No. 98-1667

IN THE
Supreme Court of the United States

DAVID H. BARAL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

Of Counsel:
JULIUS GREISMAN
THOMAS KLEIN
ROBERT KATERBERG
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

WALTER J. ROCKLER
Counsel of Record
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5789

November 12, 1999

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a remittance of estimated taxes or of taxes withheld from wages is a payment of tax that is subject to the limitation on credits or refunds set forth in section 6511(b) of the Internal Revenue Code. 26 U.S.C. § 6511(b).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 98-1667

DAVID H. BARAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Judgment and Memorandum of the Court of Appeals for the District of Columbia Circuit is set forth in the Appendix hereto at App. 1-4. The Memorandum and Order of the United States District Court for the District of Columbia is set forth in the Appendix hereto at App. 5-10. Neither decision is officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1999. The petition for a writ of certiorari was filed on April 13, 1999, and was granted on September 28, 1999. Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Sections 6315, 6511(a) and (b)(2)(A) and 6513 (b)(1) and (2) of 26 United States Code (the Internal Revenue Code of 1986)[1] and 26 Code of Federal Regulations sections 301.6315-1 and 301.6402-3(a)(1) are reproduced in the Appendix hereto at App. 11-13.

STATEMENT OF THE CASE

A. *Statement of Facts*

In the calendar year 1988, petitioner was employed, as he had been for many years, in the mailroom of *The Washington Post*. He had, before employment with *The Washington Post*, retired from service with the United States Government, and he received in 1988 a pension based on that Government service. He also had dividend income and capital gains in 1988. *See* Dep. of David Baral, Cir. J.A. 52-53; Income Tax Return of David Baral, Cir. J.A. 21.[2]

Petitioner prepared his own tax returns without professional aid or advice. He relied essentially on Internal Revenue Service ("IRS") instructions for the preparation of returns. Withholding on petitioner's wages by *The Washington Post*, transmitted to the IRS by the *Post*, amounted to $4,104. Toward the end of 1988, petitioner became concerned that the withholding might be inadequate to meet his income tax obligation (yet to be computed and determined) for the year. He concluded that, to avoid possible penalties and interest, he should remit additional funds to the IRS. Accordingly, in January

---

[1] Hereinafter, 26 U.S.C. will be referred to as the "Code."

[2] "Cir. J.A." refers to the Joint Appendix filed in the Court of Appeals for the D.C. Circuit and made a part of the record before this Court.

1989 he remitted $1,100 with an IRS Form 1040-ES (Estimated Tax Form). *See* Dep. of David Baral, Cir. J.A. 65-68; Form 1040-ES, Cir. J.A. 20.

On April 15, 1989, petitioner filed an Application for Automatic Extension of Time (IRS Form 4868) to file his 1988 income tax return, without making any additional remittance to the IRS. The filing of this Form extended the time to file his 1988 income tax return to August 15, 1989. *See* Dep. of David Baral, Cir. J.A. 56-57.

Petitioner was unable to find a copy of his 1987 federal income tax return or copies of IRS Forms 1099 (Information Returns) for 1988. He knew that he had a substantial capital loss carryover from 1987. He also knew that he had substantial capital gains and dividend income in 1988. It was necessary, in order to prepare a correct 1988 return, to determine the amount of investment income and capital gains realized and the amount of the capital loss carryover. Therefore, he went to the Washington Area Office of the Internal Revenue Service and requested assistance and information for resolving the problem. *See* Dep. of David Baral, Cir. J.A. 59-61.

Petitioner did not receive the assistance or information sought. He therefore could not complete a proper return on time. He believed, however, that the amounts withheld and estimate remitted would fully cover his income tax liability when that liability could be determined. *See* Dep. of David Baral, Cir. J.A. 64.

Sometime in early 1993 he received a letter from the IRS stating that the IRS had no record of receiving his 1988 income tax return. He responded by reiterating his need for a copy of his 1987 income tax return and the 1988 data on Forms 1099, stating why the materials sought were necessary in order to prepare his 1988 return.

This time the IRS provided copies of the 1987 return and the 1988 data. *See* Dep. of David Baral, Cir. J.A. 59-60; Mem. and Order, App. 6.

Promptly thereafter, on June 1, 1993, he filed his 1988 return. His tax as determined on the return was $4,029. Withholding taxes and the estimated tax payment amounted to $5,204. The return therefore showed, and petitioner claimed on the return, an overpayment of tax in the amount of $1,175. *See* Income Tax Return for 1988, Cir. J.A. 21-26. The return was audited by the IRS and determined to be correct sometime in the period between June 1, 1993 and December 6, 1993. The IRS, however, rejected petitioner's claim on the ground that petitioner was deemed to have made his overpayment of income tax on April 15, 1989, a date more than three years and four months (the extension period) before the claim was filed by the return on June 1, 1993. In the IRS view, Baral's claim was time-barred under Code section 6511(b).

IRS records of petitioner's tax account for 1988 show, until the assessment of the income tax on July 19, 1993, "credits" for withheld taxes and the estimate of tax payment. Only upon assessment were the credits applied to the income tax. *See* IRS Record of David Baral Account, Cir. J.A. 27; Certificate of Assessments and Payments, Cir. J.A. 28-29.

B. *Proceedings Below*

The district court below (Lamberth, J.) granted the Government's motion for summary judgment, holding that that court lacked jurisdiction because petitioner's claim, set forth in his 1988 tax return filed June 1, 1993, for overpayment of tax was barred by the statute of limitations stated in Code section 6511(b)(2)(A). The court dismissed the complaint with prejudice. *See* Mem. and

Order, App. 10. The district court based its decision on "statutory language" (Code section 6513(b)(1)) which, as construed by the court, required withholding to be treated as payment of income tax on the return due date, April 15, 1989, and on "relevant case law" which caused the "estimated remittance" to be treated as payment of income tax on the return due date. The court also accepted that the Government had "definitively" distinguished the case of *Rosenman v. United States,* 323 U.S. 658 (1945), which otherwise would lead to a contrary result and decision. The district court held that the *Rosenman* decision applied only to an "arrangement" between the taxpayer and the IRS pursuant to which remittances were held as "a deposit made in the nature of a cash bond," 323 U.S. at 662, and the court found that no such arrangement existed in the *Baral* case. Mem. and Order, App. 8-9.

Upon review, the court of appeals affirmed *per curiam,* holding (1) that the payments of withholding and estimated tax when deemed made were payments of income tax "as a matter of law," and (2) that the Supreme Court case of *Rosenman v. United States*, 323 U.S. 658 (1945), was irrelevant. App. 3-4.

SUMMARY OF THE ARGUMENT

Under Code limitations provisions, a taxpayer seeking credit or refund of an overpayment of tax for which the taxpayer is required to file a return must file his claim within three years from the time the return is filed. Code § 6511(a). Here the claim for overpayment of 1988 income tax was filed in and with the income tax return itself; therefore the claim was timely and the Government does not, as far as we know, dispute its timeliness. However, the limitations statute also provides that the credit or refund shall not exceed the amount of taxes paid

within three years (plus the period of any extension of time granted for filing the return) immediately before the filing of the claim. Code § 6511(b)(2)(A). The starting point for measuring this limitation is therefore payment of the tax which is subject to the claim for credit or refund, however late that payment may be made.

Here, Mr. Baral filed his return late, beyond the extension of time he was granted. The question before the Court is when did he pay his income tax for 1988?

Petitioner Baral maintains that payment of the income tax occurred only after he filed his return for 1988 on June 1, 1993, and the income tax was then first ascertained and known to the parties. Payment was made when the tax was assessed on July 19, 1993. At that time, outstanding credits for withheld and estimated taxes were applied by the IRS to the income tax due, in accordance with applicable provisions of the Code and Treasury Regulations. *See* Baral Account Statement, Cir. J.A. 27; Certificate of Assessments and Payments, Cir. J.A. 28-29.

Long ago, in the case of *Rosenman v. United States,* 323 U.S. 658 (1945), a refund suit for overpayment of estate tax, this Court held that the executors who remitted an estimate of the tax under protest before a return was filed could not have paid the tax at that time. This Court concluded that by remittance of the estimated estate tax, the "taxpayer did not discharge what he deemed a liability nor pay one that was asserted. . . . The tax obligation did not become defined until April 1938 [at assessment]." 323 U.S. at 662. The tax was paid only when the amount due was defined and assessed. The funds originally transmitted were, the Court declared, essentially "a deposit made in the nature of a cash bond." [3] *Id.*

[3] *See infra,* 16-17, for a detailed review of the *Rosenman* case.

In the *Rosenman* case, this Court particularly stressed the need for consistency between the Code limitations provisions and the Code interest provisions. *See* 323 U.S. at 662-63. "If it is not payment in order to relieve the Government from paying interest on a subsequently determined excess, it cannot be payment to bar suit by the taxpayer for its illegal retention. It will not do to treat the same transaction as payment and not as payment, whichever favors the Government." *Id.* at 663. The conclusion of the court below disregards this part of the reasoning of the *Rosenman* decision. April 15, 1989 was the date of payment for limitation purposes according to the court below, but interest would not begin to accrue in favor of this taxpayer until 1993. *See* Code § 6611.

Some courts of appeals, including the court below, have attempted to nullify the *Rosenman* decision altogether on the ground that it has been superseded by statute, referring to Code section 6513(b)(1) and (2). However, this conclusion is based on a misconstruction of the section, which deems the payments of withheld and estimated tax actually made during the taxable year to occur on the income tax return due date in the following year. This section does not purport to convert withheld and estimated taxes into payment of income tax on the return due date. The amount of income tax becomes defined only when a return is filed; application of withheld taxes and estimates to the income tax occurs on the return. Nevertheless the courts in question simply assume that the withholding taxes on employers and taxpayers' estimates of income tax to be determined in the future are one and the same thing as the income tax. This is error which ignores the structure of the Code and the very significant differences in the incidents and characteristics of withheld taxes and estimates of tax when compared to the income tax. Withheld taxes and estimates simply con-

stitute credits against the income tax, "to be applied" as payments of income tax when the tax is determined on the income tax return and assessed. *See* 26 C.F.R. § 301.6315-1; 26 C.F.R. § 301.6402-3(a)(1).

Central to petitioner's argument is the fact that the claim here is for overpayment of *income* tax, not a claim for overpayment of withheld or estimated taxes. Neither withholding tax nor estimated tax provisions require this taxpayer to file a return. *See* Code § 6511(a) (for requirement of a return by the claimant for limitations purposes).[4]

Under the Internal Revenue Code, withholding taxes are a part of "Employment Taxes." Subtitle C, Chapter 24. They are imposed on employers based on the wages of employees, and they are required to be remitted by employers, who may be subject to special penalties. The determination of amounts to be withheld bears no resemblance to the method for determining income tax due. Indeed approximately 70% of wage earners recover overpayments of income tax in due course. Internal Revenue Service Statistics of Income, *Individual Income Tax Returns 1995*, at 2, 4, 5, 7 (1997). The withheld taxes give rise to employee credits against future income tax. Code § 31.

Estimates of income tax are just that: informed guesses, generally based on past experience modified by unusual current experience, about income taxes to be ascertained later. They also give rise to credits against income tax to be applied when the income tax due is determined. As the Code states, unpaid estimates of tax cannot be assessed. Code § 6201(b)(1). A failure properly to pay sufficient estimates, measured by the income tax as later determined, may result in special penalties. While remittance of withholding taxes and estimated taxes results in accelerating the collection of revenue by the U.S. Treasury, neither constitutes the payment of income tax, which is imposed and determined under Subtitle A, Chapter 1, of the Code.

[4] The *employer* is required to file withholding tax returns. No Code section imposes an estimate of tax requirement or requirement of a return therefor. *See infra*, 20.

When the attributes specified by the Code are examined, it seems plain that *by statute* withholding taxes and estimated taxes are effectively deposits "made in the nature of a cash bond." *Rosenman v. United States*, 323 U.S. at 662. They could not constitute the payment of income tax on April 15, 1989, because no one knew the amount of the income tax by that date. They remained credits at least until the income tax was determined on Mr. Baral's tax return filed June 1, 1993, and they were treated simply as credits by the IRS until assessment. Payment of the income tax therefore occurred at the earliest on June 1, 1993, when the amount of that tax first became known, and more precisely on July 19, 1993, when the income tax was assessed. The claim of the taxpayer was timely in all respects since the payment of the income tax, a part of which was claimed as overpayment, occurred at the time of the claim.

Three basic grounds support the petitioner's position. First, as this Court declared in the *Rosenman* case, a tax liability cannot be paid until it is defined, known, and fixed by assessment. Second, the construction of section 6513(b)(1) and (2) by the court below does not square with the language of the section; any construction of the section beyond its strict language ought not violate the rule of reason of the *Rosenman* case. Finally, the limitations provisions of the Code are not aimed at late filing of returns and late payments; other provisions of the Code

deal with those matters. The starting point for limitations is the payment of the tax claimed to be overpaid, whenever that payment occurs and however late. Credits to be applied against a tax to be determined in the future do not, before they are so applied, constitute payment of that tax.

ARGUMENT

Both the United States and the petitioner have agreed that the application of the Code limitations provisions has been seriously inconsistent in the courts of appeals, and that those courts have treated the *Rosenman* decision in varying ways.[5] We will not review those decisions at any length here. In the petitioner's view, the question before this Court is to be resolved by analysis of the Code and Regulations provisions, with due regard for the precedent of this Court's *Rosenman* decision and the opinion there of Justice Frankfurter, read as it was written without the eroding glosses of subordinate court judges.

I. CODE SECTION 6513(b)(1) AND (2) HAS BEEN MISCONSTRUED BY THE COURT BELOW; THE DEEMED PAYMENT DATE FOR WITHHELD TAXES AND ESTIMATES IS NOT THE DATE OF PAYMENT OF THE INCOME TAX

A. A Plain Reading of Section 6513(b)(1) and (2) Shows That the Deemed Date of Payment Thereunder is the Deemed Date of Payment of Withholding Taxes and Estimates of Tax, Not the Income Tax.

The court below in this case has held that section 6513(b)(1) and (2) disposes of this case by making the

[5] Petitioner identified three lines of decisions in the courts of appeals in his petition to this Court. *See* Baral Pet. for Writ of Cert., 7-9. The Government apparently agrees. *See* Br. for the United States (on the Petition), 4-5, 9-14.

income tax return due date the date of payment of the income tax. This conclusion has no support, however, in the text of the section. Subsection (b)(1) of section 6513 reads as follows:

> Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

The tax deemed paid in the subsection is the "tax actually deducted and withheld at the source," that is, the *withholding* tax, not the income tax. Thus, withholding tax payments made at intervals during the taxable year are brought forward to the income tax return due date in the following year.[6] The subsection does not purport to convert withholding taxes into income tax on the return due date. That is done on the income tax return. *See* 26 C.F.R. §§ 301.6315-1, 301.6402-3(a)(1).

In the case of estimated taxes, subsection (b)(2) of section 6513 is equally explicit:

> Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under

[6] The section seems designed to benefit taxpayers in the following type of situation: a taxpayer files his return on the due date and the tax is paid by applying withholding taxes that had been paid throughout the year to the income tax due as shown by the return. Almost three years after the return date, the taxpayer files a claim for refund based, for example, on his discovery of additional substantial deductions for the year in question. The claim is timely in all respects. Any contention that the refund is barred because withholding and estimates paid the income tax when withholding taxes and estimates were actually collected is rejected by this section.

section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

The tax dealt with here is an "amount paid as *estimated* income tax." Code § 6513(b)(2) (emphasis added). The installments of estimated tax, paid during the taxable year, are combined and deemed paid on the return due date in the following year. The subsection does not provide that the cumulative estimates of tax are converted into income tax where no return is filed on the due date. That metamorphosis is impossible; the income tax remains undetermined and unknown without a return. *See Rosenman v. United States*, 323 U.S. 658 (1945); *see also* 26 C.F.R. §§ 301.6315-1, 301.6402-3(a)(1) (which specify that credits shall be applied, and overpayments shall be claimed, on the income tax return).

In the case of *United States v. Habig*, 390 U.S. 222 (1968), construing Code section 6513(a), this Court refused to shorten a limitations period by measuring from the date that the return was due instead of from a later date of actual filing of the return. The criminal offense subject to the statute of limitations in that case was alleged to have been committed by a false return. This Court declined to accept the "surprising" contention "that Congress intended the limitations period to begin to run before appellees committed the acts upon which the crimes were based." 390 U.S. at 224-25. Similarly, in *Rosenman* this Court refused to accept the surprising contention that a tax could be paid before the amount of it was determined and assessed. We believe that the *Rosenman* and *Habig* decisions, applications of a principle of logical impossibility,[7] are controlling against the construction urged by the Government.

[7] *See also Greene v. United States*, 1999 WL 624268, 84 A.F.T.R. 2d ¶ 99-5619 (Fed. Cir. Aug. 16, 1999). In *Greene*, the court rejected a contention that a first tax return started the running of the statute of limitations where that return could not reflect facts which occurred later and which were crucial to the claim for refund; instead the court treated an amended return filed six years after the original return as the return for Code section 6511(a) purposes, and held the claim to have been timely.

What these subsections do is synchronize the payment of withholding tax and estimated tax with the defined income tax liability shown on returns actually filed on the due date by some 98% of all individual taxpayers. Internal Revenue Service Statistics of Income, *Individual Income Tax Returns 1995*, at 5, 7 (1997). They thereby permit the discharge of income tax liability *pro tanto* when that liability is reflected in the return. As the IRS Certificate of Assessments and Payments in this case confirms, when no return is filed on the due date, credits remain outstanding, income tax liability is *not* discharged until assessment, and assessment is not made until the time that the income tax return is actually filed. Cir. J.A. 28-29.

Otherwise the Government's proposed statutory construction, endorsed by the court below, produces very strange results, contrary to good sense. On that construction there was an overpayment of income tax in Mr. Baral's case on April 15, 1989. Of course nobody, including Mr. Baral and the IRS, knew the amount of his income tax or the amount of overpayment on that date. He needed data from the IRS, which came much later, to compute the income tax and to prepare his return. Nevertheless, the Government suggests, he should in some fashion have filed a claim for refund of the unknown overpayment. This would be an invalid claim because *Flora v. United States*, 362 U.S. 145 (1960), requires that the tax liability (unknown on the return due date) be fully paid as a prerequisite to recovery of an overpayment. We note again that under the Treasury Regulations

"in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made *on the appropriate income tax return.*" 26 C.F.R. § 301.6402-3(a)(1) (emphasis added).

If payment of income tax was made on April 15, 1989, the IRS could have then assessed such payment. *See* Code § 6213(b)(4). Why did it not? The answer is obvious: the IRS could not and did not assess an amount as income tax when neither the IRS nor anyone else knew the amount of the income tax; the IRS could only, as it did, post credits reflecting the receipt of withholding and estimated taxes.

The analysis which we have presented receives direct support in some federal courts. *See, e.g., Plankinton v. United States*, 267 F.2d 278 (7th Cir. 1959); *Schmidt v. Commissioner*, 272 F.2d 423, 428-29 (9th Cir. 1959); *Trevelyan v. United States*, 219 F. Supp. 716 (D. Conn. 1963). On the other hand, while we have set forth our reasons for rejecting the Government's statutory construction, some courts have followed that construction. *See, e.g., Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, 510 U.S. 1050 (1994); *Ehle v. United States*, 720 F.2d 1096 (9th Cir. 1983); *Binder v. United States*, 590 F.2d 68 (3d Cir. 1978).

The *Oropallo* case, a withholding tax case, involved a *per curiam* circuit court decision where, in a late-filed return, the taxpayer claimed a refund. The court rejected the refund claim as barred by the statute of limitations. However, an issue of equitable tolling of the statute of limitations was the primary focus of the decision. The basic limitations question present in the *Baral* and *Oropallo* cases was summarily disposed of in *Oropallo* in a footnote, which cited an Illinois district court case to the effect that taxpayers were barred under Code section

6513(b)(1) because they filed their returns late. *See* 994 F.2d at 27 n.1.

The *Ehle* case, also a withholding tax case, sets up the usual alternatives of either "payment" or "deposit." The terms of this shorthand dichotomy, "payment" or "deposit," are somewhat inappropriate for the *Baral* case. "Payment" of *what* tax obligation is the question, since both the withholding tax provisions and the estimate provisions constitute Governmental exactions. Were the payments withholding taxes, or did withholding taxes become converted into income tax under Code section 6513(b)(1)? The *Ehle* court blithely assumes that the basic principle of the *Rosenman* case has been superseded by "the clear language of section 6513(b)(1)." 720 F.2d at 1097. But the "clear language" of the section does not purport to change the deemed date of payment of withholding taxes into the date of payment of income tax.

In the *Binder* case, involving withholding and estimated taxes, the taxpayer made the argument that withholding and estimated taxes were "payments made in escrow." 590 F.2d at 69. The court found nothing to indicate an escrow arrangement. That court also, by citation but without much analysis, invoked section 6513(b) to hold for the Government. One judge dissented from the decision upon the ground that this Court's *Rosenman* decision made it clear that payment of the income tax did not take place on the deemed date of section 6513(b).

The notion that section 6513 starts the statute of limitations running on the tax return due date in a case where the return has not been filed by that date and the amount of income tax is unknown is directly contrary to the opinion in *Rosenman v. United States*, 323 U.S. 658 (1945), which sets forth the applicable rule of reason. As this Court declared in the *Rosenman* case, by estimated remit-

tance of the estate tax, the "taxpayer did not discharge what he deemed a liability nor pay one that was asserted. . . . The tax obligation did not become defined until April 1938 [at assessment]." 323 U.S. at 662.

B. The History of the Pertinent Statutory Provisions Does Not Support the Construction Endorsed by the Court Below.

Petitioner Baral maintains that the history of the pertinent Code provisions provides no support for the statutory construction by the court below.

Before 1939 the internal revenue laws of the United States were stated in Revenue Acts, re-enacted with changes and revisions at two-year or three-year intervals ordinarily. In 1939 these laws were codified in more permanent form in the Internal Revenue Code of 1939.

In 1942, the 1939 Code was amended by adding a new section 466 which required withholding taxes on wages. Revenue Act of 1942, Pub. L. No. 77-753, § 172(a), 56 Stat. 798, 888-91 (1943). A new subsection (e) of 1939 Code section 322, added at the same time, deemed such taxes to be paid on the due date for filing the income tax return, then March 15 of the following year. Revenue Act of 1942, Pub. L. No. 77-753, § 172(e), 56 Stat. 798, 893 (1943). In 1943 a further Code amendment was made requiring payments of estimated taxes, and declaring *presumptively* that both estimated taxes and withholding taxes were deemed to be paid "not earlier than" the income tax return due date. Current Tax Payment Act of 1943, Pub. L. No. 78-68, § 4(b), 57 Stat. 126, 140 (1944).

Two years later, in 1945, this Court decided the case of *Rosenman v. United States*, 323 U.S. 658. In that case the taxpayers, executors of a decedent's estate, paid an amount of $120,000 "on account of the Federal Estate

tax" on or about the due date for the estate tax return, December 25, 1934, in order to avoid penalties and interest, stating that the amount was paid under "protest and duress." *Id.* at 660. Two months later, on February 25, 1935, the executors filed the estate tax return. Shortly thereafter, on March 28, 1935, the Collector of Internal Revenue assessed and applied a part of the remittance, $80,224.24, to the estate tax. Three years later, on March 26, 1938, the executors filed a claim for refund of the difference between remittance and assessment as an overpayment. The claim was filed three years and three months after the taxpayers' remittance. Relying on the 1939 Code provision, section 910, which barred recovery of overpayments made more than three years before the filing of the claim for refund, the IRS denied the claim for refund.

On audit in the three years following the filing of the return, the IRS determined a deficiency of estate tax of $10,497.34 and on April 22, 1938 collected additional monies. More than five years after the original payment by taxpayers, but some two years after assessment on audit, May 20, 1940, the executors filed a second claim for refund of part of their initial remittance plus the additional payment. This was denied for the original remittance as time-barred, and the IRS was upheld by the Court of Claims.

This Court unanimously reversed the Court of Claims, holding that, until assessment of the tax, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. . . . The tax obligation did not become defined until April 1938 [at assessment]." 323 U.S. at 662.

When the Internal Revenue Code of 1954 was enacted, section 322(e) of the 1939 Code became secton 6513(b)

of the 1954 Code. Although there is no indication that any substantive change was intended,[8] the draftsmen of the 1954 Code substituted a flat income tax return filing date for deemed payment of withholding taxes and estimated taxes, instead of using the phrase "not earlier than." They also provided that the income tax return due date for this purpose, April 15 of the following year for a calendar year taxpayer, did not change because of an extension of time to file. Notably, there was no effort to change or overrule by legislation the basic holding in the *Rosenman* case. There is no reference to that case or its rationale in the legislative history.

In 1966, Code section 6513(b) was divided into two subparagraphs, (b)(1) and (b)(2), and a new (b)(3) was added which has no application here. *See* Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 105 (f)(1), 80 Stat. 1539, 1567-68 (1967).

The history of these statutes is significant in the following respects:

1. There was no attempt to supersede or legislatively overrule the *Rosenman* case.

2. There was no intention to eliminate the "presumptive" character of section 6513's deemed return due date or the "not earlier than" application of the deemed date.

3. Section 6513 deals with the *timing* of payments of *withholding* and *estimated* taxes only. It does not undertake to change the tax character of the payments, *i.e.*, it does not convert payments of withholding tax or estimated tax into payments of income tax in a case where a return is not filed on the income tax return due date and the income tax is uncomputed and unknown on that date.

[8] The Senate Report accompanying the 1954 Code stated that section 6513(b) "corresponds to existing law in that the *presumptive* date of payment is the due date of the corporation or individual income tax return." S. Rep. No. 83-1622, at 587 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 5236 (emphasis added); *see also* H.R. Rep. No. 83-1337, at A416 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4563 (implying that the only change was to move the presumptive date of payment from March 15 (pre-1954) to April 15).

C. The Structure and Provisions of the Code Make It Clear that Withholding Taxes and Estimates of Tax are *Not* the Income Tax.

The design of the Internal Revenue Code evidences that withholding taxes and estimates of tax are separate and distinct from the income tax. The Internal Revenue Code has six Subtitles of which only one, Subtitle A, deals with income tax, although Subtitle F, dealing with Procedure and Administration, may be applicable to any tax under the Code, *e.g.*, the income tax or estate tax or excise taxes. Within Subtitle A, only Chapter 1 sets out the complicated and intricate rules for determining taxable income and the income tax, from definition of gross income to exclusions from gross income, from adjusted gross income to deductions and to taxable income, with special provisions for capital gains, mergers and acquisitions, pension and profit sharing plans, oil and other mineral interests, and rules for a host of other situations and transactions. Nothing in Chapter 1, except section 31(a) providing a credit for withheld tax, has to do with withholding taxes or estimated taxes.

Withholding taxes are governed by the provisions of Subtitle C, concerned with "Employment Taxes," and are dealt with in Chapter 24 thereof. The withholding tax sections impose an obligation on *employers* to withhold from compensation paid to employees and to pay to the IRS a percentage of wages determined primarily by the amount of wages and the number of dependents claimed by the employee. The withholding tax provisions also recognize special exemptions. Finally the Code imposes

unique penalties on employers for failure to collect and pay over withholding "trust fund" amounts. *See, e.g.,* Code § 6672 (imposing a 100% penalty). The penalties imposed for (civil) non-compliance with income tax law are quite different. *See, e.g.,* Code §§ 6651 and 6662.

Estimated taxes are governed by the rules of Subtitle F ("Procedure and Administration") and more particularly sections 6654 and 6655 of Subchapter A of Chapter 68 dealing with "Additions to the Tax and Additional Amounts." Section 58 of the Internal Revenue Code of 1939 and section 6015 of the Internal Revenue Code of 1954 required declarations of estimated tax by individual taxpayers. These sections defined "estimated" tax as an estimate by the individual of the amount of income tax under Chapter 1, less an estimate of credits under Chapter 1. In 1984 some Code draftsman, apparently in the interest of tax simplification, decided that section 6015 of the 1954 Code could be eliminated, and this was done. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, § 412(a)(1), 98 Stat. 494, 792 (1986). As a result, the present Code has no provision which imposes an estimate of tax requirement, but it does have *penalty* provisions for failing to pay, or for underpaying, an estimated tax. *See* Code § 6654.

The estimated tax penalty provisions, which specify various methods of estimating by which penalties may be avoided, are different and separate from income tax penalties. Interestingly, section 6654(f) itself distinguishes estimated tax from income tax by providing a definition of the term "tax" used in section 6654 as the tax determined under Chapter 1 (normal income tax) and Chapter 2 (self-employment tax), not to be confused with the "estimated tax."

Apparently, like a cash bond, estimated tax can only be "posted" as a credit. *Cf.* Rev. Proc. 84-58 § 3.05, 1984-2 C.B. 501, 502; Rev. Proc. 63-11 § 4, 1963-1 C.B. 497, 498 (an advance payment not assessed is treated as a cash bond). This was the procedure followed by the IRS in the *Baral* case, that is, posting of credits until the return was filed and an assessment of income tax was entered, *at which time* the estimated tax was applied to discharge the income tax liability. *See* Certificate of Assessments, Cir. J.A. 28-29.

Code section 6315 provides that estimated tax payments are made "on account of" income tax.[9] The Treasury Regulation interpreting this provision states that "[t]he aggregate amount of the payments of estimated tax should be entered *upon the income tax return for such taxable year as payments to be applied against the tax shown on such return.*" 26 C.F.R. § 301.6315-1 (emphasis added).

In summary, withholding taxes and estimated taxes are tax regimes in their own right. While they were created to supplement the income tax, they are governed by their own unique rules and penalties. To treat them as component parts of the income tax, set out in Chapter 1 of the Code, is an error. Both withholding taxes and estimates of tax differ from income tax in the following significant ways:

1. Amounts paid as withholding taxes and estimates give rise to credits only, to be applied in the future against the income tax when the income tax is defined.

2. Neither withholding taxes nor estimated taxes can be recovered by refund except as income tax

---

[9] This is exactly the language, "on account of" [the estate tax], used to describe the initial remittance made by the executors in the *Rosenman* case, determined by this Court to be in the nature of a cash bond. 323 U.S. at 660.

refunds upon a claim made in a return once the income tax is determined, assessed and paid.

3. No interest is payable on withholding or estimated taxes.

4. Neither withholding taxes nor estimated taxes owing can be assessed against the persons credited with these taxes.

Credits before a tax obligation is defined are clearly not a payment of that obligation. Under the Internal Revenue Code, there are forty different credits available against the income tax, ranging, *e.g.*, from foreign tax credits (sections 27 and 901), child tax credits and child care credits (sections 21 and 24), gasoline tax credits to specified tax payers (section 34), and energy credits (section 48(a)), to empowerment zone credits (section 1396). Obviously these credits do not constitute a payment of income tax when they arise. The credits become payments of income tax only when they are applied on the taxpayer's return to the income tax.

Withholding tax obligations are imposed on employers, not employees. Withheld taxes as such cannot be claimed as refunds by employee-taxpayers. The overpayment of income tax by credits for withheld taxes cannot be determined for employee-taxpayers until the amount of the income tax is known. Similarly, no refunds can be claimed on estimates of tax of taxpayers. Until the income tax is defined, there is no way to ascertain overpayments of the estimates.

Withholding taxes cannot be assessed against employee-taxpayers since those taxpayers have no obligation to report or pay those taxes. Unpaid estimates cannot be assessed against the estimating taxpayers because the Code prohibits such assessments (section 6201(b)(1))

and the prohibition is compelled by the logic of the estimate provisions in any event since estimates are simply judgment calls and remittances designed to avoid penalties.

The Government has in its submissions to the courts heretofore in this case attempted to belittle the significance of assessment, suggesting that it is merely a bookkeeping entry. More accurately, we believe, assessments fix tax liabilities and establish obligations thereafter collectible by the Government. *Rosenman v. United States*, 323 U.S. 658 (1945); *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 1559 (1998) (remittance in settlement was a deposit, not payment of income tax, and a failure of the IRS timely to assess resulted in an illegal Government holding of the remittance).

The significance of assessment as the definitive act establishing tax liability is emphasized in Chapter 63 ("Assessment") under Subtitle F of the Code. Thus, a basic effect of jurisdiction by the Tax Court of the United States is to suspend assessment and collection of tax or levy until the decision of the tax court becomes final. *See* Code § 6213(a). It is pertinent to this case and important that withholding taxes and estimates owing cannot be assessed against employee-taxpayers or estimating taxpayers, although any "amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment . . . ." Code § 6213(b)(4). Clearly withholding taxes and estimates when "deemed paid" are not payments of the income tax.

II. THE *ROSENMAN* DECISION OF THIS COURT HOLDS THAT REMITTANCES MADE BEFORE A TAX IS DETERMINED AND ASSESSED ARE DEPOSITS, NOT PAYMENTS OF THE TAX

In the Brief for the United States on the Petition for a Writ of Certiorari here, the Solicitor General attempts at some length to distinguish the *Rosenman* case from the *Baral* case by emphasizing the use of the word "arrangement" (asserted to be "consensual") between the taxpayer and IRS in *Rosenman*. However, the Baral facts indicate an "arrangement" of exactly the same limited kind as that of the *Rosenman* case. Under the Code provisions for estimates of tax, Mr. Baral forwarded his estimated payment only to avoid penalties and interest which the Code imposes. The Government received the remittance and placed a credit in Baral's account without more. The same consensus took place as in *Rosenman*.[10]

In view of this supposed built-in limitation on the *Rosenman* opinion and decision urged by the Government and endorsed by the court in this case, the following excerpt from the opinion in *Rosenman* which presents the basic rationale for the decision is worth quoting verbatim:

> The action here complained of was the assessment of a deficiency by the Commissioner in April 1938. Before that time there were no taxes "erroneously or illegally assessed or collected" for the collection of which petitioners could have filed a claim for refund. The amount then demanded as a deficiency by the Commissioner was, so the petitioners claimed, erroneously assessed. It is this erroneous assessment that gave rise to a claim for refund. Not until then was there such a claim as could start the time running for presenting the claim. In any responsible sense payment was then made by the application of the balance credited to the petitioners in the suspense account and by the additional payment of $10,497.34 on April 22, 1938. Both these events occurred within three years of May 20, 1940, when the petitioners' present claim was filed.

323 U.S. at 661-62.

[10] The taxpayer had nothing to do with withholding taxes, paid by the employer, credited by statute to the taxpayer as employee, and held in suspense as a credit in his account. That employment tax collected from the employer could not be the subject of an "arrangement" between the taxpayer and the Government. Nevertheless, its status is determined *by statute* as a credit, not as a payment of income tax.

As the facts recited elsewhere in the opinion show, the "arrangement" consisted only of the taxpayers' remittance of an estimated payment under protest before a return was filed. The Government's role in the "arrangement" was to receive the funds and credit them in a suspense account. Furthermore, in arguing to the courts, the Government contended that it had gotten payment of the estate tax in that first remittance; this is hardly evidence of any understanding between the parties that the payment was a deposit. It is particularly noteworthy that the "arrangement" was arrived at apparently without consultation or further communication between the parties beyond the transmittal letter for the remittance.

The real effect of the supposed "distinction" offered by the Government and accepted by the courts below is simply to draw attention away from the fundamental analysis and rationale of the *Rosenman* decision: payment of a tax occurs only when the amount of the tax is defined and assessed.

We have in the analysis of Code section 6513(b) above demonstrated, we believe, why that section does not undermine the validity of the *Rosenman* opinion and decision.

The importance of this Court's analysis in the *Rosenman* case is that section 6513(b) sets a deemed time of payment for withholding taxes and estimates of tax; the *Rosenman* decision makes it clear that those taxes can only become payments of the income tax when a filed income tax return defines the amount of income tax and the credits are applied to that amount at assessment. The Code and Regulations confirm this position, and that is what the IRS followed as correct procedure in the *Baral* case. Certificate of Assessments and Payments, Cir. J.A. 28-29. Payment of the income tax was made on July 19, 1993, and the claim of overpayment was timely under the Code limitations period under section 6511(b) as well as section 6511(a).

III. THE LATE FILING OF THE RETURN DOES NOT SUPPORT THE GOVERNMENT POSITION

The Government has heretofore stressed the taxpayer's failure to file his income tax return on time as some support for its limitations position. However, the limitations provisions do not cut off claims for overpayments simply because a return is filed late. There is no such penalty; late filing and late payment are addressed as penalty matters elsewhere (section 6651) in the Code and the forfeiture of refunds and credits is not one of the penalties.

The starting point for possible limitation on recovery of an income tax overpayment is the payment of the income tax, whenever that occurs and however late. Thus, if a taxpayer was not subject to withholding, paid no estimates, and filed his income tax return ten or even twenty years late, making payment of the tax with the return, he would still have three years within which to claim a credit or refund by amended return, and the claim would

unquestionably withstand attack under the statute of limitations.[11]

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that the decision of the court of appeals below be reversed.

Respectfully submitted,

Of Counsel:
JULIUS GREISMAN
THOMAS KLEIN
ROBERT KATERBERG
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

November 12, 1999

WALTER J. ROCKLER
Counsel of Record
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5789

[11] In the present case, Baral could not prepare a proper return until he got the information requested from the Government. Were this a case of assertion of ordinary civil penalties, he may well have been adjudged to have "reasonable cause" for late filing. *See In the Matter of Sims*, 1991 WL 322994 (Bankr. E.D. La. Dec. 6, 1991).