

Equitable Tolling and Tax Refund Suits

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In this article, the authors consider the disparate authorities on whether 28 U.S.C. section 2401(a) imposes a six-year limitations period for a taxpayer to file a tax refund suit and whether that six-year period is subject to equitable tolling under the Supreme Court's analysis in *Wong*.

In *United States v. Wong*,¹ the Supreme Court held that the Federal Tort Claims Act (FTCA) time limit for filing suit in district court is subject to equitable tolling. That decision may provide relief from the harsh consequences of contradictory case law on the limitations period for filing a tax refund suit when the IRS does not act on a corporate taxpayer's administrative claim for refund. *Wong* is especially helpful to corporate taxpayers in light of the IRS's announcement of a new policy potentially requiring taxpayers under audit to file any informal refund claims within the first 30 days after the audit opening conference.

Background

Under the code, a taxpayer is required to file an administrative claim for refund before any refund lawsuit may be filed.² The taxpayer may not bring suit in federal district court or the Court of Federal

Claims until six months have elapsed since the administrative claim was filed, unless the IRS disallows the refund claim within that period.³ The taxpayer is statutorily required to file the refund suit within two years of receiving notice that the administrative claim was disallowed.⁴ This two-year statute of limitations on bringing tax refund suits may be extended for any additional period agreed to in writing by the taxpayer and the IRS.⁵ However, there are no code provisions limiting the time a taxpayer has to file a refund suit if the IRS fails to act on the refund claim. In other words, if the IRS does not formally disallow the administrative refund claim, the code does not provide a time limit by which the taxpayer may file a refund suit.

However, 28 U.S.C. section 2401(a) provides:

Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

No appellate court has considered whether this provision imposes an outer limit of six years in which to file a refund suit if the IRS does not formally disallow the administrative refund claim. However, several lower court decisions and IRS guidance have reached disparate conclusions regarding the application of this provision to federal tax refund suits. The application of the six-year rule in 28 U.S.C. section 2401(a) may become more relevant in view of the IRS's recent announcement regarding the process for filing refund claims after an audit has commenced.

Last fall, the IRS's Large Business and International Division released a draft publication proposing to require corporate taxpayers under audit to file informal refund claims in the first 30 days after

³Section 6532(a).

⁴*Id.* The IRS must send the notice of claim disallowance by certified or registered mail unless the taxpayer signs a written waiver of that requirement in accordance with section 6532(a)(3).

⁵Section 6532(a)(2). Form 907, "Agreement to Extend Time to Bring Suit," must be executed by the taxpayer and the IRS to extend the two-year limitations period.

¹135 S. Ct. 1625 (2015).

²Section 7422(a).

the audit opening conference.⁶ Under the draft publication, if more than 30 days have passed, a corporate taxpayer would be required to file an amended return (Form 1120X) to claim a refund. In large case audits, it is not uncommon for the IRS and taxpayers to agree to extend the three-year limitations period for the assessment of tax. Indeed, in large cases, the statute may be extended repeatedly during the audit. Moreover, the IRS requires that there be at least 365 days remaining on the statute of limitations for corporate taxpayers to request IRS Appeals consideration, which generally requires a further extension of the limitations period.⁷ Accordingly, this new LB&I policy may cause problems for taxpayers that file their refund claims in the early months of a complex audit if the administrative proceedings do not conclude before expiration of the six-year limitations period in 28 U.S.C. section 2401(a).

This article considers the disparate authority on whether 28 U.S.C. section 2401(a) imposes a six-year period of limitations for a taxpayer to file a tax refund suit and whether the six-year period is subject to equitable tolling under the Supreme Court's analysis of 28 U.S.C. section 2401(b) in *Wong*.

Implications of 28 U.S.C. Section 2401(a)

As noted, no appellate court has yet addressed whether 28 U.S.C. section 2401(a) establishes a six-year outer limitations period for commencing a federal tax refund suit. Several lower courts are in disagreement on this issue, and the IRS has taken the position that 28 U.S.C. section 2401(a) does not apply to tax refund suits.

In 1955 the U.S. Court of Claims held in *Detroit Trust Co. v. United States*⁸ that 28 U.S.C. section 2401(a) does not apply to tax refund suits and that only the two-year limitations period in the predecessor to section 6532(a) applied.⁹ In 1923 the taxpayer filed a refund claim on which the IRS took no action. During the next 23 years, a related refund claim and lawsuit worked its way through the

district court and the court of appeals before finally settling. In 1948, after the related claim was settled, the taxpayer filed an amended refund claim that referred back to the original claim, and it requested that the IRS act on and allow the claim. In 1951 the IRS formally rejected the refund claim. Within two years of the rejection, the taxpayer filed a refund suit in the claims court. Although the suit was timely under the tax code, it was well beyond the six-year period in 28 U.S.C. section 2401(a).

The government filed a motion for summary judgment alleging that the action was time-barred by the six-year statute of limitations of 28 U.S.C. section 2401(a). The claims court denied the motion, holding that the six-year statute of limitations did not apply and that only the predecessor to section 6532(a) applied. The court reasoned that because the taxpayer had filed the refund suit within two years of the rejection of the refund claim, it had commenced the suit within the time limitations of the applicable statute. In 1956 the IRS issued Rev. Rul. 56-381, 1956-2 C.B. 953, conceding this point and agreeing with the claims court. Accordingly, under *Detroit Trust*, there is no limitations period within which a refund suit must be brought if the IRS does not mail a formal notice of claim disallowance.¹⁰

In 1996 the U.S. District Court for the District of New Jersey considered the issue addressed in *Detroit Trust* and reached the opposite result. In an alternative holding in *Finkelstein v. United States*,¹¹ the court concluded that even if the two-year limitations period under section 6532(a)(1) never commenced because the IRS did not issue a valid notice of claim disallowance, the time for filing suit had expired because the six-year statute of limitations under 28 U.S.C. section 2401(a) operated as a "secondary limitation period." In 1998 the IRS issued field service advice indicating that it was aware of *Finkelstein* and stating that the decision might be followed by other district courts.¹²

In 2009 the U.S. District Court for the Central District of California held in *Wagenet v. United States*¹³ that 28 U.S.C. section 2401(a) does apply to limit the time available to a taxpayer to file a refund suit when the IRS fails to deny an administrative claim. The IRS levied the taxpayer's bank account in 1987. In March 1988 it re-audited the taxpayer and determined that he was entitled to have some of the money returned. The taxpayer filed a timely claim

⁶IRS draft Publication 5125, *Large Business & International Examination Process*. Practitioners have noted that IRS revenue agents have been implementing the 30-day informal refund claim proposal and pointing to the regulations under section 6402 for requirements for formal refund claims made after the 30-day period. Amy S. Elliott, "Departure From Continuous Audits Creates Penalty Avoidance Worry," *Tax Notes*, June 1, 2015, p. 991.

⁷See Internal Revenue Manual section 4.8.2.8.2.1 (Apr. 14, 2015); and IRM section 8.21.3.1.1 (Aug. 28, 2014). Other periods exist for non-income tax matters and taxpayers not subject to the LB&I examination procedures.

⁸130 F. Supp. 815 (Ct. Cl. 1955).

⁹Former section 3772 (as amended in 1952).

¹⁰See Gerald A. Kafka and Rita A. Cavanagh, *Litigation of Federal Civil Tax Controversies*, para. 15.05, n.111 (2010).

¹¹943 F. Supp. 425 (D.N.J. 1996).

¹²1998 FSA LEXIS 540 (1998).

¹³No. 08-00142 (C.D. Cal. 2009).

for refund, but the IRS never rejected the claim. In 2008 the taxpayer filed suit for the refund of those taxes. The government moved to dismiss on the ground that the suit was untimely.

The district court, applying 28 U.S.C. section 2401(a), granted the government's motion to dismiss because the lawsuit had been filed more than six years from the time the claim arose. The district court explained that although section 6532(a) forbids a suit after two years from the notice of disallowance of the claim, it does not establish any deadline if the claim has not been acted on. The district court then explained that 28 U.S.C. section 2401(a) fills that gap because it applies to "every civil action commenced against the United States." The taxpayer appealed to the Ninth Circuit; however, before the case was briefed, the parties stipulated to voluntary dismissal of the appeal in accordance with a settlement agreement.¹⁴ In 2010 the IRS issued e-mailed chief counsel advice stating:

It is the position of the Office of Chief Counsel that the six-year statute of limitations set forth in 28 U.S.C. section 2401 . . . does not apply in situations where a taxpayer has filed a timely claim for refund and the Service has not issued a valid notice of claim disallowance. In such situations, the taxpayer may file a suit for refund at any time six months after a timely claim for refund was filed.¹⁵

And in 2012 the IRS released a chief counsel notice explicitly rejecting the holdings in *Wagenet* and *Finkelstein* as inconsistent with Rev. Rul. 56-381.¹⁶ Thus, the IRS's administrative practice is to not follow those cases despite their government-favorable results.¹⁷

Regardless of whether *Wagenet* and *Finkelstein* were correctly decided,¹⁸ those holdings are on the books and could be followed by other district courts.¹⁹ Moreover, even if the government chooses to follow the chief counsel notice and does not raise

the statute of limitations issue, a district court can raise it *sua sponte* because the timeliness of a refund suit is a jurisdictional question.

Moreover, the IRS's new policy, which requires corporate taxpayers to file formal refund claims rather than submit informal claims more than 30 days into an audit, may increase the likelihood that the IRS will not act on refund claims within the six-year limitations period under 28 U.S.C. section 2401(a). The harsh result would be unfair, and taxpayers should be prepared to argue that even if the six-year limitations period applies, it should be equitably tolled while the IRS considers the refund claim during the examination and administrative appeals stages.

Equitable Tolling

If applicable, equitable tolling allows a court to pause the running of a limitations period when a party "has pursued his rights diligently but some extraordinary circumstances" prevents meeting a deadline.²⁰ In 1997 the Supreme Court decided in *Brockamp v. United States*²¹ that the time to file an administrative claim for refund could not be equitably tolled under section 6511. In *Brockamp*, which involved two cases with similar circumstances, the taxpayers paid amounts that they ultimately did not owe and then filed an administrative claim for refund after the limitations period had expired. The taxpayers claimed that they suffered a disability causing them to miss the deadline, and they thus filed suit in district court requesting that the court toll the statutory period for equitable reasons.

The U.S. District Court for the Central District of California held that equitable tolling did not apply. The Ninth Circuit, contrary to other courts of appeal, reversed the district court and held that the two cases could be equitably tolled because Congress had never expressed any intention that equitable tolling should not apply under section 6511.

The Supreme Court reversed, explaining that it agreed with the other courts of appeal that section 6511 sets forth its time limits in "unusually emphatic form" and in a "highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions."²² The statute itself specified at least six exceptions to the filing deadline, and equitable tolling was not among them. Section 6511 also reiterated the applicable time limits "in both procedural and substantive forms," such that granting equitable tolling

¹⁴Notice of Appeal, *Wagenet*, No. 08-00142 (2009), ECF No. 31; Stipulation of Dismissal, *Wagenet*, No. 09-56800 (9th Cir. 2010), ECF No. 24.

¹⁵ECC 201044006.

¹⁶CC-2012-012.

¹⁷The Justice Department Tax Division, not the IRS Office of Chief Counsel, represents the government in tax refund suits filed in district court or the Court of Federal Claims. This likely explains why the IRS distanced itself from *Wagenet*.

¹⁸See Adam Gustafson, "An 'Outside Limit' for Refund Suits: The Case Against the Tax Exception to the Six-Year Bar on Claims Against the Government," 90 *Or. L. Rev.* 191 (2011).

¹⁹In contrast, refund suits brought in the Court of Federal Claims are governed by *Detroit Trust*. See *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (stating that holdings of the U.S. Court of Claims are binding precedent in the Federal Circuit).

²⁰*Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014).

²¹519 U.S. 347 (1997), *rev'g* 67 F.3d 260 (9th Cir. 1995).

²²*Brockamp*, 519 U.S. at 350.

would “require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery” — a kind of tolling for which the Court could find no direct precedent.²³ Finally, the Court found that reading an equitable tolling exception into section 6511 “could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for ‘equitable tolling’ which, upon close inspection, might turn out to lack sufficient equitable justification.”²⁴

Congress responded to *Brockamp* the following year by enacting new section 6511(h), which provides for suspension of the limitations period for filing a refund claim while the taxpayer is unable to manage financial affairs because of a disability. The Supreme Court did not address in *Brockamp*, nor has it since decided, whether equitable tolling applies to a possible six-year limitation on filing a refund action if the IRS fails to act on a refund claim. However, as explained below, the Court has held that the limitations period in 28 U.S.C. section 2401(b) for initiating a tort claim action against the United States is subject to equitable tolling.

United States v. Wong

The FTCA provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years of when the claim accrues or unless action is begun within six months after the mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.²⁵

In *Wong*, each of the claimants missed one of the FTCA deadlines but claimed that the deadlines had been equitably tolled.

In the first case, respondent Kwai Fun Wong presented a claim to the Immigration and Naturalization Service (INS) that it had falsely imprisoned her. Within six months after the INS denied her claim, Wong attempted to amend a suit in federal court to include the tort claim. The magistrate judge recommended granting leave to amend, but the district court did not adopt that recommendation until three weeks after the FTCA’s six-month deadline had expired. The district court granted the government’s motion to dismiss the claim on grounds that the deadline was jurisdictional and could not be tolled.²⁶

In the second case, Marlene June, acting on behalf of the young son of a man who was killed when the car he was in crossed through a cable median and crashed into oncoming traffic, filed a wrongful death action. During the litigation, June contended that she discovered new information that the Federal Highway Administration (FHWA) had approved the cable median despite knowledge that it had not been crash tested. Based on that information and more than five years after the accident, she presented a tort claim to the FHWA. After the FHWA denied the claim, June filed suit in federal district court. The district court dismissed her suit for failing to comply with the FTCA’s six-month deadline.²⁷

The Ninth Circuit reversed the district courts and held that the period for filing the tort claim with the federal agency or commencing the tort action against the United States was not jurisdictional and that equitable tolling should have been available.²⁸ The Supreme Court granted certiorari to resolve a circuit split and, by a 5-4 vote, affirmed the Ninth Circuit’s holding that equitable tolling was permissible under 28 U.S.C. section 2401(b).

The Supreme Court applied the framework set out in *Irwin v. Department of Veterans Affairs*²⁹ to determine whether equitable tolling was permissible under 28 U.S.C. section 2401(b). In *Irwin*, the Court had held that time limitations for lawsuits against the government are presumptively subject to equitable tolling. The Court then explained that the government may overcome that presumption by showing that Congress wanted to forbid equitable tolling and had made the time bar jurisdictional. It noted that the government “must clear a high bar to establish that a statute of limitations is jurisdictional.”³⁰

The Supreme Court held that Congress did not forbid equitable tolling of the time limitations in the FTCA because 28 U.S.C. section 2401(b) does not provide a clear statement that it is jurisdictional. The Court noted that the “separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.”³¹

The government argued that the time limitation on government contract suits brought against the United States under the Tucker Act in 28 U.S.C. section 2501 is worded the same as the time limitation in the FTCA and that the Court had previously found that the time limitation in the Tucker Act is

²³*Id.* at 352.

²⁴*Id.*

²⁵28 U.S.C. section 2401(b).

²⁶*Wong v. Beebe*, 2007 U.S. Dist. LEXIS 29114 (D. Or. 2007).

²⁷*June v. United States*, No. 2:11-cv-00901 (D. Ariz. 2011).

²⁸*Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013); *June v. United States*, No. 11-17776 (9th Cir. 2013).

²⁹498 U.S. 89, 95 (1990).

³⁰*Wong*, 135 S. Ct. at 1632.

³¹*Id.* at 1633.

jurisdictional.³² In other words, *stare decisis* required that the Court reach the same result. The Court explained that the wording of the statute was common for legislation of that era and was not the reason that it had found that equitable tolling did not apply to the Tucker Act. Thus, *stare decisis* played no role in *Wong*. And in two decisions directly addressing the limitations period in the Tucker Act, the Court had dismissed the language relied on by the government for its jurisdictional argument.³³ The Court also rejected the government's other argument — that Congress believed that every limitations period in a statute permitting lawsuits against the United States was jurisdictional — because the Court had “often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.”³⁴

Application of *Wong* to Refund Actions

The limitations period for filing a refund suit when the IRS fails to act on an administrative claim for refund remains unclear. There is a split in the circuits regarding whether the two-year limitations period in section 6532(a) for bringing suit is subject to equitable tolling.³⁵ However, these cases predate the Supreme Court's recent decisions clarifying whether a limitations period is jurisdictional and cannot be tolled or is not jurisdictional and thus subject to equitable tolling. Moreover, that the IRS and the taxpayer can contractually agree to extend the two-year period indicates that the limitations period in section 6532(a) is not jurisdictional.³⁶

³²See *Kendall v. United States*, 107 U.S. 123, 125 (1883); *Finn v. United States*, 123 U.S. 227, 232 (1887); *Soriano v. United States*, 352 U.S. 270, 273-274 (1957).

³³*Irwin*, 498 U.S. at 89; *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008).

³⁴*Wong*, 135 S. Ct. at 1633.

³⁵Compare *RHI Holdings Inc. v. United States*, 142 F.3d 1459 (Fed. Cir. 1998), with *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974).

³⁶See *supra* note 5.

Common sense says that the IRS should not benefit from its own failure to act on a claim, especially if a taxpayer follows the new IRS policy by filing its claims at the beginning of an audit and then cooperates with the IRS by extending the statute of limitations for assessment because the IRS cannot complete the examination within the unextended period. *Wong* may provide some comfort that if there is a six-year outer limitations period for filing a refund action on an administrative claim that the IRS has not acted on, the six-year period may be equitably tolled.

This is consistent with the recent decision in *Volpicelli v. United States*,³⁷ in which the Ninth Circuit held (contrary to other courts of appeal) that the nine-month limitations period for filing a suit for wrongful levy under section 6532(c) can be equitably tolled. The government did not file a petition for certiorari in that case and, given the similarities between the two subsections of the statute, perhaps has signaled its acceptance that equitable tolling can apply to any claim filed under section 6532.

Note that whether the period should be equitably tolled is based on the facts and circumstances. Thus, taxpayers will still need to demonstrate that their particular cases warrant applying the doctrine.

Further note that *Wong* also stands for the proposition that for areas of law in which the Supreme Court has already determined equitable tolling does not apply, it will not change its mind. This is important to tax professionals because of *Brockamp*, which held that equitable tolling does not apply for purposes of section 6511(a).

³⁷777 F.3d 1042 (9th Cir. 2015). In *Mattahedeh v. United States*, No. 14-3267-cv (2d Cir. 2015), the Second Circuit recently declined to decide whether equitable tolling applied to section 6532(c) because it found that the taxpayer had not alleged sufficient facts to demonstrate that equitable tolling applied.