 16-18)

The IRS' response was to refer to Treasury Regulation § 301.6402-3(a)(5) which provides that an income tax return showing an overpayment constitutes a claim for refund and simply argue that the converse is not necessarily true. (IRS Br. 23). However, noticeably absent from the IRS' brief are any references to Treas. Regs. § 301.6402-3(a)(1) and § 301.6402-2(b) both of which are more relevant to a determination of the composition of any "deemed claim."

Treas. Reg. § 301.6402-2(b) requires that a claim for refund set forth in detail the same items that would appear on a return. (TP Br. 18). Nowhere in its brief does the IRS

---

[1]. "TP Br." refers to Taxpayer's opening brief and "IRS Br." refers to the brief of the IRS.

inform this Court just what form the Taxpayer's "deemed claim" takes. For the IRS to prevail, this "deemed claim" must be a naked "non-claim" without the detailed statement of income, deductions and credits that is required of a valid claim for refund.

Most importantly, Treas. Reg. § 301.6402-3(a)(1), ignored by the IRS, requires that if, as here, a return has not been previously filed, it must be filed on the appropriate tax return form. (TP Br. 18). In effect, the IRS is asking this Court to believe that Congress not only implied a "deemed claim" but an invalid claim for refund. Is there any reason to impute to Congress such an intent? The only advantage of reading this concept into the statute is to give the IRS the power to confiscate refunds of overpayments from taxpayers whose only mistake is to elect the Tax Court as a forum for recovering their refund. The only reasonable assumption is that Congress would not intend such a result unless it expressly so stated. The fact that the Tax Court was created to assist taxpayers makes this assumption all the more logical. (TP Br. 34)

Therefore, this Court should conclude that any "deemed claim" for refund filed by the Taxpayer was embodied in a return as required by the Treasury Regulations. He would therefore have filed his claim for refund simultaneously with his return and have availed himself of the three-year limitation of section 6511(b)(2)(A).

Taxpayer's Actual Return Should Supersede or Amend any "Deemed" Return:

In the second alternative, Taxpayer contended that the Taxpayer's actual return filed prior to the expiration of three years from the due date should supersede or amend any "deemed claim" and be given effect for purposes of determining compliance with the statute of limitations. (TP Br. 18-20). The refusal of the IRS to honor Taxpayer's return for purposes

of the statute of limitations is inconsistent with rules of statutory construction approved by the Tax Court. (TP Br. 19). It is also inconsistent with the Tax Court's recent holding in Millsap v. Comm'r, 91 T.C. 926, (1988). The issues and the equities of that case were very similar to the issues in the case before this Court and the taxpayer prevailed. (TP Br. 18-20).

The IRS failed to distinguish the principles in Millsap from the principles that ought to be applied in this case. The issue of whether a taxpayer's actual return can replace a substitute or "deemed" document prepared or generated by the IRS and thereby obtain rights to which he or she was otherwise entitled is of great significance. It is therefore quite frustrating that the IRS did not address this issue. The IRS stated that Taxpayer's arguments are meritless, (IRS Br. 20) presumably referring to all of them. Its failure to address this issue at all demonstrates that this blanket statement is bravado and a substitute for serious consideration of the issues. Taxpayer submits that the only logical conclusion is that the IRS does not have a response that would be convincing to this Court.

The IRS Misstates the Legislative History: The IRS repeatedly states that the plain language of section 6512 means that the mailing of a notice of deficiency by the IRS constitutes a "deemed claim" for refund filed by the Taxpayer. (IRS Br. 10, 13-16, 19,21). The flaw in this conclusion is that there is no express reference in the statute to a "deemed claim." In fact, the Tax Court itself has interpreted this language as meaning nothing more than that the Tax Court has jurisdiction to allow a refund if the taxpayer could have filed a claim for refund on the date the notice of deficiency was issued. (TP Br. 13-14). In Wheeler, Sr. v. Comm'r, T.C. Memo. 1979-321, 38 T.C.M. (CCH) 1236, 1238, T.C.M. (P-H) 79, 321 (1979) the court articulated its interpretation of section 6512(b)(3)(B):

> Thus, it is not necessary that a refund claim actually be filed, but only that a timely claim *could have been filed* seeking recovery of the overpaid taxes at the time the statutory notice was mailed, i.e., that the overpaid taxes were not yet barred for credit or refund when the notice of deficiency was issued. (emphasis the Court's).

The Taxpayer contends that the legislative history supports the Wheeler interpretation. (TP Br. 20-24) The response of the IRS (IRS Br. 23-27) is confused, incomplete and misleading. The IRS accuses Taxpayer of basing his argument on the language and legislative history of section 322 of the 1939 Code, as originally enacted, and of ignoring the 1942 amendments to section 322. (IRS Br. 24). This is incorrect. Taxpayer's original brief set forth in Addendum B (B 2-4) all relevant portions of section 322 as it appeared on the eve of the enactment of the 1954 Code and which, of course, reflected the 1942 amendments. All of Taxpayer's references to section 322 were to the statute as amended.

Section 322(d), the predecessor of section 6512(b)(3)(B), provided in relevant part:

> No such credit or refund shall be made of any portion of the tax unless the Board[2] determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the Commissioner and the taxpayer pursuant to section 276(b) to extend beyond the time prescribed in section 275 the time within which the Commissioner might assess the tax, whichever is earliest, or (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer...

There is nothing in this language that could remotely be considered to support a "deemed claim" concept and a shorter statute of limitations for taxpayers who file a petition

---

[2] The Board was the "Board of Tax Appeals" which was renamed the Tax Court in 1942. We will hereinafter substitute "Tax Court" for "Board" or "Board of Tax Appeal"

in the Tax Court than for taxpayers who file a complaint in the district court. Certainly if such a dramatic change in the jurisdiction of the Tax Court had been intended, the 1954 legislative history would have so stated when section 6512(b)(3)(B), the successor of section 322(d) was enacted. Instead, the House Report contained a blanket statement that existing law was being reenacted. (TP Br. 22-23, IRS Br. 26).

The language of section 6512(b)(3)(B) is somewhat different from 322(b):

> (3) LIMIT ON AMOUNT OF CREDIT OR REFUND.--No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid--
>
> * * *
>
> (B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment. [Emphasis supplied.]

The Tax Court has never articulated what language in section 6512(b)(3)(B) forms the basis for the "deemed claim" concept but it is presumably the highlighted portion. Whereas the 1939 Code contained no language which would support a "deemed claim," it is arguable that the above language could. However, to find in this language a "deemed claim" concept would require a strained construction and would also be inconsistent with the Tax Court's own mandate to construe a statute in light of the overall statutory framework, the intent of Congress and any acute injustice to taxpayers and to seek harmony in the statutory network even where the statutory language is clear. Estate of Baumgardner v. Comm'r, 85 T.C. 445, 453 (1985). (TP Br. 31-32). Such a construction would also run counter to the 1942, 1954 and 1958 legislative history.

Taxpayer disagrees with the statement of the IRS (IRS Br. 24-27) that the 1942 amendments supports the position of the IRS. Indeed, an examination of the legislative history accompanying the 1942 amendments strongly supports Taxpayer's interpretation. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 52, 120-121 contained the following explanation regarding the amendments to section 322(d), predecessor to section 6512(b)(3)(B):

> There have been some decisions to the effect that the petition referred to in this provision of section 322(d) which limits the amount of the credit or refund is not necessarily the petition which brings the case before the [Tax Court], but is that petition or the amendment thereto which asserts the grounds indicating the overpayment. Under these decisions the period of limitations runs against the taxpayer, while the case is before the [Tax Court], until the taxpayer files his petition in which he asserts, or until he amends it to assert, the grounds [on] which he claims an overpayment. In order to give the taxpayer the privilege to claim an overpayment before the [Tax Court] by such amendments to his petitions as may be allowed under the rules of the [Tax Court], without the period of limitations running against the refund of such overpayment after the notice of deficiency is mailed, [section 322(d) is amended] to provide that the period of limitations which determines the portion of the tax which may be credited or refunded is measured from the date the notice of deficiency is mailed, rather than from the date the petition is filed.

This Report is illuminating in two regards. It illustrates an assumption by Congress that 322(d) prior to amendment did not permit the IRS to shorten the taxpayer's limitation period by the mailing of a notice of deficiency. The taxpayer controlled the tolling of the statute by filing a petition showing an overpayment. It also convincingly evidences a congressional intent that the statute was amended to improve the taxpayer's situation. As amended, the mailing of the notice of deficiency tolls the running of the statute of limitations against the taxpayer. Any subsequent return/claim for refund or amendment thereto, filed by the taxpayer is not time barred. Even if the grounds for the overpayment are discovered by the Tax Court rather than the taxpayer, the Tax Court has jurisdiction to allow the refund.

This legislative history clearly indicates that section 322(d), and its successor, section 6512(b)(3)(B) provides that the Tax Court has jurisdiction to determine a refund if a claim for refund could have been filed on the date the notice of deficiency was mailed. Its purpose was to aid taxpayers, not to ensnare them in a trap.

This interpretation is consistent with that of a noted commentator who wrote a definitive history of the Tax Court, Dubroff, The United States Tax Court: An Historical Analysis (1979), cited by the United States Supreme Court and the Seventh Circuit and, on numerous occasions, by the Tax Court. In that text, Professor Dubroff reviews in detail the history of the Tax Court's refund jurisdiction. Id. at 414-27. With respect to the 1942 amendments, he first noted that in 1932 and 1934, the American Bar Association had recommended that since the statute of limitations on deficiencies tolled during the Tax Court proceeding, there should be no time limitation on refund claims once the Tax Court's jurisdiction (for determination of deficiencies) was properly invoked. Id. at 418. Congress did not accept the ABA position and a "more modest proposal" was accepted. Id. Prior to the 1942 amendments, if a Tax Court petition was filed before a claim for refund, the time of filing the petition controlled. Id. A petition for this purpose was a petition that first alleged an overpayment "[because of] a Supreme Court decision holding that, for statute of limitations purposes, an amended claim for refund asserting a new and unrelated ground did not relate back to the date of filing of the original claim." [Citation omitted.] Id. at 419. The ABA took the position that since the Commissioner could amend his pleadings to assert a greater deficiency through the time of trial, the taxpayer should have the same privilege. Id. Professor Dubroff reports the Congressional response as follows (p. 419):

> In 1942, Congress agreed with the ABA objective and the statute was amended to allow credit or refund if the mailing of the deficiency notice which resulted in the [Tax Court] proceeding was within the statutory period of the overpayment. [citing Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 877.] Thus, whether or not the original petition claimed an overpayment, claim therefor would not be time barred if such a claim could validly have been made at the time of mailing of the deficiency notice. [Citing I.R.C. § 6512(b)][3][Emphasis supplied.]

This interpretation of sections 322(d) and 6512(b) is exactly the one espoused by the Tax Court in Wheeler, supra, and avoids the hardship to taxpayers and the conflict with the statutory framework in accordance with Baumgardner, supra.

To briefly summarize, Taxpayer reiterates that the predecessor of section 6512(b)(3), section 322(d), contained no language which could remotely be considered to support a "deemed claim" concept or a shorter statute of limitations applicable to taxpayers who file a petition in the Tax Court. In fact, the legislative history indicates that the Tax Court has refund jurisdiction if the Taxpayer could have filed a claim for refund on the date the notice of deficiency was mailed. Second, Congress expressly stated that it intended no material changes in then existing law (section 322(d)) when it enacted section 6512(b)(3)(B). Since Congress did not intend to change the substantive rules, the only rational conclusion is that the Tax Court has jurisdiction under section 6512, as it did under section 322 of the 1939 Code to determine Taxpayer's refund.

The IRS Ignores the 1958 Legislative History: Taxpayer's original brief contained references to and quotes from legislative history accompanying two 1958 tax bills (TP Br. 20-

---

[3]. The reference to section 6512(b) instead of its predecessor, section 322(d), was presumably made in light of his recognition that Congress intended no substantive change when it enacted the 1954 Code.

24) which contained express language indicating congressional understanding and intent that the rights of the Commissioner to assess deficiencies and the right of taxpayers to claim refunds be correlative; they each have three years. It is telling that the IRS devoted a substantial portion of its brief (IRS Br. 24-26) to the 1942 legislative history but completely ignored the 1958 legislative history.

The IRS Is Attempting to Mislead this Court as to the Existence of a Longstanding Administrative Practice of Granting Refunds to Taxpayers who File a Return/Claim for Refund Within Three Years of the Due Date: The Taxpayer is by turns angered, amused and bemused by the brief of the IRS. The IRS dismisses, in a footnote and the last one at that, the Taxpayer's frustration at being caught in the switches.

It is simply outrageous for the IRS to say that it is "a figment of his imagination" that the IRS has changed its interpretation of the statute. Allen v. Comm'r was the first case, after more than a half century of interpretation of the statute, in which a taxpayer who filed his or her return within three years of the due date of that return and who reported an overpayment was denied a refund in the Tax Court. (Allen v. Comm'r, 99 T.C. 475 (1992) aff'd., No. 93-1329, 1994 U.S. App. Lexis (6th Cir. April 13, 1994)). (TP Br. 26-27). Since then, there has been a veritable explosion of additional cases. (TP Br. 27).

What the rest of the world treats as a fact, (that a taxpayer has three years in which to claim the refund of an overpayment) is dismissed by the IRS as a "figment." Only a handful of tax law professors and a few tax lawyers that specialize in procedure are aware of the fact that there has been a change in the way this procedural rule is being interpreted by the IRS

and the Tax Court. The statute has for all intents and purposes remained unchanged for over fifty years. Why are these cases just beginning to percolate up now?

Was it a "...figment of [the Taxpayer's] imagination...", that the IRS appeals officer treated his return as valid even though it was filed after the IRS issued a notice of deficiency? (TP Br. 25). If there is no long standing administrative practice, why did the Internal Revenue Service Center send the Taxpayer a letter telling him that his check was in the mail? Why did the original answer by the IRS to the Taxpayer's petition treat his tax return as if it were valid? (TP Br. 25). For that matter, why did the very attorneys who wrote the brief for the IRS in the case before this Court, tell the Seventh Circuit that "Section 6512(b)(3)(B) thus seeks to place Taxpayers who seek a refund of an overpayment in the Tax Court in the same position as if they had brought a refund suit in the district court"? (TP Br. C26).

All of the information furnished to the public by the IRS advises Taxpayer's to file within three years in order to obtain a refund. There is simply no way that a pro se taxpayer could know that they must not respond to the invitation in the notice of deficiency to file a petition in the Tax Court.

It is most ungracious for the IRS to charge the Taxpayer with an overactive "imagination." The Taxpayer is entitled to an explanation on how the IRS can be telling the general public one thing and telling this Court another. The IRS has made no attempt to explain all of the articles, IRS press releases and publications contained in Addendum C to the Taxpayer's opening Brief. Found in the Addendum is the type of information on which the general public relies and on which the Taxpayer relied. It is also indicative of the IRS' longstanding administrative practice. The Commissioner and other high-ranking IRS officials

obviously believe that such a practice exists. What other possible explanation could account for their representations to the public? Should we ascribe an intent to deceive taxpayers on the part of the Commissioner and the other IRS officials, who have communicated to the public the existence of a three-year period in which to file return/claims without warning of a lesser period in the Tax Court? Taxpayer has included page after page of admissions by the IRS that it treats the statute of limitations as being three years. The IRS has not offered an example of a single communication to the public that warns of the trap in which they will be ensnared if they follow the IRS' advice.

The IRS notes that, alternatively, a taxpayer can recover his refund by filing his return within three years and filing a refund suit in a district court. However, most taxpayers are uneducated in the subtleties of Tax Court jurisdiction and have no idea that when they file a petition in the Tax Court they are forfeiting their refund. Moreover, as noted above, the IRS has actively publicized a three-year limitation on filing for refunds without even an asterisk warning that the "three" might be "two" if a petition is filed in the Tax Court. The notice of deficiency contains no such warning nor do the IRS publications directed to taxpayers as assistance. This is nothing more than a trap for the unwary.

The IRS is playing a semantical shell game with Taxpayers. By not admitting that the IRS has suddenly changed its position, they avoid the responsibility of explaining why the change has been made. The brief of the IRS is larded with string citations to Tax Court authority but no real analysis of the correctness of that authority. Little space is devoted to

responding to Taxpayer's arguments. Taxpayer deserves a bona fide response to his well-considered arguments. This Court deserves a serious response as well.

The Longstanding Administrative Practice of the IRS has been Incorporated into the Code Under the Legislative Reenactment Doctrine: The Taxpayer contends that the reenactment of the Code without reversal of the IRS' longstanding administrative practice bespeaks congressional approval and under the legislative reenactment rule, this practice acquires the force of law as if it had been incorporated into the Code. (TP Br. 28). This is a particularly appropriate situation to apply the legislative reenactment rule because the legislative history indicates that Congress was aware that if a taxpayer filed a claim within three years, the refund would be granted as a matter of course. (TP Br. 20-24). The IRS has not deigned to respond to this contention and make its views known to this Court.

IRS Has Failed to Explain Its Lack of Consistent Treatment: Taxpayer contends that the IRS has a duty to treat similarly situated taxpayers consistently or explain the reason for the inconsistent treatment. (TP Br. 28-30). An administrative agency must either follow its own precedents or explain why it departs from them. (TP Br. 28-30). The IRS has not deigned to respond to this contention and make its views known to this Court.

The Statute Should Not be Construed in Such a Manner that the Period for Claiming Refunds is Shorter in the Tax Court than in the Other Courts Having Refund Jurisdiction: Taxpayer has vigorously contended throughout this litigation that Congress could not and did not intend that a taxpayer, who files a petition in the Tax Court, have a shorter statute of limitation for filing refund claims than taxpayers who file in the district

court or the Claims Court. (TP Br. 30-33) Taxpayer's brief contained case law authority (TP Br. 30-33) and legislative history (TP Br. 20-24) in support of this proposition.

The IRS' response (IRS Br. 27-30) to this argument is that perfect symmetry between the Tax Court and the district court is not required. Taxpayer agrees that there are some variations in the jurisdiction of and litigation before these courts but the differences that do exist are the result of explicit statutory direction. Section 6511 is the statute of limitations for all taxpayers, regardless of the forum selected. There is no statutory provision stating that a different rule should apply in the Tax Court. The IRS maintains that the plain language of section 6513(b)(3)(B) creates a difference in the Tax Court jurisdiction. (IRS Br. 28). The IRS repeatedly represents to this Court that the "plain language" of section 6512(b)(3)(B) requires this unjust result, as if by repetition the statement will become true. Giving the IRS the most favorable reading, the language is ambiguous. Rules of statutory construction require that ambiguous language be resolved in light of the equities and consistency with the statutory framework and legislative history. Baumgardner, supra, at 451.

The IRS position in this case is inconsistent with its position espoused in the Seventh Circuit. In Galuska v. Comm'r, 5 F.3d 195 (7th Cir. 1993), aff'g. 98 T.C. 661 (1991), the IRS persuaded the Court that it was only seeking the same result in the Tax Court that the taxpayer would have obtained had he filed in the district court. The IRS brief (TP Br. C26) contained the following representation to the Seventh Circuit:

> The Tax Court is authorized under Section 6512(b)(1) of the Internal Revenue Code to determine whether a taxpayer has made an overpayment of tax for any taxable year before it, Section 6512(b)(3)(B) provides, in effect, however, that no portion of any such overpayment determined by the Tax Court shall be refunded to the taxpayer to the extent the taxpayer would have been precluded under Section 6511(b)(2) from obtaining a refund had he filed

> suit in the District Court. Section 6512(b)(3)(B) thus seeks to place taxpayers who seek a refund of an overpayment in the Tax Court in the same position as if they had brought a refund suit in the district court. [Emphasis supplied.]

The Seventh Circuit was clearly unaware that it was being induced to write an opinion that would be subsequently cited as authority for the disparate treatment of the Taxpayer sought here by the IRS. The Court there was dealing with a taxpayer who did not file his return until after three years had elapsed. If the taxpayer in Galuska had, as in the instant case, filed his return/claim for refund within three years of the due date of his return, the Seventh Circuit would have ruled that the Tax Court had jurisdiction to allow a refund. This conclusion is evidenced by the following statement of the Court:

> In view of section 6512(b)(3), a taxpayer who asks the Tax Court for a refund of an overpayment is treated the same as if he had brought a refund suit in the district court, so that there is no advantage in choosing one forum over the other. 5 F.3d. at 196, n.1.

The IRS convinced the Seventh Circuit to write an opinion that it obviously believed did nothing more than require consistent treatment for taxpayers in the Tax Court and the district court. The IRS now has the temerity to use that opinion as its main authority here (IRS Br. 7, 10, 15-19, 21-23) to support confiscation of Taxpayer's refund which concededly (IRS Br. 29) would have been available to him had he brought a refund suit in the district court. The IRS was less than candid with the Seventh Circuit and is being less than candid with this Court.

The IRS comments on this issue (IRS Br. 30) conclude with an observation that although the result that Taxpayer here can not recover a refund that might[4] have been recoverable had he brought a suit in the district court, that is simply a consequence of a complicated statutory scheme in which perfect symmetry is not achievable. With respect to the statute of limitations for claiming refunds, not only is symmetry achievable, it has been achieved. The Galuska opinion proceeds on the assumption that it has been achieved, as does the IRS' brief in the Seventh Circuit. In its constant avoidance of a serious discussion of the issues, the IRS breaches its obligation to give the Taxpayer and this Court a good reason for denying his refund.

The Code Should Not be Construed in a Manner which Results in an Arbitrary and Capricious Application of the Statute of Limitations: Taxpayer pointed out that the result sanctioned by the Tax Court will apply fortuitously and capriciously. (TP Br. 34-35).

First, if the notice of deficiency is mailed before the expiration of two years from the due date the taxpayer will recover a refund no matter how late the return is filed or even if no return is filed. (TP Br. 34, IRS Br. 28, n.10). The IRS indirectly chides those individuals, such as Taxpayer, who file their returns after two but before three years, (IRS Br. 29) implying that their culpability justifies forfeiture of their refund. But if the computer generates a notice of deficiency before the expiration of two years, the IRS admits that the taxpayer will receive his or her refund no matter how many years late the taxpayer files or even if no return is ever filed. (IRS Br. 28, n.10). Thus, the application of the limitation

---

[4]. On page 29 of its brief the IRS states that such a taxpayer "can," not "might," recover his overpayment.

period has no consistent relationship to the conduct or culpability of the taxpayer. This capricious application of the tax laws simply does not make sense.

If the IRS computer generates a notice of deficiency between two and three years from the due date, an even more capricious application of the statute of limitations occurs. If the taxpayer files a petition in the Tax Court, the practical result of the IRS' interpretation of section 6512(b)(3)(B) is that each day during that period (the date the notice is mailed) is potentially a statute of limitations. To illustrate, following is a list of recent cases and the effective statute of limitations applicable to the taxpayers: 2 years, 18 days, Braman v. Comm'r, T.C. Memo. 1992-636, T.C.M. (P-H) 92,636 (1992); 2 years, 22 days, Rossman v. Comm'r, T.C. Memo. 1993-351, T.C.M. (P-H) 93,351 (1993); 2 years, 1 month, 7 days, Patronik-Holder v. Comm'r, 100 T.C. 374 (1993); 2 years, 1 month, 10 days, Dyball v. Comm'r, T.C. Memo. 1994-76, T.C.M. (P-H) 94,076 (1994); 2 years, 4 months, 27 days, Davison v. Comm'r, T.C. Memo. 1992-709, T.C.M. (P-H) 92,709 (1992); 2 years, 5 months, 11 days, Lundy v. Comm'r, T.C. Memo. 1993-278, T.C.M. (P-H) 93,278 (1993)(this case); 2 years, 6 months, 7 days, Richards v. Comm'r, T.C. Memo. 1993-102, T.C.M. (P-H) 93,102 (1993); 2 years, 6 months, 16 days, Phillips v. Comm'r, T.C. Memo. 1993-284, T.C.M. (P-H) 93,284 (1993); 2 years, 7 months, 1 day, Diplacido v. Comm'r, T.C. Memo. 1993-169, T.C.M. (P-H) 93,169; 2 years, 8 months, 13 days, Kicza v. Comm'r, T.C. Memo. 1994-115, T.C.M. (P-H) 94,115 (1994); and 2 years, 11 months, 26 days, Raczkiewicz v. Comm'r, T.C. Memo. 1993-617, T.C.M. (P-H) 93,617 (1993).

Again, this capricious application of the statute of limitations makes no sense. The

statute is ambiguous at best. It should not be construed in such a manner that Congress could not have possibly intended.

The IRS' response is that this fickle application of the tax laws is beside the point and can be avoided by filing a return within two years of the due date. (IRS Br. 28-29). This totally capricious and/or arbitrary application of the statute is not "beside the point." A statute should be construed in such a manner so as to make sense. The response of the IRS also fails to deal with the pointed questions posed by Taxpayer: Could Congress have intended a construction that would permit 365 statutes of limitation? Could Congress have intended that the IRS have the unilateral ability to shorten a taxpayer's time in which to file a claim for refund simply by mailing a notice of deficiency? Could Congress have intended the "poor man's court" to be employed to make poor men poorer?

Finally, the IRS statement that the three-year statute of limitations can only be preserved by filing a claim for refund within two years speaks for itself.

CONCLUSION

For the foregoing reasons and the reasons set forth in Taxpayers original brief, the decision of the trial judge should be reversed with directions to enter an order determining the amount of the overpayment due the Taxpayer.

Respectfully submitted,

Date: 7/20/94

Lawrence J. Ross
Counsel for Taxpayer
ROSS LEGAL GROUP, P.C.
1700 K Street, N.W., #1100
Washington, D.C. 20006
202-223-5100

Date: 7/18/94

Professor Glenn P. Schwartz
Counsel for Taxpayer
John Marshall Law School
315 South Plymouth Ct.
Chicago, IL 60604
312-427-4843

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief were served by first class mail on this 21st day of July 1994 to Regina Moriarity, Esq., Tax Division, Department of Justice, P.O. Box 502, Washington, DC 20044.

Lawrence J. Ross
Counsel for Appellant
1700 K Street, NW, Ste. 1100
Washington, DC 20006