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Financial Disability For All

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Financial Disability For All

T. Keith Fogg

Abstract

The Internal Revenue Code has four discreet sections that allow late filing of claims and other documents under the circumstances described in those sections. The IRS has promulgated a procedural regulation that allows it to permit late elections under prescribed circumstances. Neither the Code sections nor the Regulation cover all of the circumstances in which taxpayers have a good excuse for missing a time frame. The current provisions have developed in an ad hoc manner. More ad hoc development of this area is possible as equitable tolling litigation seeks to open up time frames under the Code despite the efforts of the IRS to argue the tax code is exceptional.

Rather than continue down the path of ad hoc allowance of late claims and certain other late actions, this Article recommends the creation of a statute that would apply to all situations. The recommendation draws from the current provisions allowing late action and from principles developed in equitable tolling litigation. It proposes a transparent system under which the IRS would make a determination whether the late action qualified and that determination would be subject to judicial review under an abuse of discretion standard.

FINANCIAL DISABILITY FOR ALL

T. Keith Fogg[*] and Rachel E. Zuraw[**]

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I. Introduction

John Smith[1] worked as a scientist for a large pharmaceutical company in the suburbs north of Philadelphia. In mid-March 2003, on his way home from work one evening, he stepped out of the commuter train station into anyone's worse nightmare. As he walked to his car from the station, he was hit over the head with a cinderblock by a robber. The assailant robbed John not only of his cash but of the soundness of his mind.

The attack placed John in a coma. He awoke a few weeks later to a life he did not know. His memory faded in and out. His fears were significant. He could no longer function in his job. He slowly recovered his physical strength but not his full cognitive abilities. Unmarried and without any close family, John had no one to take full care of him. Although friends aided him during the recovery, no one person knew everything about him or took complete control to address everything that needed to be done.

John failed to file his 2002 return which came due while he was in a coma. He never realized his failure. Likewise, he failed to file his 2003 return which included his first few months of salary in addition to several months of sick leave and severance pay. The Internal Revenue Service ("IRS") eventually sent John letters notifying him of his failure to file the returns. Like so much correspondence John received, he did not know what to do with the letters and failed to respond. The IRS eventually used

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[1] John Smith is a fictional name and the facts stated here, while partially based on a real case, are a composite of facts and do not track the circumstances of a specific individual.

the substitute for return procedures to determine his liability, sent him notices of deficiency, and when he did not petition the Tax Court assessed against John the proposed liabilities. The IRS sent John the customary and appropriate collection notices including the collection due process notice informing him of its intent to levy on his assets if he did not address the unpaid taxes.

While unable to deal with the IRS correspondence due to his mental disability caused by the injury, John did receive assistance in applying for Social Security disability. He began receiving disability payments in 2005. Prior to receiving the disability determination, the entirety of John's savings was used up on medical bills and normal life expenses. Unable to afford his house any longer, he moved into an apartment. The disability payments allowed him to pay the rent, purchase food, and pay his substantial ongoing medical expenses, but with nothing left over.

After running through its correspondence stream with no response from John, the IRS began levying on his Social Security disability payments in 2007, taking 15% each month. The levy placed John in a hardship position because he could no longer afford the drugs he needed or food and other necessities. He wrote to the IRS attempting to explain his problem. His letter was difficult for the IRS to understand and John did not respond to further inquiries from the IRS because of his diminished comprehension abilities.

Almost three years after the IRS began levying on his Social Security benefits, a friend brought John to the Villanova Tax Clinic seeking help in working with the IRS to remove or reduce the levy. The clinic requested that the IRS stop the levy because it placed John in a hardship situation. At first the clinic received some resistance because John had not filed returns. At almost the same time the clinic took up the case, the Tax Court ruled that the failure to file returns did not override the statutory language concerning levies placing taxpayers in hardship situations.[2] The clinic next looked to determine whether it could reduce or eliminate the underlying liability. John had no records, no memory and liabilities which were quite old. So, the clinic moved on to seeking relief through collection alternatives. It also sought the return of the Social Security payments that the IRS received through its levy because the loss of those funds placed John in a hardship situation. Section 6343 permits the return of funds in this situation; however, it allows for the refund of funds wrongfully levied only in the previous nine months.[3] The effect of the limitation on recovery meant that John could only receive 25% of the amount taken from him by levy at a time when the levy created a hardship and he lacked capacity to contest the levy due to his financial disability.[4]

The Internal Revenue Code ("IRC" or "Code") contains a number of strict time limitations with which financially disabled taxpayers are unable to comply. In 1998, Congress addressed financial disability within the Code by creating a basis for suspending the statute of limitations for refund claims by taxpayers facing such disability.[5] This suspension of the limitations period for the financially disabled, however, only applies to individuals seeking a refund of taxes. The provision does not extend to provide relief to the circumstances faced by John, nor does it apply to a number of other situations faced by financially disabled taxpayers.

Although John's story provides an extreme example of taxpayer disability, a large number of taxpayers face financial disabilities that greatly impact their ability to comply with the strict time

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[2] See Vinatieri v. Commissioner, 133 T.C. 392 (2009); see also I.R.C. § 6343.

[3] All references and citations to sections hereinafter are to sections of the Internal Revenue Code of 1986, as amended, unless otherwise indicated. Section 6343(d) allows the IRS to return funds wrongfully levied; Section 6343(b) limits the amount of recovery to only amounts wrongfully levied upon only in the previous nine months. See I.R.C. § 6343(b), (d).

[4] The fraction twenty-five percent represents the recovery of nine out of thirty-six months of levy on his disability payments. The term financial disability will be discussed at length below. It is a term taken from section 6511 of the Code.

[5] See I.R.C. § 6511(h).

limitations imposed by the Code. This paper argues that the concept of financial disability deserves broader application to allow those afflicted by financial disability to obtain an extension of the statute of limitations in circumstances beyond requests for refund. It also examines the definition of financial disability in light of almost fifteen years of experience with the language, and proposes expansion of the language to encompass circumstances other than those allowed by the current statute.

Part II of this article provides background by reviewing the two cases, United States v. Brockamp[6] and Webb v. United States,[7] which led to the adoption of the financial disability provision in 1998. Part III of this article examines the legislative history of the current financial disability statute, Section 6511(h), and its scope. Part IV explores three other provisions within the Code that allow for the suspension of time limitations. This Part also discusses additional circumstances that give rise to financial disability and propose expansion of the definition of financial disability in the statute. Part V of this article offers a proposed legislative solution, drawing upon features of current statutes and IRS authority and outlining the correct circumstances in which tolling should occur. Finally, Part VI sets out conclusions.

II. Background of Financial Disability

The relief provisions for financial disability in the IRC came into existence primarily in response to the Supreme Court's decision in the pivotal case United States v. Brockamp. The request for relief in Brockamp occurred as a result of the Supreme Court opening the door to assertions of equitable tolling against the federal government in Irwin v. Department of Veterans Affairs.[8] Mr. Irwin was fired from his job at the Department of Veterans Affairs. He filed a complaint with the Veterans Administration, alleging that he was fired because of his race and disability, and lost. He appealed that determination to the Equal Employment Opportunity Commission (EEOC) and lost. The EEOC sent him a notice of its determination, after which he had thirty days to file a complaint in the United States District Court. Irwin failed to timely file his complaint, in part due to late receipt of the notice by him personally and in part due to the fact that his attorney was overseas when the notice came into the attorney's office.

At the trial and appellate levels, the Government succeeded in arguing that compliance with the statute of limitations was a requirement for waiving sovereign immunity. Because Irwin failed to meet this condition, his complaint was barred due to lack of jurisdiction. Instead of deciding the case on this jurisdictional ground, the Supreme Court noted that it had ruled inconsistently in this area previously and chose this case "to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government."[9] The Court stated that equitable tolling ordinarily applies to time requirements in suits against private litigants, specifying that equitable tolling also applies in private suits under Title VII. It then concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."[10]

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[6] United States v. Brockamp, 519 U.S. 347 (1997)

[7] Webb v. United States, 66 F.3d 691 (4th Cir. 1995), cert. denied, 519 U.S. 1148 (1997)

[8] 498 U.S. 89 (1991). Equitable tolling of time frames in federal statues will be discussed briefly below in Section IV. For a detailed discussion of this issue, see the following articles, written by Professor Carlton Smith of Cardozo Law School: Carlton M. Smith, Cracks Appear in the Code's 'Jurisdictional' Time Provisions, TAX NOTES 511 (October 29, 2012); Carlton M. Smith, Friedland: Did the Tax Court Blow its Whistleblower Jurisdiction?, TAX NOTES 843 (May 23, 2011), Doc 2011-9435, 2011 TNT 100-10; Carlton M. Smith, Equitably Tolling Innocent Souse and Collection Due Process Periods, TAX NOTES 1106 (Mar. 1 2010), Doc 2010-3161, 2010 TNT 41-8.

[9] See id. at 97.

[10] See id. at 97-98. Unfortunately for Mr. Irwin, the Court went on to find that his circumstances did not merit equitable tolling.

This holding created hope for litigants whose actions against the United States did not meet statutory time frames and whose cases were previously subject to motions to dismiss on jurisdictional grounds. Even though the Supreme Court went out of its way in Irwin to announce a clarifying rule in a case that did not merit equitable tolling, the clarity the Court sought to bring with the ruling was undercut by a decision it had rendered in the previous year[11] and was soon to be tested against federal tax provisions.

A. Discussion of Webb

Three days prior to the Ninth Circuit's decision in Brockamp, the Fourth Circuit had decided a case that also involved equitable tolling.[12] Unlike the Ninth Circuit, the Fourth Circuit did not find that Section 6511 contained an implied exception permitting equitable tolling. The Webb case involved Mary Morton Parsons, born in Richmond, Virginia in 1902 the only child of a very wealthy family.[13] She lived a life sheltered from concerns about finances relying on her parents, then her husband, and then her sister-in-law to manage her financial issues. By 1972 all of the individuals upon whom she had relied for advice had passed away. She placed her trust in Dr. Alvin Q. Jarrett, her personal physician and a social acquaintance, and he soon proved that her trust was misplaced.[14] Dr. Jarrett teamed with tax attorney Roland Freasier, Jr. to essentially take all of her money:

> Through systematic physical and emotional abuse during the ensuing fourteen years, Jarrett and Freasier induced Parsons to relinquish to them total control over her day to day affairs. They persuaded her to move into virtual seclusion in Virginia Beach, Virginia, where they confined her to her bed under heavy sedation. They discharged most of Parsons' household staff and prevented her from receiving mail or telephone calls and from seeing visitors. They also induced her to grant to each of them powers of attorney, thus enabling them to manipulate her financial affairs for their own benefit.[15]

As they stole her money, Jarrett and Freasier filed a gift tax return reporting the transfers of funds from her to each of them, their spouses, and their children. In 1987 Mrs. Parsons finally loosened their grip on her with the help of an old friend and discovered the fraudulent transfers. She brought suit in state court against Jarrett and Freasier to recover her money and filed a refund claim with the IRS seeking the return

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[11] See United States v. Dalm, 494 U.S. 596 (1990).

[12] See Webb v. United States, 66 F.3d 691 (4th Cir. 1995), cert. denied 519 U.S. 1148 (1997).

[13] See Webb, 66 F.3d at 691.

[14] See Best Rip-Off Artists in Richmond History, STYLE WEEKLY, http://www.styleweekly.com/richmond/best-rip-off-artists-in-richmond-history/BestOf?oid=1463690 (last visited Nov. 1, 2012) (Richmond news magazine selecting Dr. Jarrett and his accomplice, tax attorney Roland B. Freasier, Jr., the "Best Rip-Off Artists in Richmond History"). The details of the case are best traced in a series of articles by the Richmond Times Dispatch that span a decade. ELLIOTT COOPER, Physician Says Widow's Suit Against Him is too Sweeping, RICHMOND TIMES DISPATCH, January 12, 1988; Service for Philanthropist Mrs. Parsons Conducted, RICHMOND TIMES DISPATCH, August 28, 1990; RANDOLPH GOODE, Estate Files $16.8 Million Lawsuit Against U.S. Claim Seeks Nonrefunded Gift Taxes Plus Interest, RICHMOND TIMES DISPATCH, December 18, 1993; RANDOLPH GOODE, Lawsuit Seeking Return of '80 Gift Taxes Dismissed Parsons Estate Asked for Return of $11 Million, RICHMOND TIMES DISPATCH, May 6, 1994; and BILL MCKELWAY, A Quiet Man of Influence: Loved and Feared, His Links to Old Money Have Made Him a Midas – Yet Few Know His Name, RICHMOND TIMES DISPATCH, September 20, 1998.

[15] See Webb, 66 F.3d at 692.

of the gift taxes paid under circumstances in which no gift existed. Her suit against Jarrett and Freasier succeeded while her suit against the IRS did not.[16]

Under Section 6511, which governs refund claims, a taxpayer must file such claim from the later of three years from the time the return was filed, or two years from the time the tax was paid.[17] The IRS accepted the basis for Mrs. Parsons's claim for refund and refunded gift tax payments made within the statutory time frame prior to her claim. The IRS, however, denied her refund claim on gift taxes paid more than three years before the filing of her refund claim taking the position that these claims for gift taxes paid were barred by the statute of limitations.

Her estate brought suit arguing that under the circumstances of this case the statute of limitations for filing a refund claim was equitably tolled, citing Irwin as support. The district court dismissed the case for lack of jurisdiction.[18] On appeal, the Fourth Circuit noted that "[i]f this case had arisen prior to 1990, there would seemingly be no question that the district court's holding was correct."[19] The Fourth Circuit engaged in a lengthy analysis of Irwin before deciding that Irwin did not create equitable tolling in a suit for the refund of taxes. "Crucial to the Supreme Court's holding in Irwin, that equitable tolling applies in suits under Title VII against the United States was the fact that 'the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling' 498 U.S. at 95."[20] Because tax refund suits have no comparable private remedy and because the tax refund statute went to such lengths to make clear the jurisdictional nature of the statute, equitable tolling could not hold open the statute of limitations for Mrs. Parson's multimillion dollar claim even though the equities in her case were quite compelling.

The Supreme Court denied certiorari in Webb.[21] All other circuits considering the issue found that IRC 6511 did not authorize equitable tolling.[22]

B. Discussion of Brockamp

Driven by the same language in Irwin that inspired the Webb case, two cases made their way to the Ninth Circuit at precisely the same time.[23] These two cases, Brockamp and Scott, were consolidated

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[16] See Randolph Goode, Estate Files $16.8 Million Lawsuit Against U.S. Claim Seeks Nonrefunded Gift Taxes Plus Interest, Richmond Times Dispatch, December 18, 1993; Randolph Goode, Lawsuit Seeking Return of '80 Gift Taxes Dismissed, Richmond Times Dispatch, May 6, 1994 (noting that Jarrett and Freasier transferred much of the stock back to Ms. Parsons); see also Best Rip-Off Artists in Richmond History, Style Weekly (listing Jarrett and Freasier first on a list of rip off artists in Richmond). This series of newspaper articles recounts the actions taken by Jarrett and Freasier as well as the ultimate disposition of her case.

[17] See I.R.C. § 6511(a).

[18] 850 F. Supp. 489 (E.D. Va. 1994)

[19] Webb, 66 F.3d at 694.

[20] Webb, 66 F.3d at 696.

[21] Petition for certiorari filed Feb. 23, 1996 (No. 95-1360). Cert. denied 519 U.S. 1148 (February 24, 1997)

[22] Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464 (10th Cir. 1996); Lovett v. United States, 81 F.3d 143 (Fed. Cir. 1996); Oropallo v. United States, 994 F.2d 25 (1st Cir. 1993) (per curiam); and Vintilla v. United States, 931 F.2d 1444 (11th Cir. 1991).

[23] See, e.g., Brockamp v. United States, 859 F. Supp. 1283 (C.D. Cal. 1994), rev'd, 67 F.3d 260 (9th Cir. 1995); Scott v. United States, 847 F. Supp. 1499 (D. Haw. 1995), aff'd, 67 F.3d 260 (9th Cir. 1995), judgt. order reported at 70 F.3d 120 (1995) (the cases were consolidated for opinion at the Ninth Circuit).

for opinion in the Ninth Circuit. While the Brockamp case has received more attention, the second case, Scott v. United States,[24] also deserves mention. Mr. Scott held a lawyer's license in California before he lost it and many other things due to alcoholism. For the tax year 1984, his father, acting with a power of attorney, deposited over $30,000 with the IRS as estimated payments. Mr. Scott's father terminated the power of attorney before filing the 1984 return. The filing of this return finally occurred in November 1989, long after the period for claiming a refund had expired. The return sought a refund of the entire amount of estimated payments deposited in 1984. The district court determined that Mr. Scott's alcoholism rendered him mentally incompetent during the entire period between the due date for the 1984 return and the filing of the late return. The court held that the refund period was equitably tolled, and the Ninth Circuit affirmed.

In the Brockamp case, Marian Brockamp was appointed to administer the estate of her father, Stanley B. McGill. Mr. McGill, a brilliant mathematician during his working years, sent an estimated payment to the IRS for 1984 of $7,000 when requesting an extension to file but never filed the return for that year. At the time of filing the request for extension, Mr. McGill was 93 and suffering from some symptoms of dementia. He passed away in 1988 at the age of 98. Ms. Brockamp realized in reviewing his estate that her father had not filed a tax return for 1984. She prepared and filed the 1984 return which showed a liability of only $427. When the IRS did not refund the balance, she brought suit. The district court dismissed the suit for lack of jurisdiction due to the late filing of the return as a refund claim. The Ninth Circuit consolidated the Brockamp case with the Scott case. Relying on Irwin, it found that equitable tolling applies to refund claims in both cases because of the mental condition of each taxpayer at the time the statute of limitation on filing the refund claim passed.

The Supreme Court acknowledged that some language in Irwin could support equitable tolling in the refund context, but determined that it could "travel no further, however, along Irwin's road, for there are strong reasons for answering Irwin's question in the Government's favor."[25] The Court noted that "[s]ection 6511 sets forth its time limitations in unusually emphatic form."[26] It determined that the highly detailed and technical structure of the statute did not support an implicit exception for equitable tolling.[27] The Court mentioned that tax law generally avoids mentioning case specific exceptions because of the high volume of returns the IRS must process.[28] It did not specifically rule out tax provisions from possible equitable tolling nor did it limit the rule prohibiting equitable tolling to situations involving high volume IRS activities such as refunds. In short, it left enough room for taxpayers with other tax issues to hold out hope that equitable tolling might apply.[29]

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[24] 847 F. Supp. 1499 (D. Haw. 1993), aff'd, 70 F.3d 120 (9th Cir. 1995)

[25] 519 U.S. 350

[26] See id.

[27] See id.

[28] See id. at 352.

[29] This hope currently rests with the case of Auburn Regional Medical Center v. Sibelius, 642 F.3d 1145 (D.C. Cir. 2011), Sup. Ct. Dkt. No. 11-1231,cert. granted June 25, 2012. The Auburn case concerns a very late claim by hospitals to receive Medicare reimbursement. The late claims resulted from inappropriate Medicare calculations by the government and concealment of the mistake. While taxes are not at issue, the D.C. Circuit referenced Brockamp in its decision. Auburn offers the Supreme Court the opportunity to clarify or overturn Brockamp. For a discussion of this case and its applicability to time periods established in the Internal Revenue Code, see Carlton M. Smith, Cracks Appear in the Code's 'Jurisdictional' Time Provisions, Tax Notes 511 (October 29, 2012).

III. Discussion of Section 6511(h)

A. Legislative History of Section 6511(h)

The Brockamp case revealed a harshness that often exists in the Code's enforcement.[30] Both Congress and the Clinton administration recognized that the Ninth Circuit's holding in Brockamp contrasted with the Fourth Circuit's holding in Webb and yielded inequitable results.[31] The decisions led President Clinton to urge the Department of the Treasury to revise the law so that such decisions would no longer be left up to the courts.[32] President Clinton "concluded that the law at times may produce harsh results. This is particularly so when taxpayers fail to seek a refund because of a well-documented disability, or similar compelling circumstance. Accordingly, he has directed the Secretary of the Treasury promptly to make recommendations to him concerning whether and how the law should be changed to avoid such unfair results."[33] Then-Treasury Secretary Robert Rubin commented that he and Clinton believed that there should exist "a tax system that is responsive to the personal hardships faced by incapacitated taxpayers."[34]

In the House of Representatives, two Congressional members had a similar response to the Circuit Court opinions in the Brockamp and Webb cases.[35] A bipartisan effort by Democratic Representative Robert T. Matsui of California and Republican Representative Jennifer B. Dunn of Washington sought to revise section 6511 to allow for tolling of the statute under prescribed circumstances.[36] Representative Dunn cited to the "outrageous injustice" created by Brockamp which she sought to correct with a "commonsense change of law."[37] Representatives Matsui and Dunn, along with

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[30] See David G. Savage, Woman Wins Victory--but No Refund--in IRS Battle, L.A. Times (Feb. 14, 1997) (stating that Brockamp reveals that "strict enforcement of the rules, rather than a sense of fairness, reigns in the area of tax law.").

[31] See Andrea Sharetta, Problem of Equitable Tolling in Tax Refund Claims, 72 NOTRE DAME L. REV. 545, 588 (1996) ("Both the legislative and executive branches have recognized that a legislative fix is in order"). The push to fix the problem came before the Supreme Court reached its decision but after the Circuit Courts had rendered their opinions. Both cases presented extreme circumstances where the possibility of injustice existed.

[32] See Office of the White House Secretary, Press Release, Jan. 31, 1996; see also Tax Notes Today, 96-3438 (Feb. 2, 1996); Sharetta, supra note 31, at 588 ("Both the legislative and executive branches have recognized that a legislative fix is in order"). "Because the cases involved extremely sympathetic taxpayers, and the government is essentially asking the Court to disregard equity, the Clinton administration has publicly encouraged Treasury to work on a possible legislative fix." Tax Notes Today, 96-3438 (Feb. 2, 1996).

[33] Office of the White House Secretary, Press Release, Jan. 31, 1996; see Leslie Berger, Woman's Battle With IRS May Reach High Court, L.A. Times (Feb. 17, 1996) 1996 WLNR 5243063 ("The seeming absurdity of Brockamp's plight has drawn the attention of even President Clinton.").

[34] Dep't of the Treas. News Release RR-955 (March 20, 1996), available in LEXIS, Fedtax Library, TNT File, 96 TNT 57-67. Note that Secretary Rubin's comments are not limited to the refund context.

[35] See 142 CONG. Rec. H3411-12 (daily ed. April 16, 1996) (statement of Rep. Dunn).

[36] See 142 CONG. Rec. H3411-12 (daily ed. April 16, 1996) (statement of Rep. Dunn).

[37] See 142 CONG. Rec. H3411-12 (daily ed. April 16, 1996) (statement of Rep. Dunn). Representative Dunn's statement:

> I will continue to work for the inclusion of an additional provision in the final version of [the Taxpayer Bill of Rights 2] . . . . Specifically, the bipartisan provision, which I am

the House Ways and Means Committee, wished to have a provision for tolling in tax refund cases with the appropriate equitable circumstances added to the Taxpayer Bill of Rights 2.[38] The proposal would have been as follows:

> (h) SUSPENSION OF PERIOD OF LIMITATION ON FILING CLAIMS.-The running of any period of time specified in subsection (a), (b), or (c)[39] shall be suspended for the period during which it is established to the satisfaction of the Secretary that (1) the taxpayer is incompetent (as determined by a court), (2) the taxpayer is committed to a mental institution or hospital, or(3) to the extent provided in regulations, the taxpayer suffers from any debilitating physical or mental condition which prevents the taxpayer from managing the taxpayer's financial affairs.[40]

Despite their efforts, the Taxpayer Bill of Rights 2 went into effect without such an equitable tolling provision.[41]

In the following year the Supreme Court reached its conclusion in Brockamp, making clear that the injustice Congressman Dunn and Matsui tried to fix in 1996 had come to pass. As part of the Restructuring and Reform Act of 1998, Congress placed in the refund statute an ability to suspend the statute in the event the taxpayer is experiencing "financial disability."[42] Section 6511(h) provides that the limitations periods for filing a refund claim "shall be suspended during any period" in which the taxpayer is financially disabled.[43] The statutory language of subsection (h) boils down to essentially three requirements: (1) the taxpayer must have a physical or mental impairment; (2) the impairment must be medically determinable; and (3) the impairment must bear a causal relationship to the taxpayer's inability

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> sponsoring along with my colleague, Mr. Matsui, would permit "equitable tolling" application in tax refund cases. My interest in this area was precipitated by a highly publicized court case in which a 93-year-old senile man, Stanley McGill, overpaid his taxes in 1984 . . . . Although the agency acknowledged the mistake, it refused to return the money, claiming the 3-year statue [sic] of limitations on refund claims had expired . . . . This is just one example of an outrageous injustice that my commonsense change of law is intended to end. H.R. 2337, the Taxpayer Bill of Rights II, will help the average American, who might have made an honest mistake in underestimating his taxes due by providing him a little more time to prove it was an honest mistake. The new majority in this Congress is working on commonsense ways to give taxpayers a break.

Id.

[38] See 142 CONG. REC. H3411-12 (daily ed. April 16, 1996) (statement of Rep. Dunn); see also Andrea Sharetta, Problem of Equitable Tolling in Tax Refund Claims, 72 Notre Dame L. Rev. 545, 589 fn197 (1996). The Taxpayer Bill of Rights is legislation designed "to provide for increased taxpayer protections." Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452, available at: http://www.irs.gov/pub/irs-utl/tbor2.pdf.

[39] Subsection (a) of 6511 states that a claim for refund must be filed within the later of three years from the time the return was filed or two years after the tax was paid.

[40] See Dunn's Equitable Tolling Amendment to Section 6511, TAX NOTES TODAY, Feb. 6, 1997 (Doc. No. 97-3678)

[41] See Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (codified as amended in scattered sections of 26 U.S.C.).

[42] July 22, 1998, Pub.L. 105-206, Title III, § 3202(a), 112 Stat. 740

[43] See I.R.C. § 6511(h).

to manage financial affairs.[44] The statute further mandates that the taxpayer not have authorized an individual to act on the taxpayer's behalf in financial matters. Each of the listed requirements to establish financial disability limits the overall benefit Congress sought to confer and may create limitations greater than intended.

The scope of relief to disabled individuals provided through IRC 6511(h) narrowly limits relief to the refund setting.[45] Moreover, the medical limitations in Section 6511(h) may too narrowly define the circumstances needed to establish financial disability. The cases triggering passage of subsection (h) generally involved some physical or medical condition which impaired the taxpayer and prevented the timely filing of the refund claim: Brockamp (dementia); Scott (alcoholism); Webb (sedatives and other drugs administered by her "evil" doctor). Other cases seeking equitable tolling, however, raised other concerns: Lovett (alleged wrong advice from Veteran's Administration); Oropallo (carbon monoxide poisoning); and Vintilla (alleged disparate treatment by IRS *vis* a *vis* other similarly situated taxpayers and alleged misleading IRS advice).[46] By linking financial disability to physical and mental impairment, the statute misses other circumstances that raise significant equitable issues. Congress should give the IRS, and the Courts, a freer hand to determine circumstances where equity dictates broader options for relief. Congress delegated such authority in the 1998 legislation by signaling to the IRS it wanted more

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[44] See Section 6511(h); see also BRUCE A. MCGOVERN, The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform, 65 MO. L.REV. 797, 855 (2000).

[45] Other bases exist and should receive recognition. The case described at the beginning of this article represents a wrongful levy circumstance covered by IRC 6343. The time frame for pursuing a wrongful levy claim is only nine months after the taking of the property.[45] The same need for equitable tolling that exists with respect to refund claims can also exist for claims of wrongfully seized property. In addition to the case described above from the Villanova Tax Clinic, at least four decided cases point to the need for equitable tolling of the time period for claiming wrongful levy and deserve some mention in pointing out the need for equitable tolling in this context. In Volpicelli, the individual claiming the wrongful levy was a minor at the time the property was taken.[45] His father unsuccessfully sought return of the property. Upon reaching the age of majority Logan Volpicelli brought his own action seeking return of the property several years after its taking. Citing Brockamp and an absence of equitable language in the Internal Revenue Code for wrongful levy, the District Court dismissed the suit. Other cases include Becton Dickenson & Co. v. Wolkenhauer, 215 F.3d 340, 352 (3d Cir. 2000)(citing additional similar cases); Supermail Cargo Inc. v. United Sates, 68 F.3d 1204 (9th Cir. 1995); and Capital Tracing v. United States, 63 F.3d 859 (9th Cir. 1995) The Supreme Court has commented on this short time frame: "The demand for greater haste when a third party contests a levy is no accident; as the Government explained in the hearing and before the passage of the Act, since after seizure of property for non-payment of taxes an IRS district director is likely to suspend further collection activities against the taxpayer, it is essential that he be advised promptly if he has seized property which does not belong to the taxpayer." E C Term of Years Trust v. United States, 550 U.S. 429, 431-432 (2007) (internal quotation marks omitted).

[46] Additionally, Amoco Productions involved a family limited partnership, the Newton Sheep Company, claiming equitable tolling due to the unusual application of the windfall profits tax. The Tenth Circuit details how the Newton Sheep Company was, or should have been, aware of the need to file a protective claim for refund. The failure to meet the time period for filing a refund claim in this instance did not stem from a physical or mental impairment. Section 6511 would not allow tolling for any taxpayer other than an individual because only an individual can experience physical or mental impairment. Many of the cases discussed in Professor Smith's articles, see Smith, infra note [ ], involve corporations, and one individual case concerns age of majority rather than physical or mental disability. (One case in the Villanova clinic involved a guardian stealing from a minor ward and causing incorrect tax filings which the ward did not discover until reaching the age of majority.)

comprehensive relief for individuals seeking offers in compromise and by enacting legislation that created broader equitable relief for innocent spouse claimants.[47] Because Section 6511(h) was also a part of the 1998 Reform Act, it is unclear why Congress chose to define financial disability so narrowly.

Although the legislative history of Section 6511(h) does not specifically explain the origin of the "financially disabled" term, it is evident that Congress drew on statutory language from elsewhere in the Code.[48] Section 22, which provides a credit for the elderly and permanently disabled, defines permanent and total disability as "any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than [twelve] months."[49] The language definition of "disabled" in Section 22 was first used in the Social Security Amendments of 1956[50] as a threshold for receiving Social Security Disability Insurance benefits.[51]

B. IRS Guidance on Section 6511(h)

Section 6511(h) grants the Secretary the authority to require certain proof of the taxpayer's financial disability.[52] Accordingly, in April 1999, the IRS issued Revenue Procedure 99-21,[53] which "sets forth in detail the 'form and manner' in which proof of financial disability must be provided."[54] To establish a period of financial disability, the taxpayer must submit two very specific pieces of documentation. First, the taxpayer must submit a physician's written statement that sets forth:

(a) the name and a description of the taxpayer's physical or mental impairment;
(b) the physician's medical opinion that the physical or mental impairment prevented the taxpayer from managing the taxpayer's financial affairs;

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[47] See Pub. L. 105-599, Section 3462 and Section 3462 of the Senate Amendment (legislative history of 7122(c)(3)(A)); I.R.C. § 6015(f); Pub. L. 105-599, Section 3201; see also I.R.C. § 408(d)(3)(1) Pub. L. No. 107-17 (enacted by Congress in 2002, giving the IRS discretion to waive the 60-day period for IRA rollovers). For a more extensive discussion of Section 408, see infra notes [ ] – [ ] and accompanying text.

[48] See McGovern, supra note 44, at 850, n.286 (stating that "the legislative history of Section 6511(h) is silent as to the origin of the definition of 'financially disabled.'") (citing H.R. REP. NO. 105-364, pt. 1, at 68-69 (1997); S. REP. NO. 105-174, at 145 (1998); H.R. CONF. REP. NO. 105-599, at 146-47 (1998)).

[49] See I.R.C. § 22.

[50] See Pub. L. No. 84-880, § 103(a), 70 Stat. 807, 815 (codified as amended at 42 U.S.C. § 423(d)(1)(A)); see also McGovern, supra note 44, at 850, n.289.

[51] See 42 U.S.C. § 423(d)(1)(A).

[52] See 26 U.S.C. 6511(h)

[53] See Rev. Proc. 99-21, 1999-1 CB 960, April 8, 1999 (Limitations on Credit or Refund – Suspension of Period While Taxpayer is Disabled). Despite the passage of fourteen years, this guidance is in the form of a Revenue Procedure on which the public has not had the opportunity to comment in the manner contemplated by the Administrative Procedure Act. The IRS has yet to promulgate a regulation. Its failure to use formal agency rulemaking arguably leaves this guidance vulnerable to attack. One taxpayer has argued that Rev. Proc. 99-21 should not control the determination because of the failure of the IRS to use the formal rulemaking provisions. The Eighth Circuit rejected that argument and found the procedure reasonable. Abston v. Commissioner, No. 11-3689 (8th Cir. Aug. 31, 2012)

[54] Bova v. United States, 80 Fed. Cl. 449, 455 (Fed. Cl. 2008).

(c) the physician's medical opinion that the physical or mental impairment was or can be expected to result in death, or that it has lasted (or can be expected to last) for a continuous period of not less than 12 months;[55]
(d) to the best of the physician's knowledge, the specific time period during which the taxpayer was prevented by such physical or mental impairment from managing the taxpayer's financial affairs; and
(e) the following certification, signed by the physician:
I hereby certify that, to the best of my knowledge and belief, the above representations are true, correct, and complete.[56]

The taxpayer also must submit a statement that no other person was authorized to act on behalf of the taxpayer regarding financial matters during the period of financial disability.[57] Any time period during which an individual was authorized to act for the taxpayer in financial matters must be included when determining the limitations period.[58]

C. Judicial Application of Section 6511(h)

i. Judicial Refusal to Equitably Toll Section 6511

Focusing on refund claims brought under Section 6511, the lower courts have adhered to Brockamp in holding that the limitations period generally cannot be equitably tolled. In implementing Section 6511(h)'s financial disability provision, the IRS has imposed a number of requirements on taxpayers who are seeking to establish such disability. When circumstances fall clearly outside the scope of Section 6511(h) or when taxpayers fail to properly substantiate their disability, courts have refused to apply equitable tolling to refund claims.

The First Circuit has strictly applied Brockamp to what is commonly referred to as Section 6511's "look back" provision.[59] In addition to limiting the time within which a taxpayer may file a claim for refund, Section 6511 also places limits on the amount of refunds available to taxpayers. Pursuant to Section 6511(b)(2)(A), a taxpayer is entitled to a refund equal to the amount of the tax paid within the three years immediately preceding the refund claim, plus the period of any extension of time for filing the return. In Dickow v. United States,[60] the court rejected a taxpayer's argument that he was entitled to equitable tolling under this subsection for a refund claim relating to a portion of an estimated estate tax payment made several years prior.[61] Quoting Brockamp, the First Circuit reiterated that "[c]ourts cannot

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[55] This twelve-month period tracks the requirement in Section 22 but places a limitation not found in Section 6511(h) on taxpayers seeking this relief. No one has challenged this time limitation yet.

[56] See Rev. Proc. 99-21, 1999-1 CB 960, April 8, 1999. The meaning of "physician" is set forth in the Social Security Act § 1861(r)(1), 42 U.S.C. § 1395x(r).

[57] See Rev. Proc. 99-21, 1999-1 CB 960, April 8, 1999

[58] See SALTZMAN, IRS PRACTICE AND PROCEDURE ¶11.05. Rules Applicable to Claims for Credit or Refund.

[59] See Dickow v. United States, 654 F.3d 144 (1st Cir. 2011).

[60] 654 F.3d 144 (1st Cir. 2011)

[61] Under Section 6075(a), federal tax returns for estates are due nine months after the death of the deceased. In this case, estate taxes were due on October 15, 2003. Dickow, as executor of the estate, filed an application for a time extension, including with the mailing an estimated payment for the estate taxes. The IRS received the application on October 14, 2003, and the filing deadline was extended until April 15, 2004. See Treas. Reg. 20.6081-1(b). On March 23, 2004, Dickow submitted a second request for a time extension, which the IRS did not approve. Dickow finally filed the estate tax return on

toll, for nonstatutory equitable reasons, the statutory time (and related amount) limitations for filing tax refund claims set forth in section 6511."[62]

The Northern District of Mississippi similarly held that Section 6511's statute of limitations cannot be equitably tolled. The taxpayer in Davis v. United States[63] argued that he was entitled to equitable tolling of the limitations period because the time limitation for filing a refund claim seeking return of his estate tax payment allegedly expired before "the refund claim and its value came into existence."[64] Specifically, the taxpayer paid estate taxes on a parcel of property believed to be held by the decedent in fee simple, but was later determined to be only a vested remainder. Davis' refund claim, filed after resolution of the issue by the Mississippi Court of Appeals, was denied by the IRS as untimely. Davis asserted that taxpayers need to have "sufficient legal and factual grounds to file a claim for refund and that . . . [the estate] lacked sufficient grounds to file a claim prior to the statutory deadline."[65] The district court, although sympathetic to the taxpayer's situation, concluded that "the law directs a finding inconsistent with the [c]ourt's sympathies" and disallowed the claim.[66]

In regards to the tolling provision, Section 6511(h) requires that no individual be authorized to act on the taxpayer's behalf.[67] In Plati v. United States,[68] the Court of Federal Claims held that because the

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September 30, 2004, seeking a refund of the estimated payment previously submitted, and the IRS refunded the requested amount. On September 10, 2007, Dickow filed an amended return seeking an additional refund, which the IRS denied as untimely. Dickow's equitable estoppel argument alleged that the IRS misrepresented to him that his second request for a time extension had been granted.

[62] See Dickow, 654 F.3d at 151-52 (quoting United States v. Brockamp, 519 U.S. at 348).

[63] 2011 WL 6294467 (N.D. Miss. Dec. 15, 2011)

[64] Davis v. United States, 2011 WL 6294467 *1 (N.D. Miss. Dec. 15, 2011).

[65] See id. On February 3, 2003, Davis filed a federal income tax return on behalf of the estate at issue, reporting a liability of nearly $500,000. The estate included a parcel of property believed to be possessed in fee simple by the decedent. On April 17, 2003, Davis paid the IRS approximately $400,000, representing estate taxes, interest, and penalties. Several months later, a chancery court in Mississippi determined that the decedent had held only a vested remainder in the property as opposed to a fee simple interest. The ruling was upheld by the Mississippi Court of Appeals, and the Mississippi Supreme Court denied certiorari on March 2, 2006. Davis then filed an administrative claim with the IRS on November 4, 2008, seeking a refund of overpaid federal estate taxes. The IRS denied the refund claim as untimely, asserting that the claim was not filed within three years of the filing of the return or two years of payment.

[66] See Davis, 2011 WL 6294467 at *1. These two cases, Dickow and Davis, suggest that Section 6511 may not adequately accommodate the complexities and uncertainty inherent in estate administration, specifically estimated estate tax payments. In a recent case similar to Davis, where a taxpayer filed a refund suit after litigation of an underlying issue, the Court of Federal Claims declined to toll Section 6511's statute of limitations. See Haas v. United States, __ Fed. Cl. __, 2012 WL 4320652 (2012). In Haas, the taxpayer, a seventy-five-year-old veteran, sought a ruling from the Department of Veterans Affairs in 2001 that his medical conditions were a result of his service in Vietnam. Eight years and a number of appeals later, the taxpayer ultimately was granted service connection for his disability. Because compensation for disabilities related to service in the armed forces is not considered taxable income under Section 104(a)(4), the taxpayer filed amended income tax returns in 2010 for the years 2001-2009. The IRS granted refunds for 2007 through 2009, but denied the refund claims for 2001-2006 as untimely. The taxpayer filed suit in the Court of Federal Claims, arguing that due to the delay in the decision on his claim for veterans benefits, he was unable to file amended tax returns before 2010. The court held that the statute of limitations could not be equitably tolled and that the refund claims for tax years 2001-2004 were therefore untimely.

[67] See I.R.C. § 6511(h)(2)(B).

taxpayer had authorized an individual to act on her behalf regarding financial matters during the time period at issue, she was not financially disabled for purposes of Section 6511. The court firmly applied the statutory language, stating that the relevant inquiry is into whether an individual is authorized to act on the taxpayer's behalf, "not whether the authorized person actually took such action."[69] Therefore, although the taxpayer had insisted on managing her own finances, the fact that she had designated her son to manage her financial matters foreclosed her from bringing a refund claim.[70] While Mrs. Plati's continued involvement in her financial affairs made it difficult or practically impossible for her son to manage her financial affairs, the decision tracks the language of the statute.

The decisions regarding 6511(h) almost uniformly hold for the IRS. The effect of the statute in causing the IRS to concede the application of tolling remains unknown since these types of decisions do not become public. Section 6511(h) does not appear to have opened floodgates of cases with financial disability. It provides a narrow exception to one circumstance where a time frame can bar recovery.

ii. Judicial Treatment of Revenue Procedure 99-21

Rev. Proc. 99-21's requirements have led courts to reach various conclusions when faced with "technically deficient" documentation of medically determinable illnesses.[71] Taxpayers who submit only medical records to prove financial disability and fail to submit an accompanying physician's statement generally have been denied the benefit of Section 6511(h)'s tolling provision.[72] Most courts have also strictly adhered to the specific requirements for physician statements set forth in Rev. Proc. 99-21.

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[68] 99 Fed.Cl. 634 (Fed. Cl. Aug. 19, 2011)

[69] See Plati v. United States, 99 Fed.Cl. 634, 641 (Aug. 19, 2011) (citing Bova v. United States, 80 Fed.Cl. 449, 458 n. 12 (2008)). The taxpayer at issue, Ms. Plati, had designated her son as her attorney-in-fact with the authority to manage her financial affairs. However, Ms. Plati "insist[ed] on keeping control" and "did not let [him] have control or authority to act for her." See id. at 640.

[70] See Plati, 99 Fed.Cl. at 641 ("The plaintiff does not dispute that Mr. Plati was indeed authorized to act for his mother, Ms. Plati, in her financial matters. Whether Mr. Plati had difficulty in doing so does not change the application of the plain language of the statute.").

[71] See Abston v. Commissioner, 109 AFTR 2d 2012-508, (E.D. Mo. Nov. 8, 2011)(Granting summary judgment for the Government stating Abston "had not proferred the necessary evidence to permit consideration of whether the limitations period was suspended." She chose not to submit a physician's statement probably knowing she could not obtain one that would met the requirements of the Revenue Procedure.), aff'd, No. 11-3689 (8th Cir. Aug. 31, 2012)(Abston did not come to the Court with clean hands. She waited to file her refund claim in order to avoid its almost certain offset to pay her outstanding student loans.); see also Bowman v. IRS, 2010 WL 2991712 at *4 (E.D. Cal. July 29, 2010) (holding that technically deficient physician's statement can be cured by supplemental physician statements to comply with Revenue Procedure 99-21); Walter v. United States, 2009 WL 5062391 at *10 (W.D. Pa. Dec. 16, 2009) (same) with Estate of Rubinstein v. United States, 96 Fed. Cl. 640, 652 (Fed. Cl. 2011) (holding that "[s]trict compliance with [Revenue Procedure 99-21] is necessary."); Ibeagwa v. United States, 2009 WL 3172165 at *2 (N.D. Ill. Sept. 30, 2009) (same); Nunn v. United States, 2009 WL 260803 at *4 (W.D. Ky. Feb. 4, 2009) (same)).

[72] See, e.g., Abston v. Commissioner, 109 AFTR 2d 2012-508 (E.D. Mo. Nov. 8, 2011), aff'd, No. 11-3689 (8th Cir. Aug. 31, 2012) (holding taxpayer ineligible for equitable tolling for failure to submit physician statement); Henry v. United States, 2006 WL 3780878 at *4 (N.D. Tex. Dec. 26, 2006) (dismissing taxpayer's claim because she failed to submit physician's statement, stating that physician's written statement "is necessary to claim financial disability").

In Bowman v. IRS,[73] for example, the Eastern District of California declined to toll the statute of limitations for a taxpayer who had submitted a fairly comprehensive physician statement.[74] The court deemed the statement technically deficient because it failed to set forth the dates of treatment or include a basis for the physician's knowledge of the taxpayer's illness.[75] After stating that Section 6511(b) bars a refund claim unless a taxpayer can show he was financially disabled under Section 6511(h), the court detailed the requirements for proving financial disability under Rev. Proc. 99-21.[76] The court noted that "[w]here a physician substantially complies with Revenue Procedure 99-21, technical deficiencies may be cured by a supplemental statement."[77] The court then directed the taxpayer to include a statement by the physician setting forth the treatment dates and including a basis for his knowledge of the illness during the years at issue.[78] However, due to the failure of the taxpayer to submit the additional information, the district court ultimately granted the government's motion to dismiss.[79]

The District of New Jersey also refused to find that a taxpayer was financially disabled after rigid application of Rev. Proc. 99-21's requirements. The taxpayer in Pleconis v. IRS[80] sought to toll the statute of limitations under Section 6511(h) for the period of time during which he had undergone five back surgeries, in addition to two heart surgeries.[81] The taxpayer thus submitted a physician statement

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[73] 2010 WL 2991712 (E.D.Cal. July 29, 2010)

[74] See Bowman v. I.R.S., 2010 WL 1780194 (E.D.Cal. April 30, 2010). To provide some factual background, the taxpayer had filed a 2001 tax return on September 24, 2006 with a letter stating that he was submitting a refund claim because he had been incarcerated since November of 2001. See id. An IRS Appeals Officer responded on January 7, 2008, describing to the taxpayer the requirements of Revenue Procedure 99-21. The taxpayer responded with a letter, dated January 16, 2008, and included medical records. He did not, however, include a written statement from a physician addressing the requirements of Revenue Procedure 99-21. See id.

[75] Bowman v. IRS, 2010 WL 2991712 (E.D.Cal. July 29, 2010). The physician statement stated, in part: "I hereby certify that Mr. Bowman, who is 48, has been suffering from years of chronic daily headaches with clear migraine characteristics. They have been intense and daily for over six years with the last two years being more intense even . . . . In these conditions it is understandable that his concentration and productivity is greatly affected and therefore feasible that for medical reasons he has at times in the last years been unable to fulfil[l] his duties of doing the tax return in a timely fashion . . . . This statement is signed by Marc Lenaerts M.D., and dated October 28, 2009."

[76] Bowman v. IRS, 106 A.F.T.R.2d 2010-5611 (July 29, 2010). The district court's opinion went through a discussion of Brockamp, stating that 6511(h) was enacted in response to the Supreme Court's decision in Brockamp for circumstances in which taxpayers are facing financial disability. See id.

[77] Bowman v. IRS, 2010 WL 2991712 (E.D.Cal. July 29, 2010) (citing Walter v. United States, 2010 WL 724445, *4 (W.D.Pa. 2010).

[78] Bowman v. IRS, 2010 WL 2991712 (E.D.Cal. July 29, 2010).

[79] See Bowman v. I.R.S., 2010 WL 3516685 (E.D. Cal. Sept. 8, 2010)

[80] 2011 WL 3502057 (D.N.J. Aug. 10, 2011)

[81] See Pleconis at *2. Mr. Pleconis and his wife had failed to file joint returns for the tax years 1999 through 2003 until late in 2007. See id. at *1. To satisfy interest and penalties that had accrued, the IRS levied the taxpayer's bank account. The IRS also denied the taxpayer's refund claims for several of the tax years. See id. Pleconis also suffered from sleep apnea, obstructive sleep, and restless leg syndrome. See id. The court, however, noted that Placonis was able to play an active role as the owner of his own company, a gas detection device servicer. The court suggested that his participation in the company undercut the extent and nature of his alleged injuries. See id.

which specifically stated that "[t]he surgeries, rehabilitation and pain medication could be expected to have an adverse effect on the patient's ability to carry about business and personal activities."[82] The taxpayer's cardiologist also opined that, because of his medical condition, "there may be adverse effects on the patient's ability to carry out business and personal activities correctly."[83] The district court held that these statements, however, did not sufficiently comply with the Revenue Procedure, which requires that a physician opine that the injury actually prevented the taxpayer from managing his financial affairs.[84]

One trial court has held that substantial compliance is sufficient to establish financial disability. In Walter v. United States,[85] did not require strict adherence to Rev. Proc. 99-21's requirements. The taxpayer at issue submitted a physician's statement, which stated that the taxpayer's failure to file his tax return "was a result of his clinical depression" in attempt to prove financial disability.[86] Later, when the case moved to the litigation phase, the physician wrote a more thorough supplemental statement, which the taxpayers submitted to the court. The IRS argued that the taxpayer could not submit a supplemental statement, and that the initial documentation was insufficient because it did not specifically assert that the taxpayer's clinical depression "prevented him from managing his financial affairs."[87] The court, however, held that the taxpayer substantially complied with Rev. Proc. 99-21 by submitting a physician's statement and providing the supplemental letter. The taxpayer received the benefit of the tolling of Section 6511's time limitations.[88]

IV. Continuing Effort to Expand Relief for Missed Time Frames

A. Legislative Responses in the Internal Revenue Code

Including Section 6511(h), the Code contains a total of four statutory provisions that allow taxpayers the benefit of tolling limitations periods. The three additional statutes, discussed below, each present an example of when and how the IRS may determine that a taxpayer is entitled to tolling. This Article will draw on some positive aspect of each statutory provision to create an adequate financial disability statute.

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[82] See id. at [ ].

[83] See id. at [ ].

[84] See Pleconis at *2 ("Neither of Plaintiff's physicians opined that his various impairments actually prevented him from managing his affairs."). Additionally, the district court examined the extent of Pleconis's injuries. The court noted that he was "able to talk on the phone, watch television, surf the internet, drive to the pharmacy for his prescriptions, and do 'light grocery shopping.'" See id. These abilities undercut Pleconis's argument that he was unable to file his tax returns in those years, and the court concluded that he was able to manage his finances. See id.

[85] 2009 WL 5062391 (W.D. Pa. 2009)

[86] Walter, 2009 WL 5062391, at *9.

[87] See id. at *10.

[88] See id. at *11.

i. Section 7508

Section 7508 continues a line of special provisions for members of the armed services that trace their history back to the passage of the Sixteenth Amendment in 1913.[89] The changes to the special provisions for members of the armed services generally run parallel to the United States' involvement in foreign conflicts.[90] In the Revenue Act of 1921, Congress enacted the first general waiver provision for limitations periods in the Code.[91] This waiver was not specific to individuals serving in combat zones, but recognized the necessity for the extension of statutory limitations periods under certain defined circumstances.[92]

World War II brought about the first extension of limitations periods for certain individuals affected by war conditions.[93] The Revenue Act of 1942 added to the Code Section 3804, Section 7508's predecessor provision, which was "designed to expand, in situations described, the time specified for the performance of certain acts where the ability to do or perform those acts would or might be affected by the war."[94] This wartime provision allowed an extension for the period during which any individual was outside of the western hemisphere for more than ninety days and the following ninety days thereafter.[95] The time extension therefore applied to any individual caught outside of the country during the war, not

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[89] See Rousseau, supra note [ ] ("Since the inception of the first modern income taxation in the United States in 1913, special federal income tax benefits have been granted for service members.").

[90] See Edward A. Beck, III, The Taxation of Members of the Armed Services: Legislative and Administrative Changes Arising from the Persian Gulf Conflict, 38 Fed. B. News & J. 350, 350 (Aug. 1991). Before Congress allowed for the suspension of certain limitations provisions for individuals serving in such conflict, it provided benefits to such individuals through exclusions from federal income tax. See id. In addition to the time limit extensions granted to active service members discussed in this article, the Code also provides for pay to active service members to be excluded from taxation. The Current Tax Payment Act of 1943 allowed for an exclusion from federal income taxation of up to $1500 for commissioned officers. See Current Tax Payment Act of 1943, Pub. L. No. 68, Section 7,57 Stat. 126 (1943). Subsequently the Revenue Act of 1945 allowed for all pay for active service members to be excluded from federal income taxation. See Revenue Act of 1945, Pub. L. No. 214, Section 3808, 59 Stat. 556 (1945). Congress initially gave special treatment to members of the Armed Forces during World War I by enacting a provision which excluded up to $3,500 from taxable income of salaries received by individuals engaged in active service, either abroad or at sea. See Kusiak, CDR, JAGC, USN, Income Tax Exclusion for Military Personnel During War; Examining the Historical Development, Discerning Underlying Principles, and Identifying Areas for Change., 39 Fed. B. News & J. 146 (1992) (citing H.R.REP. NO. 1037, 65th Cong., 3d Sess. 1, 48 (1919)). This specific provision remained in effect until 1921. See id.

[91] See 15 Mertens Law of Fed. Income Tax'n § 57:2 (citing Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 265-266).

[92] See Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 265-266. This Section 250(d) provided that the statute of limitations would apply "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." See Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 265-266. Currently, this provision is present as I.R.C. Section 6501(c)(4).

[93] Members of the Armed Forces serving during World War II "were beneficiaries of a host of tax exemptions and exclusions enacted during World War II." See Kusiak, supra note 90 (noting that these benefits included an extension of the time period to file tax returns and to pay taxes).

[94] Hamilton v. C.I.R., 13 T.C. 747, 750 (Nov. 14, 1949).

[95] See Section 507 of the Revenue Act of 1942 (56 Stat. 798, 961 (1942)).

just service members.[96] The committee reports that discussed the addition of Section 3804 to the Code noted that the allowance for the extension of the listed limitations periods was due to the fact that such acts were "impracticable or impossible on account of war conditions."[97]

As the United States has continued to involve itself in foreign conflicts, Congress has repeatedly allowed for the extension of certain limitations periods, but generally only for those individuals who are serving in the Armed Forces.[98] The time limit extensions were revised to accommodate individuals either serving directly or serving in support of the Armed Forces, in areas designated as combat zones by the President through an Executive Order.[99] Such benefits also extended to such individuals who were hospitalized abroad for injuries that occurred during service in a combat zone.[100] The extension amounted to the length of time of service in a combat zone, in addition to the length of time of hospitalization abroad, and an additional 180 days.[101] In 1954, the Revenue Act recodified Section 3804 into the current Section 7508, making no material change to the provision.[102] Section 7508 has since been revised to include those individuals serving in the foreign conflicts in which the United States has become involved.[103] Regarding the Kosovo conflict, President Clinton stated: "With our citizens working so hard to protect the people of Kosovo, they shouldn't have to worry about their taxes."[104]

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[96] In addition to being broader in the scope of who was covered 3804 also seems broader than 7508 in terms of "where" is covered, because it appears to cover individuals outside the western hemisphere no matter where they were outside that zone.

[97] Hamilton v. C.I.R., 13 T.C. 747, 750 (Nov. 14, 1949) (noting that the committee reports relating to Section 3804 were limited to this brief discussion). Modes of communication were much different then, which may account for the broad geographical grant of relief compared to the more geographically limited grant under 7508 now that computers and phones allow relatively easy access across the globe. Soon after the end of World War II, Congress amended Section 3804 to discontinue the extension of the limitations period after December 31, 1947. See 15 Mertens Law of Fed. Income Tax'n § 57:2 (citing Pub. L. No. 384, Sec. 13, amending I.R.C. (1939) Section 3804(c)).

[98] See 15 Mertens Law of Fed. Income Tax'n § 57:2. In the past few decades, Section 7508 has been amended to address foreign conflicts in which the United States has been engaged. In the early 1990's, President Bush by Executive Order designated the portions of the Arabian Peninsula and surrounding waters as a "combat zone" for purposes of Section 112. See Kusiak, supra note 90. Section 112 was enacted to provide that "gross income does not include compensation received for active service . . ." I.R.C. § 112.

[99] See 15 Mertens Law of Fed. Income Tax'n § 57:2.

[100] See 15 Mertens Law of Fed. Income Tax'n § 57:2.

[101] See15 Mertens Law of Fed. Income Tax'n § 57:2

[102] See H.R. 8300, 2d Session ("Section 7508. Time for performing certain acts postponed by reason of war. This section, which is identical with that of the House bill, contains no material change in existing law. It continues in the law those provisions of section 3804 of the 1939 Code which are made necessary by reason of the continued application of subsection (f) of that section.").

[103] Section 7508 was revised to accommodate those serving in the Armed Forces in Vietnam. See Senate Report No. 94-1319 (stating that individuals serving in Vietnam who were missing in action or hospitalized receive certain tax benefits that expired after January 2, 1977). In 1976, Congress also revised the language of Section 7508 which had previously extended its benefits to those individuals affected "by reason of war" to those affected "by reason of service in combat zone." See Pub.L. 94-455, § 1906(a)(51)(A). Section 7508 was subsequently amended in 1991 to include those in 1991 for those serving in the Gulf War and the Desert Shield Operation, in 1996 to accommodate those that served in Bosnia and Herzogovina, and several years later for the Armed Forces in Kosovo. 1 Casey Fed. Tax Prac.

ii. Section 7508A

Congress enacted section 7508A in 1997, drawing on the provisions of section 7508 in its design.[105] Whereas section 7508 suspends time limitations within the Code for combatants, the newer provision seeks to assist taxpayers impacted by disaster. Similarly to section 7508, section 7508A has followed a number of pieces of legislation designed to assist taxpayers affected by specific disasters.[106] Congress also created a broad catch-all provision in section 7508A, which grants the Treasury with the authority to prescribe regulations allowing taxpayers (and the IRS) to postpone various acts required by the Code for up to ninety days.[107] The list of acts covered follows the list in section 7508, allowing suspension of "[a]ny other act required or permitted under the internal revenue laws specified in regulations prescribed by the Secretary of the Treasury."[108] The trigger mechanism for the IRS to use its authority to postpone certain actions stems from presidentially declared disasters – at least with respect to the natural disaster portion of the statute.[109] The ninety-day period grew to 120 days in 2001.[110]

While the scope of the two sections, from the perspective of what provisions the IRS may suspend, appears identical, section 7508A gives much more discretion to the IRS to decide when to suspend and for how long. Each of the two statutes creates a zone, and when compared, the zones aid in illustrating the amount of IRS authority. Where Congress creates a combat zone, any qualified taxpayer entering that zone has the specified tax provisions suspended for the period of time they spend in the combat zone plus 180 days.[111] When the President declares a disaster, the IRS must analyze the nature and scope of the disaster to create a response tailored to that disaster.[112]

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§ 5:45 (citing I.R.C. 7508(f), added by Tax Extension Act of 1991, Pub. L. No. 102-227, 102d Cong, 1st Sess, approved Dec. 11, 1991); P.L. 104-117: Tax Benefits for Servicemen in Bosnia and Herzegovina (March 20, 1996) ("members of the Armed Forces performing services for the peacekeeping efforts in Bosnia and Herzogovina, Croatia, and Macedonia shall be entitled to tax benefits in the same manner as if such services were performed in a combat zone, and for other purposes"). In 2003, Congress revised Section 7508 to include "contingency operations" in addition to combat zones. Although unclear from legislative history, this amendment was most likely designed to accommodate for the changing nature of international conflicts, especially given the United States' recent involvement in Iraq and Afghanistan. See Pub. L. 108-121, § 104(b)(2).

[104] 70 Daily Tax Rept. G-1 (BNA) (Apr. 13, 1999).

[105] See Pub. L. No. 105-34

[106] See, e.g., Pub. L. No. 101-604 (providing limited tax benefits to victims of the terrorist attack on Pam Am Flight 103 over Lockerbie, Scotland on December 21, 1988); H.R. 4440 (2005) ("provides tax benefits for the Gulf Opportunity Zone and certain areas affect by Hurricanes Rita and Wilma"); Pub.L. 109-73, H.R. 3768 ("provide[s] emergency tax relief for persons affected by Hurricane Katrina").

[107] See Treas. Reg. § 301.7501A-1(c)(1)(vii) provides that this catch-all clause encompasses "any other act specified in a revenue ruling, revenue procedure, notice, announcement, news release, or other guidance published in the Internal Revenue Bulletin.".

[108] See IRC § 7508A( ).

[109] See IRC § 7508A( ).

[110] See Pub. L. 107–16, §§ 802(a), 901.

[111] See Internal Revenue Service, Combat Zones, http://www.irs.gov/uac/Combat-Zones (providing detailed list of areas designated as combat zones). Combat zones are designated by an Executive Order from the President as areas in which the Armed Forces are engaging or have engaged in combat. There are currently three combat zones (including airspace above each): Arabian Peninsula Areas (beginning

Congress' willingness to give to the IRS the authority to make decisions on whether and how much relief to grant within the parameters set by Congress shows again that Congress wants to get out of the business of passing legislation with minute details of the nature and scope of relief, similar to a private bill. Instead, it adopts a model, as it did in section 6511(h) and in section 408(d)(3)(I), discussed below, to pass this authority to the agency.

iii. Section 408(d)

In 2001 Congress added section 408(d)(3)(I) creating the fourth statutory provision to allow suspension of a time period under the Code.[113] This new provision permits Treasury to waive the sixty-day rollover requirement for individual retirement accounts ("IRAs"), "where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement."[114] The conference report

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Jan. 17, 1991); Kosovo area (beginning Mar. 24, 1999); Afghanistan (beginning Sept. 19, 2001). Additionally, the Department of Defense has certified a number of locations for combat zone tax benefits due to their direct support of military operations. See id. For a discussion of qualified service in a combat zone and the benefits of such service, see http://www.military.com/benefits/military-pay/special-pay/combat-zone-tax-exclusions.html. This site also provides the specific Executive Orders that have created the currently qualifying combat zones as well as the Defense Department designation expanding that coverage. See also T. KEITH FOGG, EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE IRS Ch. 23 "Assisting Military Clients" (5th Ed. 2011).

[112] The process of declaring a disaster begins with the governor of a state impacted by catastrophic event. See Federal Emergency Management Agency, The Declaration Process, http://www.fema.gov/declaration-process. See generally Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (amending the Disaster Relief Act of 1974, Pub. L. 93-288). The President receives the request from a governor and makes a decision whether and where to declare a disaster working in consultation with the Federal Emergency Management Agency (FEMA) and the Governor's office. The President also decides whether the scope of relief will include individuals or public assistance. See The Declaration Process. FEMA maintains a list of areas that the President declares as disaster areas. See Federal Emergency Management Agency, Disaster Declarations, http://www.fema.gov/disasters. Once the declaration of disaster occurs, then the IRS makes a determination of the impact of the disaster for tax purposes and issues a notice setting out the tax consequences. See, e.g., Notice 2001-61; Notice 2001-63 (issued by the IRS in response to the 9-11 terrorist attacks). The President declared certain areas disaster areas. On September 13, 2001, the IRS issued Notice 2001-61 providing some relief. Then on September 14, 2001, the IRS issued Notice 2001-63 providing additional relief as more information became available. The 9-11 terrorist attacks impacted three areas of the United States: New York City, Western Pennsylvania, and the Pentagon in Northern Virginia. The impact on each area differed as did the President's response in his declaration of disaster and the IRS' subsequent response. With disasters, one size does not fit all. Congress decided to leave to the IRS the decision of whether to provide relief and how much relief to provide. The IRS does not make this decision in a vacuum as the impacted areas have representatives in Congress who will make their views known if the response of the IRS does not seem appropriate.

[113] Pub. L. No. 107-17

[114] See I.R.C. § 408(d)(3)(I). After a taxpayer receives funds from an IRA, there is a sixty-day time limitation to complete the rollover to another IRA. See I.R.C. § 408(d)(3)(A). If the rollover is not completed within sixty days, the amount received will be treated as ordinary income. In deciding whether to grant a waiver of the sixty-day period, the IRS "will consider all relevant facts and circumstances, including: whether errors were made by the financial institution (in addition to those described under

describes examples of situations justifying waiver of the sixty-day period and include some reasons unique to this type of transaction, including failure to cash the check, errors committed by the financial institution, restrictions imposed by a foreign country, and postal error.[115] Other examples more closely match, yet expand upon, the bases listed in section 6511(h) for allowing for suspending the time period: death, disability, hospitalization, or incarceration.[116] Perhaps because the sixty-day time period is short and during such a short time period death, hospitalization, or incarceration could have an impact on failing to act within the statutory time frame, Congress did not believe a longer period such as the two or three year period of 6511(h) would merit. Still, this opens possibilities for additional bases for suspension not considered when Congress passed 6511(h).[117]

In addition to providing new bases for relief of a time period, section 408(d)(3)(A)(i) also provides a different procedure. Rev. Proc. 2003-7 establishes a requirement that taxpayers must apply to the Service using the private letter ruling process in order to obtain relief under this provision.[118] If the transaction meets certain safe-harbor provisions, approval through the private letter ruling process is not required.[119] The provision of the Revenue Procedure discussing the "Requirements for a favorable ruling" upon application to the Service contains additional bases for granting a favorable ruling – "casualty, disaster or other events beyond the reasonable control of the taxpayer."[120] These additional bases mentioned in the Revenue Procedure also offer possibilities not considered in 6511(h).

B. Legislative Responses in Other Titles

Just as Congress sought to expand financial disability by enacting of Section 6511(h), the legislature has revised similarly inequitable statutes of limitations. Lilly Ledbetter, a supervisor at a Goodyear Tire and Rubber Company plant, discovered that she was earning significantly less than three males in her same position after nineteen years of employment. In 1998, she brought suit against Goodyear, asserting a Title VII equal pay claim and a claim under the Equal Pay Act of 1963. In Ledbetter v. Goodyear Tire & Rubber Co.,[121] the Supreme Court held that Ledbetter's suit was untimely even though she was unaware of the discrimination during the prescribed time frame and did not learn of

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automatic waiver, above); whether you were unable to complete the rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country or postal error; whether you used the amount distributed (for example, in the case of payment by check, whether you cashed the check); and how much time has passed since the date of distribution." See Retirement Plans FAQs relating to Waivers of the 60-Day Rollover Requirement, available at: http://www.irs.gov/Retirement-Plans/Retirement-Plans-FAQs-relating-to-Waivers-of-the-60-Day-Rollover-Requirement.

[115] H.R. Rep No. 84, 107th Cong., 1st Sess. 252 (2001).

[116] Id.

[117] Sections 7508 and 7508A have their own ties to 408(d)(3)(I) which permit postponement of this sixty-day period if the taxpayer serves in a combat zone or resides in a Presidentially declared disaster area. See Treas. Reg. § 301.7508-1 and Rev. Proc. 2002-71.

[118] Since the beginning of the process of requesting revenue rulings set out in Rev. Proc. 2003-7, the Service has issued approximately 800 private letter rulings on the issue of the appropriateness of giving the taxpayer additional time to make a qualifying rollover of funds in an IRA.

[119] See Rev. Proc. 2003-7, Sec. 3.03 for details on automatic approval. Such approval occurs where the financial institution actually received the rollover funds within sixty days together with appropriate instructions and the failure to complete the rollover resulted solely from the institution's error.

[120] Rev. Proc. 2003-7, Sec. 3.02.

[121] 550 U.S. 618 (2007)

the discrimination until years later. The Court concluded that under the applicable 180-day limitations period, Ledbetter should have filed suit within six months of receiving her first discriminatory paycheck.[122]

In response to the Supreme Court's ruling, democrats in the House of Representatives sought to amend the statute so that the 180-day time limit for filing suit would restart with each discriminatory paycheck received by the employee.[123] George Miller, House Education and Labor Chairman, stated that the legislation "will make it clear that discrimination occurs not just when the decision to discriminate is made, but also when someone becomes subject to that discriminatory decision, and when they are affected by that discriminatory decision."[124] After the bill was struck down by the Senate, it was reintroduced and ultimately passed in early 2009. The Lilly Ledbetter Fair Pay Act was the first piece of legislation signed into law by President Obama.[125] Under the amended law, the occurrence of employment discrimination was expanded to include when an individual becomes subject to an unfair pay decision or when an individual is affected by such unfair compensation decision.[126]

C. Judicial Responses

While time limitations in the Internal Revenue Code may not be subject to equitable tolling due to their "unusually emphatic" and "technical" language, courts have relied on Irwin to allow for equitable tolling in other areas of law that do. As detailed above, the Supreme Court in Irwin, in the context of employment discrimination, held that the "rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."[127] Since that decision, equitable tolling principles have been applied to several other statutory contexts.[128]

In 2010, the Supreme Court resolved an issue among the appellate courts by allowing equitable tolling for the one-year statute of limitations prescribed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Under the AEDPA, an individual in custody must file a request for habeas corpus relief

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[122] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (stating that "Ledbetter should have filed an EEOC charge after each allegedly discriminatory pay decision was made and communicated to her."). Under 42 U.S.C. § 2000e-5(e)(1), an individual has 180 days within which to file suit. The Supreme Court reasoned that "[t]his sort deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." Ledbetter, 550 U.S. at [ ].

[123] See Jesse J. Holland, "House Dems Target Court's Pay Ruling," USA Today (June 12, 2007), available at: http://usatoday30.usatoday.com/news/washington/2007-06-12-2953732132_x.htm.

[124] See id.

[125] Pub. L. 111-2, 123 Stat. 5 (2009); see Associated Press, "Obama Touts Equal-Pay bill at Signing Ceremony," NBCNews.com, available at: http://www.msnbc.msn.com/id/28910789/#.UJahVcU1-sY (noting that President Obama chose this Act as the first piece of legislation to sign).

[126] See 42 U.S.C. §2000e-5(e)(3).

[127] Irwin, 498 U.S. at 95-96.

[128] See Scarborough v. Principi, 541 U.S. 401, 420-23 (2004) (allowing untimely amendment of fee application under Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)); Holland v. Florida, 130 S. Ct. 2549 (2010) (allowing equitable tolling in habeas corpus petition). These principles are discussed in Justice Stevens' and Justice Ginsburg's dissent in John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008), which disallowed equitable tolling of the six-year time limitation to file a suit against the United States in the Court of Federal Claims.

within one year in most cases from the date that the conviction becomes final.[129] This one-year time limitation is statutorily tolled for the period in which any properly filed post-conviction relief is pending in state court.[130] In addition to the tolling of the limitations period that is available within the statute, the one-year period is also subject to equitable tolling.[131] In Holland v. Florida,[132] the Supreme Court held that because the AEDPA's statute of limitations is not jurisdictional, it is subject to a rebuttable presumption in favor of equitable tolling.[133] The Court specifically concluded that because habeas relief is based in equity, and the statute "differs significantly" from the tax provision with which Brockamp was concerned, the equitable tolling presumption should apply.[134]

Courts therefore have the discretion to award habeas relief to petitioners who otherwise would be denied relief under the statute of limitations. To be entitled to equitable tolling, a habeas petitioner must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."[135] Such extraordinary circumstances have been defined as those in which "it would be unconscionable to enforce the limitation period . . . and gross injustice would result."[136] For example, "sufficiently egregious misconduct" by a petitioner's counsel may be sufficient to toll the limitations period.[137] Although circumstances in which a habeas petitioner is entitled to

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[129] See 28 U.S.C. § 2244(d)(1) (2006). The statute provides that a petitioner must file a habeas petition from the latest of: (1) the date judgment becomes final; (2) the date an impediment to filing is removed; (3) the date the Supreme Court recognizes a constitutional right; or (4) the date the factual predicate of the claim could have been discovered through the exercise of due diligence. See id. Prior to the enactment of the AEDPA, there was no statute of limitations governing federal habeas filings. See Day v. McDonough, 548 U.S. 198, 214 (2006) (stating that "[h]istorically, there [wa]s no statute of limitations governing federal habeas.") (internal quotation marks omitted).

[130] See 28 U.S.C. § 2244(d)(2). Because of the complexities involved in calculating the one-year statute of limitations, the Supreme Court has heard AEDPA limitations period cases twelve times since its enactment. See Anne R. Traum, Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus, 68 MD. L. REV. 545, 553 (2009).

[131] This statute does not, however, contain any language itself setting out circumstances under which it could be tolled in the same manner as I.R.C. 6511(h) or I.R.C. 408).

[132] 130 S. Ct. 2549 (2010)

[133] In Henderson ex rel. Henderson v. Shinseki, the Supreme Court laid out a test to determine whether a limitations period is "jurisdictional." To resolve whether the limitations period in the context of an appeal of a Board of Veterans' Appeals decision could be equitably tolled, and accordingly, whether such time limitation should be categorized as jurisdictional, the Supreme Court pointed to several factors to eventually conclude that the limitations period at issue was not jurisdictional. First, the Court looked to the fact that the statute did not indicate that the time limitation "was meant to carry jurisdictional consequences." Therefore congressional intent serves as a bright line rule for allowing equitable tolling of a statute. Because "filing deadlines . . . are quintessential claim-processing rules," they should not be jurisdictional unless Congress has clearly indicated that the rule should be jurisdictional. See Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011).

[134] See Holland, 130 S. Ct. at 2561. The statute at issue in Brockamp, the Court reiterated, "set forth its time limitations in unusually emphatic form," using "technical" language. Id. The Court reasoned that the AEDPA's statute of limitations does not contain "unusually emphatic" language and that equitable tolling would not affect the substance of a habeas petitioner's claim. Id.

[135] Lawrence v. Florida, 549 U.S. 327, 336 (2007) (internal quotation marks omitted).

[136] Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2006).

[137] See Fleming v. Evans, 481 F.3d 1249, 1256 (10th Cir. 2007)

equitable tolling are relatively narrow, the judiciary at the very least has presented a petitioner who files an untimely application with an opportunity to set forth an argument in favor of equitable tolling.

As mentioned, the Court in Holland made a threshold determination as to whether the statute of limitations at issue was "jurisdictional." [138] The Court found the time period for filing a habeas petition was not "jurisdictional." After making that determination, it applied a rule which it had previously created providing a "rebuttable presumption in favor of equitable tolling."[139] As discussed in Professor Smith's article and in the subsequent case of Henderson ex rel. Henderson v. Shinseki, the Court may no longer find comfort with this label.[140] The signal the Court sent in Henderson gives hope to tax litigants that some of the provisions of the Internal Revenue Code may fall outside the "jurisdictional" label and allow equitable tolling.

D. Administrative Responses

The IRS offers a significant opportunity for resolving missed time periods under Procedural Regulation 301.9100-3.[141] This provision allows taxpayers who fail to make a timely election to request relief upon a showing that "the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government."[142] The regulation lists five circumstances that meet the criteria of reasonableness and good faith: 1) requesting relief before the IRS discovers the failure to timely make the regulatory election; 2) demonstrating that the failure resulted from intervening events beyond the taxpayer's control; 3) demonstrating that the failure to make the election occurred because of the taxpayer's failure to know of the necessity of the election despite exercising reasonable diligence; 4) the taxpayer's reasonable reliance on written advice received from the IRS; or 5) the taxpayer's reasonable reliance on a tax advisor who failed to make the election or to advise the taxpayer to do so.[143]

The procedure for requesting Treas. Reg. 301.9100-3 relief requires the taxpayer to make the request using private letter ruling procedure.[144] This creates transparency essentially identical to Section 408(d)(3). In the request, the taxpayer must show that the taxpayer acted reasonably and good faith under the factors listed in the regulation and that the IRS will not be prejudiced by the granting of the request.[145] The provisions adopted by the IRS to permit a taxpayer to obtain this form of equitable relief mirror other sections and cases allowing similar relief, and, in factor two add a broad catch-all for relief.

Congress inserted equity into the Code in 1998 in the innocent spouse provision found in Section 6015(f) and in the offer in compromise provision found in Section 7122.[146] The innocent spouse

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[138] 130 S. Ct. 2539, 2560 (2010)

[139] Id. For a discussion of Holland's application to tax cases involving equitable tolling, see Carlton M. Smith, Cracks Appear in the Code's 'Jurisdictional' Time Provisions, TAX NOTES 511 (October 29, 2012).

[140] See id. at 517-520; Henderson, 131 S. Ct. at 1202-1203.

[141] Treas. Reg. 301.9100-1 has provisions for automatic extensions to fix a missed election. These provisions are not discussed here. The relief provided in 9100-3 is available only for regulatory, not statutory time frames. See generally Timothy J. Watt, Bennett Thrasher and Thomas L. Evans, Requesting 9100 Relief, The Tax Advisor, October 2008.

[142] Treas. Reg. 301.9100-3(a)

[143] Treas. Reg. 301.9100-3(b)

[144] Treas. Reg. 301.9100-3(e)(5)

[145] Treas. Reg. 301.9100-3(e)(1)

[146] Section 3201(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 734 (RRA), enacted section 6015, which provides relief in certain circumstances

provision did not address a time limitation but created a previously unavailable path to innocent spouse status. Interestingly, time became the focus of litigation concerning this equitable provision. For several years, taxpayers and the IRS fought about a time limitation for claiming equitable relief that the IRS imposed through it regulations.[147] Ultimately, the IRS conceded the position taken in its regulation and announced its intention to withdraw the regulation.[148]

Individuals claiming innocent spouse relief frequently have difficulty pressing their claims in a timely manner. The nature of the relationship between certain spouses that creates the need for innocent spouse relief, e.g., domination, manipulation, domestic violence, also leaves the victim in need of such relief in a vulnerable financial and emotional state causing difficulty in meeting statutory time frames. Over and over the cases litigating the IRS 6015(f) regulations painted the picture of a vulnerable population.[149] These individuals not only have trouble meeting the two year rule imposed in IRC 6015 (b) and (c) but also in meeting other time frames set out in the Code because of the issues surrounding their relationships.

Mannella v. Commissioner provides a stark picture of the problems facing certain spouses.[150] Mrs. Mannella missed the time frame established in the IRS regulations for submitting an innocent spouse claim because her former husband took the mail each day and refused to allow her to see it.[151] While upholding the IRS regulation under IRC 6015(f), the Third Circuit remanded the case to the Tax Court for a consideration of equitable tolling.[152] Ultimately, the decision became moot before the Tax Court could consider equitable tolling because the IRS withdrew the application of the two-year rule.[153]

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from the joint and several liability imposed by section 6013(d)(3). Section 3462 of the same act directed the IRS to create provisions for the allowance of an offer in circumstances in which the taxpayer had assets which could fully satisfy the outstanding liability but to do so would create economic hardship. See Treas. Reg. 301.7122-1(b)(3) and (c)(3). The equitable provisions for offers in compromise do not relate to time frames and will not be discussed further.

[147] See Lantz v. Commissioner, 607 F.3d 479 (7th Cir. 2010); Mannella v. Commissioner, 631 F.3d 115 (3d Cir. 2011); Jones v. Commissioner, 642 F.3d 459 (4th Cir. 2011).

[148] Rev. Proc. 2003-61, 2003-2 C.B. 296, provided the initial guidance regarding equitable relief from income tax liability under section 66(c) and section 6015(f) of the Internal Revenue Code. Both Revenue Procedure 2003-61, section 4.01(3) and Treas. Reg. § 1.6015-5(b)(1) (TD 9003), required that the requesting spouse's claim for equitable relief must be filed no later than two years after the date of the Service's first collection activity. On July 25, 2011 the IRS withdrew its position on the two year rule in innocent spouse cases seeking equitable relief. See Notice 2011-70. On January 23, 2012, the IRS issued Notice 2012-8, 2012-4 I.R.B. 309, withdrawing Rev. Proc. 2003-61, issuing new equitable factors and requesting comments. The reversal resulted from the Commissioner's decision to no longer pursue the litigation position that the two year period in Rev. Proc. 2003-61 and Treas. Reg. 1.6015-5(b)(1) correctly interpreted the statute despite the success of the IRS in the courts, see cases cited in footnote 142, defending efforts to strike down the regulation.

[149] See, e.g., Stephenson v. Commissioner, T.C. Memo. 2011-16 (Jan. 20, 2011) (taxpayer suffered both physical and verbal abuse by her husband and faced threats of violence for refusing to sign documents); Brown v. Commissioner, 55 T.C.M. 1249, 1255 (1988) (wife abused by her husband, forced to sign documents and yield to his demands).

[150] 631 F.3d 115 (3d Cir. 2011)

[151] See id. at [ ].

[152] See id. at [ ].

[153] See Notice 2011-70.

The circumstances in Mannella and in situations where domestic violence exists create a type of financial disability that needs to be recognized in crafting an equitable remedy for those missing time frames due to circumstances beyond their control. Addressing this need requires a statute that does not limit financial disability to physical and mental impairment. The IRS has administratively acknowledged the problem and is seeking to work with the bar to find language in its forms and guidance that will meet the needs of this group of taxpayers.[154]

V. Crafting a Solution

Congress' approach to suspending statutory time frames in the Internal Revenue Code allows limited suspension in relatively narrow circumstances. Each of the four statutory provisions discussed throughout the course of this Article that allow a time limitation suspension takes a different approach to the mechanism for granting the suspension. The two individual specific sections, 6511(h) and 408, offer relief only of the time limitation within their respective Code sections and each takes a different approach on the criteria for granting suspension. This section of the paper proposes a broad approach to the granting of relief when a financially disabled taxpayer misses a time period in the Internal Revenue Code. The authors believe that ad hoc sections addressing narrow circumstances do not serve the best interests of either taxpayers or the IRS. A statutory solution provides a better mechanism for relief than entrusting courts with applying equitable tolling on a case by case basis.[155]

To create a broad system for suspending time periods due to excusable circumstances, three issues require resolution. First, the solution must have a sufficient breadth of the suspension. Sections 7508 and 7508A essentially allow suspension of any time frame in the Internal Revenue Code. This very broad approach allows qualified taxpayers to attain relief in any circumstance provided they meet the established criteria. Similarly, financial disability should apply to a wide range of time limitations. Second, an acceptable group of excusable circumstances must be identified. The circumstances should be sufficiently broad to address all, or essentially all, situations in which relief should be granted. The statutory solution will allow broader bases for relief than the current section 6511(h), drawing on Revenue Procedure 2003-7 and equitable tolling cases. Third, the process of defining financial disability should include a mechanism that gives the IRS an opportunity to make the initial decision, subject to abuse of discretion review by the courts. The IRS should have the authority to waive the time periods and taxpayers should be able to seek an administrative waiver in order to conserve valuable judicial resources, in the right cases, to avoid the courts.

A. Breadth of suspension

The legislative history of Section 7508 signifies Congress' recognition of the sacrifices made by those serving in combat zones and the hardships those individuals face. The purpose of Section 7508 most concretely applicable to this article stem from the provision initially enacted in 1941; this statute, to reiterate the Tax Court's language, recognized that performing certain acts under the Code were "impracticable or impossible" because of the war.[156] Although the benefits afforded by this initial statute ended just a few years later with the end of World War II, Congress has repeatedly recognized the need to retain the suspension of limitations periods for individuals serving in or in support of the Armed Forces.

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[154] See T. Keith Fogg, "Low-Income Taxpayer Clinicians Meet with Service Representatives" Vol. 1, No. 4, p. 16, ABA Section of Taxation News Quarterly Summer 2012.

[155] A statutory solution not only prevents a case by case equitable tolling fight but also gives the IRS the administrative ability to suspend statutory time frames. This authority is not something that the IRS necessarily presumes that it has.

[156] Hamilton v. C.I.R., 13 T.C. 747, 750 (Nov. 14, 1949) (noting that the committee reports relating to Section 3804 were limited to this brief discussion).

Although Congress and the IRS have recognized a number of situations in which complying with a limitations period is "impracticable or impossible" for taxpayers, there has been no comprehensive reform or broadly applicable statute that accommodates the wide range of financial disability.[157] For this reason, the breadth of Sections 7508 and 7508A is an attractive model for financial disability. If the Internal Revenue Code or an IRS regulation sets a time frame, any taxpayer, not just individuals, subject to that time frame should have the right to show that the failure to meet the time frame stemmed from excusable circumstances as defined by Congress.

Allowing the suspension to apply broadly, as Congress has done in section 7508 and 7508A frees the discussion to focus on the quality of the excuse for missing the time frame and not the nature of the time frame itself. Perhaps certain time frames require more certainty but that does not mean that any time frame can stop a taxpayer from applying to act after the time frame if the excuse has sufficient merit. While we do not differentiate between the various provisions in the Internal Revenue Code setting time frames, Congress may decide to do so and require stronger proof in certain circumstances. Late action by the taxpayer, even where the lateness has an excusable basis, does not mean that the excuse permitting the late action necessarily supports granting the underlying relief the taxpayer seeks. It simply means that the time barrier for seeking the relief will be lifted if the taxpayer shows a sufficient basis for doing so.

B. Excusable Circumstances

Section 6511(h) provides a very narrow path to suspension of the time frame for filing a refund claim. The test under 6511(h) leaves out many of the traditional bases for relief provided in equitable tolling cases and compounds the narrowness in the statute with a Revenue Procedure that narrows relief even further with strict requirements that go too far in putting a burden on a taxpayer to comply – particularly low income taxpayers. A better source of excusable circumstances exists in the legislative history of 408 and in the Revenue Procedure enabling that statute. The excusable circumstances found there should be supplemented with circumstances found in equitable tolling cases in order to provide a broad base of potential circumstances for the IRS to consider in deciding whether to allow a taxpayer to obtain an extended time frame.[158] We recommend that Congress adopt a specific set of excusable circumstances and that it provide definition of those circumstances sufficient to guide the IRS in its application of the law.

i. Bases for Relief

Considering the sources described above, nine events deserve recognition as potential triggering events for the suspension of a time frame in the Internal Revenue Code: a) casualty, disaster, or other intervening events beyond the taxpayer's control; b) mental incapacity; c) physical disability including hospitalization; d) death; e) misleading statement or guidance by IRS; f) breach of fiduciary duty; g) domestic or sexual abuse; and (h) diligent pursuit of litigation. Each of the identified triggering events requires a brief explanation in support of its inclusion on the list.

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[157] Former Treasury Secretary Rubin also spoke of the need for a broad solution to the inequitable circumstances present in the Brockamp and Webb cases. See Dep't of the Treas. News Release RR-955 (March 20, 1996), available in LEXIS, Fedtax Library, TNT File, 96 TNT 57-67. See supra note 34 and accompanying text.

[158] These additional bases for relief also draw support from several of the bases for reasonable cause allowing the IRS to excuse late filing of a return or late payment of a liability, e.g., death, serious illness, erroneous advice from the IRS, fire, casualty natural disaster or other disturbance. See DAVID RICHARDSON, JEROME BORISON, & STEVE JOHNSON, CIVIL TAX PROCEDURE 298-300 (2d ed. 2008). The granting to the IRS of the ability to excuse penalties for late filing and late payment for these bases adds symmetry to the granting of authority to the IRS to excuse other deadlines for action.

a. Disasters and other intervening events beyond the taxpayer's control: Guidance from Sections 408(d)(3), 7508A and Treas. Reg. 301.9100-3

While Section 7508A protects taxpayers who have the necessary nexus to a presidentially-declared disaster area (including certain military and terrorist sites), individual disasters can pose similar or even greater barriers to meeting time frames posed by disasters of broad scope. A home fire, sewer backup, burst pipe, and many other types of personal home disasters have the potential to prevent a taxpayer from meeting a necessary time frame.[159] Rev. Proc. 2003-7 recognizes individual disaster as a possible triggering event for suspension of the time frame under section 408(d)(3)(I). The procedural regulation recognizes that the broad category of intervening events beyond the taxpayer's control can also create a circumstance deserving of relief.[160]

b. Brockamp and Webb: Mental Incapacity

The loss of mental capacity led to the first basis for individual relief of a statutory time frame in the Internal Revenue Code. This basis deserves to remain on the list. The circumstances of Mr. McGill and Mrs. Parsons demonstrate the devastating impact that mental incapacity can have on an individual's ability to meet statutory time frames. While the loss of mental capacity of Mr. McGill and Mrs. Parsons extended well beyond the twelve-month period required by Rev. Proc. 99-21, it is possible that mental incapacity could cause a taxpayer to miss a time frame even though it cannot be shown to last for twelve months. The authors recommend that the taxpayer have the opportunity to show the impact of the loss of mental capacity without the requirement of the twelve month period. Section 408(d)(3)(I), which does not require long time periods of disability in order to obtain relief, provides a more appropriate approach.

c. Physical Disability

Physical disability, including periods of hospitalization, combines a provision in section 6511(h) with a basis for relief provided in Rev. Proc. 2003-7, which implements section 408(d)(3)(I) . The issue here is not whether a physical disability could impact a taxpayer's ability to meet a time frame under the Internal Revenue Code but whether providing relief for a shorter period of disability is appropriate. As with mental incapacity, the current provision in section 6511(h) limits relief for physical disability to those situations in which the taxpayer can demonstrate that the period of incapacity last at least twelve months. That length of disability creates a barrier of inappropriate length. The inclusion of hospitalization in Rev. Proc. 2003-7 signals the IRS' willingness to accommodate a briefer and more appropriate time frame. A taxpayer should still be required to demonstrate the physical disability caused the missed time period but should be allowed to demonstrate that without the burden of showing incapacity for such a long period. Even a short period of incapacity, in certain circumstances, can have a devastating impact if it causes a taxpayer to miss an important time frame. Rather than seeking to limit the relief to those with long-term disabling conditions, the focus here is on the disability itself and not the length of the disability. The length of the disability may become relevant as the taxpayer seeks to prove the basis for missing the time frame but should not serve as general barrier. Taxpayers with short period of incapacity are less likely to have someone appointed to act on their behalf and should be penalized because their incapacity does not last for at least one year or some other arbitrary time period not related to the deadline missed.

d. Death: Section 408(d)'s Guidance

Death is another basis for suspension allowed by section 408(d)(3)(I). Death can cause significant disruption in the affairs of a taxpayer as a transition occurs between the decedent and the

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[159] See I.R.M. 20.1.1.3.2.5 which recognizes a fire, casualty, natural disaster, or other disturbance may constitute reasonable cause if the taxpayer exercised reasonable care but was unable to comply with tax obligations due to circumstances beyond their control.

[160] This type of relief could protect someone like Mrs. Mannella who might otherwise fail to qualify for relief under the provisions on this list.

executor.[161] While the executor has a duty to step forward within a reasonable time to manage the affairs of the estate, it is possible that this transition could result in a missed time frame. For example, as illustrated by the above discussion of Davis v. United States, value determinations of a decedent's assets may be subject to litigation that delays a taxpayer's ability to comply with time limitations.[162] The Code should acknowledge that possibility while keeping the requirement that the estate act with reasonable alacrity.

e. IRS Misleading the Taxpayer Through its Statements or Conduct

The case law governing equitable tolling recognizes tolling in situations in which the government misleads.[163] This body of law supports including this basis in the list.[164] Recognizing the ability of the IRS to mislead taxpayers, Congress enacted a provision that requires the IRS to list the last day to petition the Tax Court on statutory notices of deficiency.[165] For taxpayers who rely on an inaccurate date on the notice, that provision grants them the benefit of the additional time period for filing a petition granted by the inaccurate date.[166] This statute reflects the general rule in equitable tolling that providing misleading

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[161] I.R.M. 20.1.1.3.1.2.4 lists death as a basis for reasonable cause for abating a late filing or late payment penalty.

[162] Davis v. United States, 2011 WL 6294467 (N.D. Miss. Dec. 15, 2011).

[163] See, e.g., Bailey v. West, 160 F.3d 1360, 1362-68 (Fed.Cir. 1998) (noting that if government misleads claimant into missing filing deadline, claimant may be entitled to equitable tolling of six-year statute of limitations to file complaint in Court of Federal Claims); Juice Farms, Inc. v. United States, 68 F.3d 1344, 1346 (Fed.Cir. 1995) (noting that equitable tolling of six-year statute of limitations would be allowed if government tricked plaintiff into missing filing deadline).

[164] Treas. Reg 301.6404-3 requires the IRS to abate the portion of a penalty attributable to erroneous written advice by an IRS employee if the advice is rendered pursuant to written request by the taxpayer that contained adequate and accurate information and the advice was reasonably relied upon by the taxpayer. I.R.M. 20.1.1.3.2.4.2 allows the IRS to abate a penalty for reasonable cause if the taxpayer relies on the oral advice received from an IRS employee.

[165] Pub. L. 105-206, section 3463(b); IRC 6213(a) "Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed."

[166] Service Center Advice 1998-036 (Released December 4, 1998) entitled "90-Day Letters -- Inconsistent Dates" provided that "[g]enerally, the time for filing a petition begins to run on the date of actual mailing, at least where the notice is undated or dated prior to the actual mailing date (Situation 1). See Hurst, Anthony & Watkins, 1 B.T.A. 26 (1924); United Telephone Co. v. Commissioner, 1 B.T.A. 450 (1925). Courts have fixed the date of actual mailing variously -- as the date the notice is delivered to the post office, the date on the certified mailing list (Form 3877), or the postmark date. See Traxler v. Commissioner, 61 T.C. 97 (1973). It is now fairly settled that the relevant date is the postmark date, and that in the absence of the actual postmark, the best evidence is the certified mailing list. See Coleman v. Commissioner, 94 T.C. 82, 91 (1990)." This advice was issued immediately prior to the passage of Pub. L. 105-206 amending I.R.C. 6213(a) and requiring the IRS to place in the notice of deficiency the actual date by which the taxpayer must file a petition in the Tax Court for the petition to be timely. This Service Center Advice and the cases cited in the advice discuss the situation in which the IRS misled taxpayers by failing to date the notice of deficiency or by dating it inconsistent with the date shown on the certified mailing record. The courts addressing the issue adopted the certified mailing record as the "true" date of the mailing of the notice of deficiency and did not allow the IRS to gain an advantage by its mistake. See also Lundy v. Commissioner, T.C. Memo 1997-14. After the change to IRC 6213(a) in 1998, it was still possible for the IRS to occasionally put the wrong date on the notice of deficiency as the last date for petitioning the Tax Court. Chief Counsel, IRS has adopted the view most favorable to the taxpayer and

information should be associated with a basis for granting relief to the misled party.[167] The number of these cases should be low and the bar for showing the IRS misled should be high, but the Government should accept responsibility when its own mistake prevents a taxpayer from meeting a required time frame.

f. Breach of Fiduciary Duty

Allowing a breach of fiduciary duty to extend the period for performing a duty allows taxpayers who fall prey to unscrupulous fiduciaries to have additional time to seek the correct tax result. The loss of a time frame for acting due to the actions of a fiduciary most frequently occurs with minors or the very old. Listing this as a triggering event allows minors to seek a remedy when they reach the age of majority. It does not cause the IRS to grant substantive relief when it should not nor does it allow fiduciaries to escape liability where such liability exists. Too often, however, the fiduciary that breached their duty has no ability to make the taxpayer whole. If the IRS receives a windfall because of the actions or inactions of a fiduciary, the injured beneficiary should have the opportunity to come forward within a reasonable time of gaining capacity and learning of the missed deadline to seek relief.

g. Domestic Abuse

Victims of domestic and sexual abuse suffer in many ways. The IRS has acknowledged the special problems caused by domestic abuse in granting relief under 6015(f) for equitable reasons.[168] Congress should recognize the possibility that domestic abuse could prevent a taxpayer from meeting a federal tax deadline other than simply the deadline to request innocent spouse relief. As the Third Circuit noted in its remand of the Mannella case, the taxpayer's circumstances could justify equitable tolling. In circumstances in which the taxpayer can show that domestic abuse prevented him or her from meeting time frames, those periods should be suspended.

h. Diligent Pursuit of Litigation

Taxpayers should be entitled to tolling during the period in which litigation or an administrative determination is pending, so long as the taxpayer is in diligent pursuit of such litigation. Congress has allowed tolling for the pendency of properly filed post-conviction relief in the context of habeas petitioners, discussed above. To reiterate the case of the unfortunate taxpayer in Davis, a taxpayer may be unable to file a refund claim or file suit prior to a court's resolution of an underlying issue.[169] Because litigation is often costly and time-consuming for taxpayers, they should receive the benefit of statutory tolling for the period of pending judicial or administrative determinations.

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the one that kept the IRS from benefiting from mistakes in setting out the date on the notice of deficiency. See I.R.M. 35.3.2.3 (09-21-2012), "Timeliness of Petition" ("Section 3463(a) of RRA 98 provides that the Service shall include on each notice of deficiency the date determined by the Secretary as the last day on which the taxpayer may file a petition with the Tax Court. Even if the date listed on the notice of deficiency for the last day to file is incorrect and allows more than the statutory 90 or 150 day period to timely file a petition, a petition mailed to the Tax Court on or before the date listed on the notice will nevertheless be deemed timely.").

[167] See supra note 157, listing cases in which court has held that equitable tolling applies where government misleads.

[168] Notice 2012-8 "Significantly, this proposed revenue procedure expands how the IRS will take into account abuse and financial control by the nonrequesting spouse in determining whether equitable relief is warranted. Review of the innocent spouse program demonstrated that when a requesting spouse has been abused by the nonrequesting spouse, the requesting spouse may not have been able to challenge the treatment of any items on the joint return, question the payment of the taxes reported as due on the joint return, or challenge the nonrequesting spouse's assurance regarding the payment of the taxes."

[169] See Davis, 2011 WL 6294467 (N.D. Miss. Dec. 15, 2011); see also Haas v. United States, __ Fed. Cl. __, 2012 WL 4320652 (2012) (taxpayer's refund claims dismissed as untimely despite his ongoing pursuit with Department of Veterans Affairs of disability determination).

These eight excusable circumstances seek to capture the range of circumstances for which Congress should give taxpayers a second chance after missing a time frame. They are based on circumstances already identified by Congress in the tax code or circumstances identified by the courts in equitable tolling cases. Undoubtedly, additional circumstances exist and debate exists over allowing a second chance for some of these circumstances.

ii. Standards for Testing Bases for Relief

The IRS, and the courts, needs reasonable and administrable standards to apply when a taxpayer seeks the suspension of a time frame missed as the alleged result of a qualifying basis for relief. The very technical medical report required by Revenue Procedure 99-21 provides one model for the type of standard Congress might apply in selecting a standard for relief. Having a quantifiable standard and requiring a taxpayer seeking relief to meet that standard is reasonable and aids the IRS in administering a provision that has the possibility of opening a Pandora's Box of unfinished business. The goal is to strike the right balance between a sufficiently measurable standard and recognizing the difficulty that some worthy taxpayers will encounter in providing proof if the standard is too difficult.

The type of medical report required in Revenue Procedure 99-21 places a heavy burden on the taxpayer to procure magic words from a physician. The standard created can deny a taxpayer relief if the expert cannot opine on the taxpayer's condition in a sufficiently specific manner. Rather than focus on the specific language of the expert, whether it is a medical opinion or the circumstance of domestic violence, the standard should take an approach focused on gathering the facts and applying those facts to the basis for relief. The IRS should not require the taxpayer to provide reports with specific language, but should focus on what the taxpayer must prove and then make a decision based on the evidence provided to establish the excusable circumstance.

With respect to each of the eight excusable circumstances the Service should provide guidance of what a taxpayer must prove to show both the existence of an allowable excuse and the length of the excused circumstances. The guidance should further provide assistance explaining how the taxpayer might make that proof but without the type of specificity detailing what an expert report must say. The taxpayer then must do their best to provide adequate proof and not submit expert or other opinions that fail to address the specifics needed to show a basis for excusing the lateness of the submission at issue.

Both the case law in equitable tolling and Revenue Procedure 2003-7 appear to take this broader approach foregoing the narrow, check the box approach of Revenue procedure 99-21.[170] By viewing all of the circumstances, as developed through the submission of the taxpayer in support of the application of the excusable circumstance, the IRS and the court reviewing the decision of the IRS create the greatest opportunity for a fair result.

iii. Mechanism for Granting Relief

The existing statutes in the Internal Revenue Code each have different mechanisms for relief. An initial concern with Section 6511(h)'s process is that it allows the IRS office receiving a claim for refund to make a decision concerning relief in a non-transparent way. If the IRS receiving office or appeals office determines that a taxpayer meets the criteria of 6511(h) as elaborated in Revenue Procedure 99-21, then no one knows about the allowance other than the taxpayer and the IRS. The only cases making their way into the public eye involve disputes between the IRS and the taxpayer over the application of the

[170] Even one case deciding the application of Rev. Proc. 99-21 permitted an opportunity beyond the narrow language of the revenue procedure. See Bowman v. IRS, 2010 WL 2991712 at *4 (E.D. Cal. July 29, 2010) (holding that technically deficient physician's statement can be cured by supplemental physician statements to comply with Revenue Procedure 99-21; unfortunately, the taxpayer failed to cure the defect within the time permitted by the court).

relief provision. The process of denying a claim for refund as untimely allows for judicial review of the IRS' decision but does not make public those decisions in which the taxpayer does not seek relief through the judicial system. As evidenced by the cases taken to court, most courts engaging in this review have given significant deference to Rev. Proc. 99-21 and the conclusion of the IRS in applying the rules set out in this guidance.[171] It is not possible, however, to get a good sense of the circumstances in which the IRS has determined the taxpayer meets the statute's requirements and administratively treated an otherwise late claim as timely.

Section 408(d)(3)(I) provides a transparent but arguably more cumbersome procedure based on the private letter ruling process. Taxpayers seeking relief from the sixty day rule must submit themselves to this process. Similar to meeting the requirements to establish financial disability contained in Revenue Procedure 99-21, private letter ruling presents challenges for pro se taxpayers who may not fully understand the procedures necessary to meet the submission process. Obtaining a private letter ruling, however, does allow a transparent view of agency decision making and provide guidance to others seeking similar relief. A system which provides transparency at the administrative decision making level better equips taxpayers and their representatives to evaluate when they should seek relief based on excusable circumstances.

Section 7508 relies upon a statutory definition that looks to decisions by persons outside the IRS to provide guidance on who receives relief. The determination of both combat zone and qualifying individual within a combat zone is made by Congress, the President, or the Defense Department. While the taxpayer and the IRS may have some discussions concerning the proof that the taxpayer or the place meets the required definition, the process is essentially transparent regarding Congress' grant of relief. The IRS' role is one of verification and not determination. The verification role is not transparent at the administrative level.

Section 7508A in many ways places the greatest burden on the IRS because Congress has delegated to the IRS broad authority to make decisions concerning the scope of relief granted. The relief here is granted on a broad basis and a very transparent basis through the issuance of public notices. The IRS, in addition to its role as decision maker on the scope of relief, has a role to play concerning verification of a taxpayer's claim that the taxpayer fits the publicly granted basis for relief. Once again the verification role is not transparent at the administrative level.

Adopting a mechanism for relief for a new provision should consider the existing procedures, in addition to other review mechanisms for granting relief to taxpayers. Revenue Procedure 99-21 sets up a procedure that operates within existing IRS claims review procedures. It has the advantage of using decision makers at the IRS familiar with the refund claims as well as a process familiar with those claiming refunds. Because this system lacks transparency, however, it does not provide much information to other applicants about the likelihood of relief.

Rev. Proc. 2003-7 established a private letter ruling process where none existed previously. The private letter ruling process has issued a large number of rulings in the decade since the process was adopted.[172] The number of rulings allows others seeking relief to see the IRS' analysis in processing requests providing the type of transparency that aids practitioners and taxpayers in deciding whether their circumstances merit an application for relief. Because of the fee associated with obtaining these rulings, the private letter ruling process also imposes a cost on the taxpayer applying for relief.[173] Perhaps,

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[171] See supra note 71, citing cases in which courts have granted significant deference to the requirements set forth in Rev. Proc. 99-21.

[172] A search for private letters rulings issued pursuant to Rev. Proc. 2003-7 found that the IRS has made almost 800 rulings in the past decade which amounts to about 65 private letter rulings each year on this issue.

[173] For private letter rulings, the fee list the IRS publishes near the beginning of each year is calculated in accordance with OMB Circular No. A-25. See Rev. Proc. 2012-1, Section 15, Appendix A (listing most fees in range of $625 to $11,500). Automatic and simplified methods are generally not subject to a user

charging a fee for a determination of relief for an untimely action best serves the system. If a fee system exists, it must provide relief for low income taxpayers for whom the fee itself may serve as a barrier.[174] In addition to the fee, the private letter ruling process is a formal and technical process not particularly well-suited to the needs of low income taxpayers.

Congress has created two procedures that have less formality than the private letter ruling process that allow an administrative appeal and provide for a review of the IRS determination by the Tax Court: the Innocent Spouse provisions and Collection Due Process. These processes both generally involve low income taxpayers, unlike the private letter ruling process. Both of those procedures could serve as models for a process to review requests for relief based on excusable circumstances for missing a deadline. The IRS could set up a special unit for processing relief requests based on the defined excusable circumstances and provide an administrative appeal of the initial determination, as with Innocent Spouse.[175] Alternatively, it could allow the unit making the underlying determination on the tax matter to make the initial determination regarding the request for relief based on excusable circumstances and then provide an appeal of the decision of initial unit similar to the structure of Collection Due Process.[176] In either case, the Appeals Office could issue a determination which, if unfavorable to the taxpayer, could result in a ticket to Tax Court for a review of the determination. To make the process more transparent, the process could include a publication of determinations by appeals similar to the

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fee. For an offer in compromise the fee is $150, unless the taxpayer is a low income taxpayer meeting the fee waiver requirement. See Internal Revenue Service, Offer in Compromise, http://www.irs.gov/Individuals/Offer-in-Compromise-1 (specifying that completed offer packing will include $150 non-refundable application fee). For an installment agreement, the fees are set forth in IR-2006-196, Dec. 28, 2006. The news release noted that in accordance with the Office of Management and Budget's direction for federal agencies to charge user fees "reflecting the full cost of goods or services that convey special benefits," the fees were going to increase in 2007. See Internal Revenue Service, "IRS Announces Installment Agreement User Fee Increases for Some Taxpayers," (Dec. 28, 2006) ("User fees for entering into a non-direct debit installment agreement will increase from $43 to $105, and the fee for direct debit installment agreements will increase from $43 to $52."). The United States Tax Court has produced a standard form for requesting permission of the Court to waive the filing fee. The Tax Court form is "Application for Waiver of Filing Fee and Affidavit." The Court routinely grants these requests. The form is available at the Tax Court web site. See http://www.ustaxcourt.gov/forms/Application_for_Waiver_of_Filing_Fee.pdf.

[174] The fee waiver that exists for the application for an offer in compromise and for the Tax Court filing fee as well as the fee reduction that exists for installment agreement requests does not have a parallel in requests for private letter rulings.

[175] I.R.M. 4.11.34.3.1 (12-15-2004) ("Receipt of Innocent Spouse Claim to be Worked at the Centralized Site").

[176] For collection due process cases, one centralized site does not exist. The correspondence giving the taxpayer the appeals rights informs the taxpayer of the location for sending the collection due process request for appeal. See I.R.M. 5.1.9.3.2 (02-23-2012) (providing directions for taxpayer submission of CDP hearing request). A taxpayer must either send or deliver the CDP hearing request to the IRS office and address as directed on the CDP notice. If the CDP notice does not list such address, the taxpayer should call a toll-free number to obtain the address. The taxpayer may also deliver the request to the local taxpayer assistance center within the thirty-day period. See id.

process of the publication of accepted offers in compromise.[177] Either of these processes is simpler for low income taxpayers, and other taxpayers as well, than the private letter ruling process.

We recommend a process similar to the Innocent Spouse determination process: the taxpayer should first have the opportunity to make an administrative appeal, followed by the opportunity for a Tax Court hearing on the determination by appeals using the abuse of discretion standard. The administrative determinations should be made public through an online system, in order to provide guidance to similarly situated taxpayers. Additionally, taxpayers seeking review should pay a relative high fee which would be waived for qualifying low income taxpayers.[178]

VI. Conclusion

Congress has expressed concern for individuals and entities that miss time frames required under the Internal Revenue Code. Yet, it has only done so in limited circumstances. More than twenty years have passed since the Supreme Court said that equitable tolling applies to federal statutes. Perhaps it was an unlucky stroke of timing that the first statute litigating under the Internal Revenue Code after the Irwin case was the refund statute with its many rules. Despite the setback in Brockamp, however, the push to extend equitable tolling to the Code is a reality that will not disappear without a much stronger statement by the Supreme Court concerning the exceptional nature of tax laws. Without broad legislation providing guidance in this area, the prospect of many years of litigation exists as parties seek to carve out portions of the Internal Revenue Code.

Given its acknowledgement of the role of equitable circumstances in certain, so far limited, circumstances, Congress should look to get ahead of the litigation and set broad parameters for the application of principles that would allow a taxpayer to extend a time period for performance. By adding a broad provision to the Internal Revenue Code, Congress could eliminate much unnecessary litigation concerning the application of equitable tolling and control the discussion on its own terms. It could also move away from the narrow case driving type of relief reflected in IRC 6511(h) to the broader type of equitable relief perhaps envisioned by Treasury Secretary Rubin. This type of relief only gives deserving taxpayers the opportunity for success on the merits and promotes fairness in the tax system that aids in overall compliance. In creating a broader system not dependent on the bringing equitable tolling cases in court or stiff administrative barriers in applying through the IRS, Congress can also apply the knowledge it has gained through some of the provisions passed in the 1998 Reform Act and craft a system that serves all taxpayers and not just those with funds to purchase the full measure of justice.

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[177] See I.R.C. §6103(k)(1) (providing for public inspection of certain offers in compromise); I.R.M. 11.3.11.8 (06-30-2009) ("Public Inspection of Accepted Offers-in-Compromise"). Treas. Reg. 601.702(d)(8) requires that Form 7249 "Offer Acceptance Report" for each accepted offer in compromise with respect to any liability for tax imposed by the IRC will be available for inspection and copying. Applicable Forms 7249 will be available for one year from the date of execution and the file will be maintained so that it is readily available for examination by the public. See I.R.M. 5.8.8.6 (Acceptance Processing). Treas. Regs. 301.7122-1 and 601.702(d)(8) also provide guidance for inspection for offers in compromise matters.

[178] The authors recommend charging a fee of $1,000 or more to reflect the cost to the IRS but would consider allowing it to be returned to taxpayers whose determinations were favorable. While this puts the IRS in a position where it could be accused of disallowing a favorable determination in order to keep the fee, the IRS would not make its decisions on such a basis and credible accusations of that type behavior would be extremely rare.