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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

REPLY BRIEF OF THE PETITIONER

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The Brief for the United States[1] in this case for the most part is not responsive to the argument made by the petitioner, misstates the petitioner's position on essential matters, and trivializes *Rosenman* v. *United States*, 323 U.S. 658 (1945), a decision of this Court addressing the question now before the Court.[2]

1 Hereinafter, that brief will be referred to as "G.Br."; petitioner's original brief will be referred to as "P.Br."; 26 U.S.C. will be referred to as the "Code"; and the Joint Appendix filed in the court of appeals below will be referred to as "Cir. J.A."

2 It is plain, we believe, that the petitioner's argument is not based on equitable tolling of the Code limitations provisions. Mr. Baral filed his 1988 income tax return late, and there is no dispute about that. Footnote 2 of the Government's brief, page 2, parsing in detail Baral's deposition (in which he represented himself *pro se*) serves no purpose unless it is designed to suggest that Mr. Baral is unworthy and therefore should not recover his overpayment of income tax.

I. THE *ROSENMAN* CASE HOLDS THAT PAYMENT DOES NOT OCCUR UNTIL THE DETERMINATION OF A DEFINED LIABILITY BY EITHER THE TAXPAYER OR THE GOVERNMENT

As set forth in petitioner's original brief, the facts of this case are, in all significant ways, indistinguishable from the facts of *Rosenman* v. *United States*, 323 U.S. 658 (1945). In both cases, taxpayers remitted amounts to the Government prior to filing returns for the period to which the remittances related. The remittances were made more than three years prior to the claims for refund, and the Government rejected both claims on grounds that the remittances constituted "payment" beyond the limitations provision requiring payments to be made no more than three years before the filing of the claim for refund.

In *Rosenman*, this Court rejected the Government's argument on the ground that, at the time of the remittance, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted." 323 U.S. at 662. In other words, neither party had then defined or asserted a tax liability, whether by the taxpayer's filing a return ("self assessment") or by the Government's assessment or other assertion of liability.

Precisely the same situation exists here. Until the time of the refund claim itself (taxpayer's late-filed return), the Government did not assert a taxpayer liability, and no such liability was "self-assessed" by the taxpayer. Until the return, in the words of this Court, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted." Not until then did the government transfer Mr. Baral's remittances, to the extent required to pay the tax, from suspense status[3] and apply them

[3] This Court noted in *Rosenman*, "The Government does not consider such advances of estimated taxes as tax payments. They are, as it were, payments in escrow. They are set aside, as we have noted, in special suspense accounts established for depositing money received when no assessment is then outstanding against the taxpayer." 323 U.S. at 662.

against his defined income tax liability. In the *Rosenman* case (after crediting of the remittance as payment to the extent of the liability shown on the return) the Government assessed an additional liability in the form of a deficiency. Again in the words of the Court, "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" by taxpayer. 323 U.S. at 661-62.

Rather than admit that *Rosenman* turns on a principle equally applicable here, the Government minimizes the Court's decision by limiting its applicability to a supposedly special consensual "arrangement." However, the "arrangement" in *Rosenman* consisted of a remittance to avoid penalties and interest. Here Baral also paid estimated tax only to avoid penalties and interest.[4] The Government in the *Rosenman* case put the remittance in a suspense account until assessment. The Government in the *Baral* case reflected credits for withholding taxes and estimates in Baral's account until Baral's income tax return was filed. Cir. J.A. 28-29. There is no significant difference in the procedures followed in the two cases.

We also do not understand why the Government brief contends that the parties in *Rosenman* acted by "consensus." The Government's litigating position in *Rosenman*, arguing for a payment of estate tax in the first remittance so that the limitations provision would apply, shows a total lack of consensus.

[4] Somewhat like the Cheshire cat that vanished leaving only a smile, the requirement of estimated taxes disappeared in 1984, leaving only penalties for failing to estimate or underpaying estimates.

The *Rosenman* case plainly holds, with good sense, that a tax cannot be paid until the amount of it is calculated, defined, and known. Until then, a taxpayer does not "discharge what he deem[s] a liability nor pay one . . . . asserted."

II. THE GOVERNMENT MISSTATES THE PETITIONER'S POSITION

A. The Petitioner Did Not Ignore Sections 6511(b) and 6513(b) of the Code or the Treasury Regulations Bearing Thereon

"Petitioner is wrong in ignoring these controlling statutory provisions . . . ," the Government asserts, referring to Code sections 6511(b) and 6513(b). G.Br. 5. Further, "petitioner failed to comply with the *regulatory* prerequisites for a 'deposit' to be accepted by the United States." G.Br. 6 (emphasis added).

Far from "ignoring these controlling statutory provisions," the petitioner's brief reviewed and analyzed them possibly to excess, devoting a section of six pages to section 6513(b) alone. P.Br. 10-16. That the Government may not agree with our analysis does not cause that analysis to disappear. Rather, it is the Government that has disregarded the plain language of section 6513(b), preferring to treat the deemed payment date for *withholding* and *estimated* taxes as the date of payment of *income* tax.

The Government has also disregarded and failed altogether to mention pertinent Treasury Regulations, 26 C.F.R. §§ 301.6315-1 and 301.6402-3(a)(1), preferring to elevate IRS Revenue Procedures ("Rev. Procs.") to regulations status which, as administrative practice releases, they do not achieve or deserve. *See* 8, n.5, below.

B. The Government's Analysis of Income Tax Liability Has Little to Do With the Case

The Government brief proves at some length that taxpayers have an obligation under the Code to pay income taxes whether or not those taxes are assessed. We certainly do not dispute this. The obligation comes into existence at the end of a taxable year since up to the last day of the year income previously received during the year may be offset by expenses, losses, and deductions.

The Government does not discuss the significance of income tax returns, required by Code Section 6012. Under the 1939 Code, income tax returns were due two and one-half months after the end of a taxpayer's taxable year. 1939 Code §53(a)(1). This period was extended to three and one-half months in the 1954 Code (1954 Code § 6071 and 26 C.F.R. § 1.6072-1(a)) after several groups and associations pointed out the need for more time to collect tax data, prepare returns, and ascertain taxable income and the tax. Hearings Before the House Committee on Ways and Means, 83rd Cong., 1st Sess., Pt. 1, 330-34 (1953). The liability for income tax may exist before a return is filed, but it is undefined and inchoate until a return can be prepared.

If the implication of the Government's demonstration that taxpayers have tax liabilities is that any remittance before a return is filed (and liability is stated) or before the Government asserts a specific liability is a payment of that liability, the contention obviously goes too far. On such a doctrine, the opinion and judgment in *Rosenman* v. *United States*, 323 U.S. 658 (1945), would simply be in error. When the testator died in that case, an undetermined estate tax liability arose immediately. Under the Government's view, as we understand it, the first remittance to the Treasury by the executors would be inher-

ently a payment of the unknown estate tax liability owing, and this Court would be wrong in its analysis and decision. The Government's contention is a great deal less than persuasive; not all remittances are payments of tax liability, and certainly not where the liability is unascertained and unknown at the time of remittance.

C. The Government's Argument That Assessment Is Unrelated to Payment Is in Error

The Government asserts that assessment is essentially unimportant in tax matters, providing only ancillary tax collection possibilities. G.Br. 6, 12. Apparently in the Government's view assessment follows payment. If this view is correct, the petitioner and some courts favorable to the petitioner have been seriously misled by the opinion in the *Rosenman* case. There the executors transmitted funds on December 24, 1934. However, in the words of this Court, "[t]he 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." 323 U.S. at 661. As the Court further noted, "on December 24, 1934, 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," that is, not until assessment. 323 N.S. at 662.

The petitioner may also have been misled by the recent decision in *New York Life Ins. Co.* v. *United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). There the court of appeals dealt with remittance of $31,912,823 in tentative settlement of an income tax dispute with the Government, subject to

a right of the taxpayer to file a claim for refund. When the Government failed to assess the remittance within the time permitted by the statute of limitations on assessments, the court of appeals held that (1) the remittance was a "deposit," not a "payment," and (2) the taxpayer could recover the remittance under the Tucker Act (28 U.S.C. § 1491). In its holding of "deposit" rather than "payment" the court followed the *Rosenman* decision. 118 F.2d at 1556-57. Obviously the Court of Appeals for the Federal Circuit did not regard assessment as a clerical matter of no great consequence; failure to assess timely cost the Government a very substantial sum of money. While this Court, in denying a writ of certiorari in the *New York Life* case, did not affirm the circuit court, the denial hardly constitutes disapproval of the circuit court decision.

In response to the *New York Life* decision, the Government has cited *Moran* v. *United States*, 63 F.3d 663 (7th Cir. 1995), as rejecting the contention made in the later *New York Life* decision. G.Br. 14, n.8. The *Moran* case does have a bearing on the question of when payment of a tax is made, but it does not lend support to the Government's position. In *Moran*, the taxpayers recognized and declared expressly that they were paying their income tax in an amount asserted by the IRS and that they were *not* making a "deposit." In effect the taxpayers "self-assessed" themselves. *See* 63 F.3d at 664-65, 668-69.

Where payment is made with an income tax return, assessment may be deemed to be virtually automatic, and a brief interval for making the assessment may be bridged by a realistic application of the rule of *nunc pro tunc*. *See* Code § 6201(a)(1) (where a tax is shown on a return, the IRS is authorized to assess forthwith). However, the Code does not authorize payment by an em-

ployer of withholding taxes to be assessed as an income tax payment by the employee; such a payment gives rise only to a credit on account of the income tax. Code § 31. The credit becomes payment when it is applied to the income tax shown on the employeee's income tax return. Similarly, as the Treasury Regulations provide, payments of estimated income tax are "payments to be applied against the tax shown on such [taxpayer's] return." 26 C.F.R. § 301.6315-1; *see also* 26 C.F.R. § 301.6402-3.[5]

Finally, we note that an alleged issue of "payment" versus "assessment" has no significance or impact in the Baral case. In accordance with the Code, the Treasury Regulations, and the IRS' actual practice in this case, payment of 1988 income taxes occurred at the filing of Mr. Baral's income tax return on June 1, 1993. Assessment was made on July 19, 1993. Either date is timely under Code Section 6511(b)(2)(A), since the claim of overpayment was made in the tax return filed on June 1, 1993. Therefore, the three year look-back limitation on refund or credit in Code Section 6511(b)(2)(A) does not apply.

[5] The Government's brief omits any discussion of or references to these Treasury Regulations which have the force of law. Instead, the Government suggests that IRS Revenue Procedures are authoritative directives, even though taxpayers other than tax professionals may be generally unaware of Revenue Procedures, which simply reflect IRS administrative practice. *See Helvering* v. *New York Trust Co.*, 292 U.S. 455, 468 (1934) (IRS rulings "have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of law"); *Snap-On Tools, Inc.* v. *United States*, 26 Cl. Ct. 1045, 92-2 U.S.T.C. (CCH) ¶ 50,425, p. 85,432 (1992) (a Revenue Procedure "simply announces the IRS position on the issue; it lacks binding precedential value on this Court").

D. The Government Has Failed to Respond to Petitioner's Analysis of Code Section 6513(b)

The Government's brief fails to respond to petitioner's contention that section 6513(b) sets the income tax return due date as the deemed date of payment of withholding taxes and income tax estimates, not payment of the income tax. Withholding taxes under Subtitle C of the Code and estimates are not component parts of the income tax. They simply give rise to credits, becoming payments of the income tax due when that tax is ascertained, known, defined or asserted. The Government repeatedly refers to section 6513(b) as dealing with the "payment of tax" or "payments of tax," apparently content with payment of any kind of tax, whether or not income tax. *See, e.g.*, G.Br. 7, 10, 21, 28, 29.

The closest the Government comes to meeting the petitioner's argument on Section 6513(b) is a reference (G.Br. 29) to the Conference Report on the Current Tax Payment Act of 1943. H.R. Conf. Rep. No. 78-510, 78th Cong., 1st Sess. 54 (1943). The part of the Report which the Government quotes deals with estimated taxes only, not withholding taxes. It reads *fully* as follows:

> "The section further provides that payment of the estimated tax shall be considered payment on account of the income (including Victory) tax imposed by chapter 1 for the taxable year. *The taxpayer will, of course, have to file his regular income tax return as usual, and on such return the estimated tax paid will be taken into account.* All such payments of estimated tax are for the purpose of the provisions of law relating to refund or credit of the tax imposed by chapter 1, including the provisions relating to interest on overpayments of such tax, deemed to have been paid on the fifteenth day of the third month

following the close of the taxable year." (Emphasis added.)

It is significant that the estimated tax payment is referred to as payment "on account of" the income tax. This is the same language that appears in present Code Section 6315,[6] interpreted in the Treasury Regulations as requiring estimated tax payments to be entered on the taxpayers income tax return "to be applied against the [income] tax shown on such return." 26 C.F.R. § 301.6315-1. The section of the Conference Report quoted above makes it very clear that the estimated taxes will be "taken into account" when the taxpayer files his income tax return. If anything, the Conference Report seems to be the source for present Treasury Regulations section 301.6315-1. The Conference Report simply emphasizes and reinforces petitioner's position on section 6513(b). By application on the return, credit for estimated taxes is applied to the income tax to discharge or pay the tax *pro tanto* at that time. *See* Cir. J.A. 28-29.

The petitioner's argument on withheld taxes is at least as strong as the argument on estimated tax. Those employment tax payments constitute simply credits until they are applied on the return to the income tax. An attempt

[6] In *Rosenman* v. *United States*, 323 U.S. at 660, the first remittance made by the executors which was, as this Court noted, in the nature of a cash bond, was described in the taxpayers' letter of transmittal as "a payment on account of the Federal Estate tax."

In the most recent decision on "payment" or "deposit," *Pransky* v. *IRS (In re Pransky)*, 84 AFTR 2d ¶ 99-5597 (N.J. Bankr. Ct., Nov. 3, 1999), the court followed *Rosenman* after considering in detail the Government's arguments and the split in circuit courts. There the taxpayers made remittances "to be applied to the account" of the taxpayers "for any income tax liability they may have for the year." Michael Saltzman, author of a treatise which the Government brief cites (G.Br. 13, 20), appeared as counsel for the successful taxpayers, obviously disagreeing with the IRS limitations arguments.

to label them payments of income tax on the deemed payment date is wholly unwarranted and unreasonable; the amount of income tax, absent a return, is then unknown.

Let us suppose, as some have advocated, that a federal sales tax or value-added tax should be enacted with a provision that such tax gives rise to taxpayer credits for income tax purposes. No one would seriously contend that the sales or value-added taxes thereby constitute integral parts of income tax, or that the payment of such taxes would be the payment of income taxes.[7] The case is not different for withholding taxes, classified in the Code as employment taxes.

E. The Government Erroneously Argues That a Late-Filed Return Prejudices the Internal Revenue Service and the Treasury

The Government suggests that the late filing of a return and late payment of a tax delays assessment and otherwise prejudices it. The realities are exactly contrary. Any detriment from late filing and late payment is sustained by taxpayers.

If the filing of the return or an audit results in a determination that tax is due, the taxpayer who files a return late is subject to substantial compound interest and penalty add-ons to the tax. Code §§ 6601 and 6651. On the other hand, if (as in the Baral situation) the return and audit show overpayment, the taxpayer loses interest

[7] In petitioner's original brief the existence of forty credits against income tax was noted, with the observation that when they come into being they do not constitute payments of the income tax. P.Br. 22. In its brief, the Government simply sidesteps the existence and application of these credits by a meaningless and misdirected reference to the Conference Report on the Current Tax Payment Act of 1943, *supra*. *See* G.Br. 30, n.20.

on the overpayment until the return is filed and, of course, loses the use of the amount of overpayment (here for four years); in effect, the taxpayer has made an interest-free loan to the Government. Code § 6611(b)(3). In any event, the Government retains the right to audit the taxpayer's reporting for a period of three years after a late-filed return. Code § 6501(a).

Moreover, should there be a dispute between the taxpayer and the IRS, the passage of time may present a problem for the taxpayer. In a refund suit, the burden of going forward and the burden of proof are on the plaintiff-taxpayer. *United States* v. *Janis*, 428 U.S. 433 (1976). It is the taxpayer who years later may be in a difficult position to adduce documentary proof or testimony.

In his brief, petitioner presented a hypothetical case of late filing of a return and late payment of tax with no limitations question resulting from the lateness. P.Br. 26. The Government responds that the hypothetical case is not the *Baral* case. G.Br. 30, n.21. In the hypothetical, the taxpayers would pay the tax with cash transmitted with the return; in the instant case, the tax was paid by withholding and estimated tax credits. It is more than a little difficult to see how in the latter case the Government is especially prejudiced by holding an overpayment derived from withheld and estimated taxes for four years without paying interest thereon.

We are well aware that equitable considerations are not taken into account in applying the Code limitations provisions. It is nevertheless unwarranted to expand and over-extend the limitations provisions in this case so as to confiscate the taxpayer's overpayment. On a strict and literal construction of the Code provisions, the statute of limitations does not apply. *See* P.Br. 10-16. On a construction which takes into account legislative history, the limitations provisions do not apply. *See* P.Br. 16-19. On an application of the doctrine of the *Rosenman* case, limitations do not apply. *See* P.Br. 24-26. The limitations simply do not apply in this case. Credits to be applied against the tax do not constitute payment of the tax before the amount of tax is ascertained or defined.

As this Court has recently declared, a statute of limitations does not begin to run against a party until that party has a complete and present cause of action and the right to bring suit. The statute does not commence until the amount of a claim sought to be enforced is known. *Bay Area Laundry* v. *Ferber Corp. of Cal., Inc.*, 118 S. Ct. 542, 546, 549 (1997). Baral had no cause of action, no right to bring suit, and no knowledge of the amount of his income tax or overpayment on April 15, 1989, the date on which the court below held that the limitations provisions began to run.

CONCLUSION

The petitioner respectfully requests that the summary judgment of the court of appeals below be reversed.

Respectfully submitted,

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