

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: COMMISSIONER OF INTERNAL REVENUE,
Petitioner v. ROBERT F. LUNDY
CASE NO: No. 94-1785
PLACE: Washington, D.C.
DATE: Monday, November 6, 1995
PAGES: 1-55

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COMMISSIONER OF INTERNAL :

4 REVENUE, : CORRECTED VERSION

5 Petitioner :

6 v. : No. 94-1785

7 ROBERT F. LUNDY :

8 - - - - -X

9 Washington, D.C.

10 Monday, November 6, 1995

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 KENT L. JONES ESQ., Assistant to the Solicitor General,
16 Department of Justice, Washington, D.C.; on behalf of
17 the Petitioner.

18 GLENN P. SCHWARTZ, ESQ., Chicago, Illinois; on behalf of
19 the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-1785, Commissioner of Internal Revenue v.
5 Robert F. Lundy.

6 Mr. Jones.

7 ORAL ARGUMENT OF KENT L. JONES

8 ON BEHALF OF THE PETITIONER

9 MR. JONES: Mr. Chief Justice and may it please
10 the Court:

11 The tax court is an Article I court of limited
12 jurisdiction. This case concerns the limitations on the
13 jurisdiction of the tax court to award refunds.

14 When a taxpayer commences a suit in tax court to
15 review an asserted deficiency, the court may then also
16 determine whether an overpayment was made. Section
17 6512(b)(3) of the Internal Revenue Code, however, provides
18 three detailed jurisdictional limits on the amount of the
19 refund that the court may award.

20 Under section 6512(b)(3)(A), the court may award
21 amounts paid after the notice of deficiency is issued.
22 Under 6512(b)(3)(C), the court may award amounts for which
23 a claim for refund was made before the notice of
24 deficiency was issued, but when, as in this case, there
25 was neither subsequent payment nor a prior refund claim,

1 section 6512(b)(3)(B), which this case concerns, limits
2 the jurisdiction of the tax court to award amounts that
3 would be refundable under 6511(b)(2) if on the date the
4 notice of deficiency was issued a claim for refund had
5 been filed.

6 In turn, 6511(b)(2) allows a refund of amounts
7 paid within 3 years prior to the claim for refund only if
8 the claim for refund was made within 3 years from the time
9 of the taxpayer's return, but when --

10 QUESTION: Mr. Jones, in subsection (B) that
11 you're referring to it says that no credit or refund will
12 be allowed unless it was paid within the period which
13 would be applicable under 6511(b)(2)(C), or if on the date
14 of the mailing of the notice of deficiency a claim had
15 been filed, whether or not filed.

16 Now, that language is just incomprehensible.
17 What does that parenthetical mean? Does it mean if it
18 isn't filed we can deem it to have been filed?

19 MR. JONES: That's -- what it means is that,
20 whether or not a claim for refund had actually been filed,
21 the court is to apply these statutes as if a claim for
22 refund was filed on that date. That was -- no one has
23 doubted, I think, that that is the meaning of that
24 provision.

25 QUESTION: And is that what should be done in

1 this case?

2 MR. JONES: Yes. In this case, because the
3 taxpayer had failed to file a return before the date of
4 the notice of deficiency, 6512(b)(3)(B) operates, and what
5 it operates to do is to require the court to apply
6 6511(b)(2) as if a claim for refund was filed on the date
7 the notice of deficiency was issued.

8 QUESTION: Why does it say, whether or not,
9 since subsection (C) covers the case in which it had been
10 filed before that?

11 MR. JONES: Yes, it -- subsection (C) applies if
12 a claim had been filed before that date. Subsection (B)
13 says you are to assume a claim is filed on that date,
14 whether or not one had been filed.

15 QUESTION: Why didn't it just say that it
16 wasn't, or if it wasn't?

17 MR. JONES: I think one of the reasons it might
18 put it that way is because if you read the rest of
19 subsection (B) it goes on to say, a claim based upon
20 whatever grounds the tax court determined an overpayment
21 was made.

22 Now, what that refers to is a basic distinction
23 between district court and tax court jurisdiction.

24 QUESTION: Oh, I see.

25 MR. JONES: The district court only has

1 jurisdiction to consider a judicial claim that is based
2 upon precisely the administrative claim. If there's any
3 material variance between the district court claim and the
4 administrative claim, the district court has no
5 jurisdiction, but in the tax court there is no requirement
6 of an administrative claim. The court may award a refund
7 based upon any grounds for which it determines an
8 overpayment.

9 QUESTION: Well, in that respect the taxpayer is
10 better off to be in the tax court.

11 MR. JONES: It -- the taxpayer has a broader
12 refund argument in the tax courts. He has whatever
13 argument he can come up with, but the price that is paid
14 is that the amount of refund that can be awarded is
15 subject to the very specific and detailed jurisdiction
16 provisions --

17 QUESTION: Mr. Jones, can I ask you a question
18 about (B), the same -- the one that is at issue here?
19 It's as if a refund claim had been filed.

20 Now, if on that date -- I guess it was
21 September 26, 1990 -- before receiving the notice of
22 deficiency the taxpayer had decided that he ought to file
23 a refund claim because he realized that they had
24 overwithheld, what document would he have then filed?
25 Would it not have been a return?

1 MR. JONES: He could have filed a return, but --
2 QUESTION: What else? Is there any --
3 MR. JONES: Yes.
4 QUESTION: -- other form that the IRS uses that
5 would have enabled him to claim a refund without filing a
6 return?
7 MR. JONES: I think the right answer to your
8 question is that courts have routinely held that refund
9 claims can be submitted informally, that they don't have
10 to be on a return --
11 QUESTION: But is there any Internal Revenue
12 form that provides for seeking a refund without filing a
13 return?
14 MR. JONES: There are -- there isn't an Internal
15 Revenue form that, of course, is exactly what you've
16 described, a return that includes a claim for refund.
17 There's also --
18 QUESTION: But is there an Internal Revenue form
19 that seeks a refund without filing a return? I don't
20 think there is, but if there is, would you identify it for
21 me?
22 MR. JONES: It would be the amended return form.
23 QUESTION: The amended return form, which is a
24 kind of return.
25 MR. JONES: It is an amended return.

1 QUESTION: But there's no way, is there, to file
2 a claim for refund at that date without also filing a
3 return?

4 MR. JONES: No, sir, I'm sorry, I must disagree.
5 The courts have routinely held that you can file a refund
6 claim informally.

7 QUESTION: But there's no form. There's no
8 regular IRS form that the average taxpayer who has
9 overwithheld can go to the office and say, would you give
10 me the refund form. What would he get?

11 MR. JONES: There's no IRS form, but there is --
12 but you don't have to use an IRS form to make a refund
13 claim, according to the courts.

14 QUESTION: How is the average taxpayer to know
15 that? If he went to the IRS, what would they tell him to
16 do? If he went to a lawyer, what would he tell him to do?

17 MR. JONES: If they went to the IRS, the IRS
18 would probably ask him to file a return --

19 QUESTION: Correct.

20 MR. JONES: -- which this taxpayer hasn't done.

21 QUESTION: And that raises a question, Mr.
22 Jones. As I understand it, this provision, as you read
23 it, favors the taxpayer when the taxpayer has filed a
24 return.

25 We get into this problem with the taxpayer who

1 hasn't filed a return, and at some point in the exchanges
2 between the IRS and the Service, the taxpayer was told,
3 file your return soon, and if you don't, then we'll
4 prepare a substitute return for you.

5 Can you explain how that would have played out
6 if the Service, instead of sending the notice of
7 deficiency, had first filed a substituted return for the
8 taxpayer?

9 MR. JONES: A substituted return is -- it's
10 lingo, if you'll pardon the expression. It is not a
11 return. A substituted return is simply an internal
12 document that the IRS prepares to set forth their
13 calculations based upon what they think the taxpayer's
14 liability is. The return that 6511 refers to is
15 specifically the return filed by the taxpayer.

16 QUESTION: So that substituted return would not
17 have counted --

18 MR. JONES: No. It would --

19 QUESTION: -- to serve as the return.

20 MR. JONES: It cannot be the taxpayer's return.

21 QUESTION: Does the taxpayer get a copy of the
22 substituted return?

23 MR. JONES: It isn't sent to the taxpayer.
24 What's sent to the taxpayer is the notice of deficiency,
25 which includes the calculations. Whether the taxpayer can

1 see the underlying basis for it, I don't have any doubt
2 that they can see it, but I don't believe that it's
3 routinely sent.

4 QUESTION: But they don't attach the substituted
5 return to the notice of deficiency. They have the same
6 calculation, but not the form.

7 MR. JONES: I can't say definitively. I'm
8 sorry, Justice Kennedy, I don't know, but what I am
9 confident about is that this thing that we call a
10 substituted return is not a return of the taxpayer, it is
11 simply -- for example, a taxpayer, we might have a W-2.
12 It might show some information about income and
13 withholdings. That might be all that we know.

14 For example, that might have been all that we
15 know in this case, and based upon that limited knowledge,
16 we "prepare a substituted return," but what we're really
17 doing is filling in the blanks as best we know.

18 The definition of a return in the code I think
19 is best described in 6611(h), which talks about a return
20 in processable form. A return -- it must be a document
21 filed by the taxpayer that purports to be a return, and
22 that contains all of the information from which the
23 taxpayer's entire liability --

24 QUESTION: But does the code define the term,
25 claim, as used in this section?

1 MR. JONES: A claim for refund has been defined
2 judicially.

3 QUESTION: I -- that wasn't my question.

4 MR. JONES: I'm not familiar with a definition
5 of a claim for refund in the --

6 QUESTION: Well then, why should we look at the
7 definition of return? We're asking -- the question is,
8 what does the word claim mean in this section --

9 MR. JONES: Well, Justice --

10 QUESTION: -- and you've just told me the only
11 way you can file a claim is by filing a return --

12 MR. JONES: No, sir, I didn't.

13 QUESTION: -- but yet the claim doesn't include
14 the term, return.

15 MR. JONES: I did not say that. The courts have
16 held quite clearly that you can file a claim informally,
17 and you don't have to use a return, and let me be
18 specific, a claim for refund --

19 QUESTION: You can file a claim informally
20 without first having filed a return?

21 MR. JONES: Absolutely. A claim for refund --

22 QUESTION: What case gives us an example of
23 that?

24 MR. JONES: In our brief, in our reply brief we
25 cite the Salzman Treatise, which elaborates a lot of cases

1 that deal with this subject. A claim is -

2 QUESTION: Do I understand correctly that it
3 wouldn't have made any difference as long as he didn't
4 file a return?

5 MR. JONES: Yes.

6 QUESTION: As you read the statute, he must have
7 filed a return first. He could have filed a formal,
8 informal, all the claims in the world, and on your reading
9 of the statute it would not have made any difference.
10 What he had to file, what he didn't file before the notice
11 of a deficiency was not a claim, but a return.

12 MR. JONES: That's absolutely correct. The
13 statute makes the distinction between taxpayers who have
14 been delinquent in filing returns and taxpayers who have
15 not, and by its very words it provides an abbreviated
16 period of recovery for taxpayers who have not filed a
17 return before the notice of deficiency was issued.

18 QUESTION: Mr. Jones, other than this, rather
19 unusual circumstances of this case, is there any other
20 time that the 2-year look-back period would apply under
21 this subsection?

22 MR. JONES: Well, it applies whenever --

23 QUESTION: Does it apply only to circumstances
24 of this case, and in no other instance?

25 MR. JONES: It applies routinely when the

1 taxpayer has not filed a return before the notice of
2 deficiency is issued. That would be the -- you only get
3 the 3-year look-back if you have filed the return before
4 the claim for refund arises.

5 QUESTION: Now, has the IRS been totally
6 consistent in its position and interpretation of this
7 statute? It seems rather inconsistent with the position
8 the Government took in the Miller case in the Ninth
9 Circuit, and with the Revenue Ruling 76-511.

10 MR. JONES: There's a long answer to that
11 question which I'd like to give, and I'd like to try to
12 give it in a logical order.

13 The first part of the answer to your question
14 is, has the Government been consistent about tax court
15 cases, and the answer to that is plainly yes. Since 1957,
16 in Revenue Ruling 57-354, which is quoted at page 48 of
17 the petition appendix, the Commissioner has stated that
18 the status of a claim for refund must be determined as of
19 the time it is filed and that if, as the time it is filed,
20 no return has then been filed, you only get a 2-year look-
21 back period.

22 The tax court has consistently reached the same
23 conclusion under its own jurisdiction since the early
24 1970's. The suggestion that our position in this case is
25 newly minted simply ignores this historical record, and

1 moreover, factually, the suggestion of respondent that we
2 would routinely pay refund claims in this context is
3 demonstrably incorrect, as the tax court found, because
4 6512(a) of the Internal Revenue Code says that if a notice
5 of deficiency is issued, and the taxpayer files a claim in
6 tax court, then no refund or credit shall be allowed
7 except as the tax court determines, so in tax court cases
8 the Commissioner has no administrative authority to award
9 a refund. We are deprived of it by statute.

10 Now, the question that you're really, I think,
11 focusing on is, have we been the same about district court
12 cases and tax court cases, and I think -- there's a short
13 answer to that and a long explanation.

14 The short answer is, it is not perfectly clear
15 whether in each and every situation the refund periods are
16 supposed to be the same in district court and tax court
17 cases, and there is no basis for assuming that Congress
18 intended them to always be the same, and I'd like to
19 explain the latter part first.

20 There's no reason to think Congress necessarily
21 intended the same periods always to apply in district
22 court and tax court.

23 QUESTION: Mr. Jones, may I derail you just for
24 a moment to go back to where you were in the tax court?

25 One might wonder whether the Commissioner was

1 always consistent in the tax court because part of the
2 history of this case that initially this taxpayer, that
3 the answer in the -- to the petition in the tax court
4 didn't raise a time bar, and in fact the taxpayer got a
5 letter that said, you're going to get a refund check, and
6 then it was over a year after the initial answer that the
7 amendment was made to assert the time bar.

8 MR. JONES: I believe that you've accurately
9 described the facts, Justice Ginsburg, but I also believe
10 that the Commissioner raising the defense in this case is
11 something that he has -- she, in this case, has
12 consistently done since the issue has been presented.

13 The fact that there may have been a delay in
14 it's assertion in this case --

15 QUESTION: It's not just a delay. There just
16 wasn't -- there was an answer. The time bar was obvious
17 from the start, and yet over a year went by without this
18 being asserted.

19 MR. JONES: It is -- I think it's fair to say
20 that it's relatively common for defenses to be amended,
21 for answers to be amended, and I would hope the Court
22 wouldn't draw any inference from that in this case.
23 There's really no reason to.

24 I mean, as I emphasized just a point ago, we
25 don't have authority to make a refund in a tax court case

1 unless the tax court has determined an overpayment, so we
2 have to -- when we think a refund might be appropriate, we
3 have to submit an agreed order that falls within the
4 jurisdiction of the tax court.

5 It may have been -- and I'm speculating here.
6 It may have been that in preparing a draft of some kind of
7 agreed order to submit in this case, that it then occurred
8 to counsel, oh, wait a minute, this case isn't within the
9 tax court's jurisdiction. It may be that that's the
10 mechanics that led to this being asserted at the time that
11 it was.

12 Now --

13 QUESTION: Mr. Jones, can I just follow up,
14 because I didn't think I got a complete answer to my
15 question.

16 I asked if there were cases involving claims for
17 refunds such as the notations -- and you referred on pages
18 14 and 15 of your reply brief -- in which those informal
19 claims had been made without there having previously been
20 filed any return at all.

21 MR. JONES: And I --

22 QUESTION: And which of those do you think fits
23 that category?

24 MR. JONES: I'm sorry, Justice Stevens, I cannot
25 tell you, as I stand here, which of those cases might

1 involve those facts, but I would like --

2 QUESTION: Do you think any of them involve
3 that?

4 MR. JONES: I would think they might well, and I
5 would be speculating, but let me point out, because you
6 seem -- this is something important to you, and I want to
7 emphasize it. Congress wrote this statute. Congress
8 wrote it anticipating that there would be situations where
9 claims for refund were filed at a time when no return had
10 been filed.

11 QUESTION: How do you know that?

12 MR. JONES: I know that because section 6511(a)
13 provides a limited look-back for situations where the
14 claim for refund is filed at a time that no return had
15 been filed.

16 QUESTION: Correct.

17 MR. JONES: So Congress anticipated that claims
18 for refund could, in fact, be filed where no return had
19 been filed, and provided for a 2-year look-back period
20 and, in fact, that's this case.

21 QUESTION: That would be that no return had
22 previously been filed.

23 MR. JONES: Absolutely.

24 QUESTION: But that doesn't mean that there
25 could be cases in which the claim for refund could ever be

1 filed without simultaneously filing a return.

2 MR. JONES: If the claim for refund and the
3 return were filed simultaneously --

4 QUESTION: Which they normally would be.

5 MR. JONES: Which they often are.

6 QUESTION: Normally.

7 MR. JONES: Most -- ordinarily may be, but
8 certainly or not necessarily required --

9 QUESTION: Except that you can't give me an
10 example in adjudicated cases of one having been filed
11 without the other. That is, of the claim for refund
12 having been filed without the return, which seems to me
13 makes it very reasonable to assume that when Congress used
14 the term, claim, they used it to apply to the document on
15 which the claim is normally made.

16 MR. JONES: Justice Stevens, if we were to
17 assume that a claim for refund and a return was the same
18 thing, then very little --

19 QUESTION: Oh, I don't suggest that at all. I'm
20 just suggesting that you cannot file a claim for refund
21 without also having either previously or simultaneously
22 filed a return.

23 MR. JONES: Well, Justice --

24 QUESTION: And you haven't given me a contrary
25 example.

1 MR. JONES: Well, this is such a case. Congress
2 imputed the claim for refund, but setting that aside,
3 Justice Stevens, frankly you would have to write out
4 almost all of 6511(a) to support that view, because first
5 of all the second clause of the first sentence of 6511(a)
6 says that, and if the claim for refund is filed at a time
7 when no return has been filed, then you get a 2-year look-
8 back period.

9 So to suggest -- I mean, you can't suggest that
10 Congress didn't think that a claim for refund and a return
11 were independent documents that could be filed in
12 different orders. Congress clearly contemplated that, and
13 clearly also provided an abbreviated period, an
14 abbreviated look-back period for the taxpayer who fails to
15 file the return before he files the refund claim.

16 QUESTION: Mr. Jones, can I ask something about
17 the Government's theory of why, when the return is later
18 filed, after the deficiency has been assessed, you do not
19 thereupon get the benefit of the 3-year period? I think I
20 may disagree with you as to the reason, though perhaps not
21 as to the result.

22 MR. JONES: Well, the reason that we see is that
23 section 6512(b)(3) provides a detailed set of answers to
24 these questions. It says that you can base a refund on a
25 refund claim filed before --

1 QUESTION: Where are you reading from,
2 Mr. Jones?

3 MR. JONES: 6512(b)(3)(C) says that you can
4 award a refund based upon a prior refund claim filed
5 before the notice of deficiency. 6512(b)(3)(B) says you
6 can award a refund based upon a claim assumed to arise on
7 the date of the notice of deficiency. There is no basis
8 for engrafting onto this statute an additional refund
9 jurisdiction for subsequent refund claims, which is what
10 the court of appeals theories would require.

11 You'd have to be adding a clause to the statute,
12 and you'd be adding a clause to the statute that would
13 contradict the clauses that already exist.

14 Now, this Court has said on several occasions
15 that the jurisdictional limitations on refunds are limited
16 waivers of sovereign immunity that must be strictly
17 applied and strictly adhered to by the judiciary.

18 In this case, the court of appeals acknowledged
19 that it was not applying the statute as Congress wrote it.
20 The court said, we will not use the imputed refund claim
21 under 6512(b)(3)(B) to decide whether a 2-year or 3-year
22 look-back period applies, but that is precisely what
23 Congress told them to do.

24 QUESTION: You just before were saying -- you
25 were asked the question, has the Government always been

1 consistent.

2 MR. JONES: Yes, Your Honor.

3 QUESTION: And then you said, it's been
4 consistent in the tax court, and then you said, well, in
5 the court of claims for the refunds, it seems to be a
6 little different, and I was wondering if you'd said
7 everything you wanted to say there, or if you wanted to
8 say a little more --

9 MR. JONES: I'd like to try to briefly describe
10 that, because time is limited.

11 There is no reason to think they have to be the
12 same. The jurisdiction of the tax court and the district
13 court have always been different.

14 The district court had a common law jurisdiction
15 to award refunds against the collector, had a statutory
16 authority, ultimately had a statutory authority to award
17 claims against the United States long before the tax court
18 came into existence, and when the tax court came into
19 existence, it was only allowed as an administrative wing
20 in the Treasury Department to review the notice of
21 deficiency.

22 It couldn't even talk about overpayments until
23 1928, and it wasn't until 1988, just 7 years ago, that the
24 tax court was allowed to enter an order requiring that a
25 refund be made.

1 Moreover, as I've already described, the
2 jurisdiction of the two courts is different, even as we
3 stand here, because of the variance of the claim doctrine,
4 and so there's no reason to assume, ab initio, that in
5 establishing or in merging these disparate jurisdictions,
6 that -- and in using the terminology that is peculiar to
7 tax court litigation in doing so, that you're always going
8 to reach the same result.

9 QUESTION: It's still a little odd, though,
10 isn't it, in the --

11 MR. JONES: At most, it's odd --

12 QUESTION: I take it -- it's April 15, for the
13 last year, right. This is right. Then you have -- if you
14 file your return within 2 years, you're home free.

15 MR. JONES: Yes.

16 QUESTION: No problem. If you wait till after
17 3 years, you've had it.

18 MR. JONES: In either court.

19 QUESTION: In either court. Now we're talking
20 about that key middle year between 2 years and 3, and if
21 you go into the tax court, on your reading of it, it's a
22 race. If they get the deficiency notice out before you
23 file your return, you only get the 2-year look-back, so
24 you've had it. If you're in the court of claims -- is
25 that right?

1 MR. JONES: No, I don't think so. It's not a
2 race. I don't want you to ever think it's a race.

3 QUESTION: I don't mean to be pejorative.

4 MR. JONES: Let me explain why -- because they
5 don't have to go to tax court.

6 QUESTION: No, no, wait. If -- I didn't mean --
7 I mucked it up by saying this pejoratively. I'm just
8 trying to find out what happens. In the tax court, during
9 that key year -- nothing's happened, 2 years have gone by.
10 Now, during the next year, if the notice of deficiency
11 comes out, forget it.

12 If, before the notice of deficiency comes out,
13 the taxpayer wakes up and files his return, then you get
14 back the 3 years. That's correct, isn't it.

15 But in the court of claims, if the notice of
16 deficiency comes out, the taxpayer can wake up then and
17 file the return, and then he'll get the 3-year look-back.

18 MR. JONES: I don't think there's an answer to
19 the last part of your point, and that's what I'd like to
20 address.

21 In the Ninth Circuit decision in the Miller
22 case, the Court concluded that these refund periods were
23 identical in district court and tax court cases.

24 QUESTION: But they're wrong, aren't they?

25 MR. JONES: I think --

1 QUESTION: I mean, that's because they did that,
2 they thought you could file a return forever, but they
3 forget if you file a return 50 years later, you're only
4 going to get 3-year look-back.

5 MR. JONES: I don't think that they are
6 obviously wrong. I think that they make a textual point,
7 and I need to argue both sides of this, and I want to
8 explain that at the beginning, because my point is, the
9 essential point is, it doesn't matter. It isn't critical.
10 What's critical in this case is, what is the tax court's
11 jurisdiction.

12 QUESTION: But what does matter is your approach
13 to reading this statute, and I understand what you say
14 about the tax court. You've got to apply this literally.

15 MR. JONES: That's right.

16 QUESTION: And yet Judge Wiggins didn't apply
17 the limitation there applicable literally. He seemed to
18 be looking for some -- one of the reasons that he gave for
19 a construction that as far as I can see varied from what
20 you said in your revenue ruling, one of the reasons that
21 he gave is there ought to be symmetry between the tax
22 court and the district court claims court.

23 MR. JONES: Yes, and our first point is that
24 there is no reason to assume there's symmetry when both
25 the history and the text of the provisions is not

1 symmetrical -- are not symmetrical.

2 QUESTION: You've given us an example of
3 symmetry, of a symmetry in the taxpayer's favor in the tax
4 court --

5 MR. JONES: That's correct.

6 QUESTION: -- and answered my question.

7 May I ask you another technical question which
8 probably doesn't matter either, but if the taxpayer had
9 let 2 years go but had filed no return, more than 2 years
10 had passed since the last tax payment, then made an
11 administrative claim and followed that by going into the
12 district court, he would be in exactly the same position
13 he's in here, wouldn't he? He'd be out.

14 He couldn't -- he couldn't file his claim in the
15 district court, and then say, oh, wait a minute, I forgot
16 to file a return --

17 MR. JONES: Oh, I see.

18 QUESTION: -- and then file a return and get the
19 3-year period. On your reading he'd be just as stuck as
20 he is here.

21 MR. JONES: The subsequent return would not
22 affect the prior refund claim. It wouldn't validate the
23 timing of the prior refund claim.

24 QUESTION: Because it's --

25 MR. JONES: Because the statute says that.

1 QUESTION: Because the reading of the, within 3
2 years from --

3 MR. JONES: That's correct.

4 QUESTION: -- implies before.

5 MR. JONES: That's what the Richards court
6 said --

7 QUESTION: So he'd be in the same boat, in my
8 hypo, in the district court that he's in here.

9 MR. JONES: That is correct. But let me --

10 QUESTION: Could he -- in Justice Souter's
11 hypothetical could he dismiss the district court action
12 and start all over again?

13 MR. JONES: Hypothetically, and then we'd have
14 the problem that Miller addresses, and the only thing I
15 want to say about Miller in the brief time that's
16 remaining is that the Service has ruled to the contrary
17 about district court cases that even a late return might
18 allow a 3-year look-back period in the district court, but
19 I do want to point out that that ruling doesn't explain
20 its analysis.

21 We don't know, in reading it, whether it's based
22 upon a textual analysis or upon administrative grace. We
23 don't have administrative grace in tax court cases.
24 That's another difference between tax court and district
25 court cases.

1 QUESTION: The Revenue Ruling, you say you don't
2 know whether that's administrative grace, that's why --
3 but the Revenue Ruling for that particular taxpayer,
4 because of the 3-year look-back period, came out that the
5 taxpayer didn't get the refund.

6 MR. JONES: On the facts of that ruling.

7 QUESTION: And wouldn't that have been the same
8 thing in Miller, that -- wouldn't the tax --

9 MR. JONES: No, I don't -- I'm sorry. I believe
10 in Miller the return was filed more than 2 but less than
11 3 years after its due date, whereas in the ruling it
12 involved a return filed more than 3 years after its due
13 date.

14 These are very -- the intricacies of the
15 intertwining of these provisions are complicated. I just
16 want to end by explaining once again that on this Court's
17 decisions, what we should look at is the jurisdictional
18 provisions of the tax court. They should not be amended,
19 they should be enforced, and --

20 QUESTION: Mr. Jones, you do have -- even in tax
21 court cases, you would have administrative discretion, the
22 week before sending a notice of deficiency, to send a
23 letter to the taxpayer saying we're about to file a notice
24 of deficiency. You'll get 3 years if you promptly file a
25 return. That you could do, couldn't you?

1 MR. JONES: What we did do was, 90 days before
2 we issued the notice of deficiency --

3 QUESTION: My question is, you could do that,
4 couldn't you?

5 MR. JONES: -- we told him that we were about
6 to.

7 QUESTION: And if he'd been smart enough, he
8 then could have filed a return right away and been
9 protected.

10 MR. JONES: The tax court opinions on this are
11 of long standing, Justice Stevens.

12 I would like to reserve --

13 QUESTION: But I just want to be sure, I am
14 correct, he could have protected himself then by
15 immediately filing a return, couldn't he?

16 MR. JONES: Hypothetically, he could have
17 protected himself.

18 QUESTION: And you would have had administrative
19 discretion to tell him that that option was open to him,
20 would you not?

21 MR. JONES: Justice Stevens, I have to answer
22 that question yes, because obviously we would have
23 discretion to tell every taxpayer everything we know, if
24 we had the time.

25 I would like to reserve the balance of my time

1 for rebuttal.

2 QUESTION: Very well, Mr. Jones.

3 Mr. Schwartz, we'll hear from you.

4 ORAL ARGUMENT OF GLENN P. SCHWARTZ

5 ON BEHALF OF THE RESPONDENT

6 MR. SCHWARTZ: Mr. Chief Justice, and may it
7 please the Court:

8 Justice Stevens identified the core issue in the
9 interpretation of 6512(b)(3)(B). The key question is,
10 what is meant by the word claim in that statute?

11 Under the interpretation of the IRS, the claim
12 is a defective claim, because if Congress intended, and it
13 must have, that that claim be valid, then it would have to
14 be on a Federal income tax return for the following
15 reasons.

16 A return is required to be filed under 6011, but
17 6011 does not define what a return is, nor do the
18 regulations, but the case law has --

19 QUESTION: Well, the Solicitor General said that
20 the code does define a return. You're saying that the
21 code doesn't define a return.

22 MR. SCHWARTZ: The code does not define a
23 return, Your Honor.

24 QUESTION: But the one thing the code clearly
25 does is distinguish, at least in 6511, between claim and

1 return, so presumably it -- there is no reason, I guess,
2 to assume that it was -- that it was assuming a possible
3 identity.

4 MR. SCHWARTZ: Your Honor, a claim and a return
5 can be different documents. For example, for taxes other
6 than an income tax, Form 843 is used, the claim for refund
7 form. Prior 1976, a Form 843 claim could be used in lieu
8 of an amended return, but whereas here an original return
9 has not been filed, a valid claim for refund, and Congress
10 must have meant that that claim be valid, must be on a
11 Federal income tax return for these reasons.

12 QUESTION: Before you give me the reasons, would
13 you respond to this: (b)(3)(C) deals specifically with
14 the case in which a return has been filed. Doesn't that
15 suggest that claim in (b)(3)(B) was referring to a claim
16 in which a return had not been filed?

17 MR. SCHWARTZ: I don't believe so, Your Honor.
18 I -- the proper -- the question is, what does Congress
19 mean by claim in (b)(3)(B)? That's the question, and it
20 has to mean a valid claim.

21 QUESTION: Well, certainly you'd read (C), which
22 comes right along next to it and also contains the word
23 claim, in deciding what claim means in (B). They're not
24 totally independent sections.

25 MR. SCHWARTZ: That's correct, Your Honor, but

1 the claim in (B) still has to be a valid claim, and I
2 would like to explain what a valid claim has to be.

3 QUESTION: Before you do that, you've left me in
4 some confusion. I was astounded to hear you say that
5 Justice Stevens had put his finger on the crux of the
6 question. The point he raised was not raised in your
7 brief, as far as I know.

8 MR. SCHWARTZ: Oh, yes, Your Honor, I devoted --

9 QUESTION: He claimed -- well, he is questioning
10 whether the claim might not constitute a return. Your
11 brief doesn't say that the claim constituted the filing of
12 the return. To the contrary, it says the later filing of
13 the return constitutes the claim. That's quite different,
14 it seems to me. Well, which is it?

15 MR. SCHWARTZ: Your Honor --

16 QUESTION: I mean, do you think the claim
17 constitutes the return, or the later return constitutes
18 the claim?

19 MR. SCHWARTZ: Your Honor, we have alternative
20 arguments. The --

21 (Laughter.)

22 MR. SCHWARTZ: Our first argument is that the
23 statute doesn't provide for a deemed claim at all, it
24 provides a reference date for application of the
25 limitation period.

1 QUESTION: Yes, I understand that. That has
2 nothing to do --

3 MR. SCHWARTZ: All right -- okay.

4 QUESTION: -- with what's the claim and what's
5 the return. But I thought your brief --

6 MR. SCHWARTZ: Your Honor --

7 QUESTION: -- as far as the word claim and
8 return, I thought your position was the later return was
9 the claim.

10 MR. SCHWARTZ: We've devoted four or five or six
11 pages of our brief to the question of, if it is assumed
12 that there is a deemed claim, if that's what the language
13 means, and we don't concede that, then the deemed claim
14 must have been a valid claim, and the only valid claim
15 that could be filed under these circumstances --

16 QUESTION: Is the later return.

17 MR. SCHWARTZ: -- is a return.

18 QUESTION: Yes, and that's not what Justice
19 Stevens was questioning about at all. Either you
20 misunderstood him, or --

21 MR. SCHWARTZ: Perhaps I misunderstood him, but
22 the core issue with respect to this statute is what is
23 meant by the word claim. Claim has to mean return.
24 Claim, again, is not defined in the statute or in the
25 regs, but the regs under 6011 do say that you should make

1 returns in accordance with the applicable Treasury
2 regulations.

3 Now, a claim -- a return has been defined under
4 case law as meaning any document which contains sufficient
5 information to allow the IRS to determine tax liability.

6 Now, the IRS in its construction of this section
7 has ignored -- in every brief it submitted to the tax
8 court, the Fourth Circuit and this Court, the last phrase
9 of the statute treats it as surplusage, stating the
10 grounds upon which the tax court finds that there's an
11 overpayment.

12 In fact, the IRS went so far as to excise it
13 from its quotation of the statute on page 5 of its reply
14 brief, but this language is important, because if the
15 claim referred to in 6512(b)(3)(B) states the grounds upon
16 which the tax court finds that there is an overpayment,
17 that would constitute the same information that would be
18 on a return, because the --

19 QUESTION: The Government's position is that
20 (b)(3)(B) doesn't refer to any real claim. It's a
21 hypothetical claim.

22 MR. SCHWARTZ: Well, it's -- even if it's a
23 hypothetical claim, it has to be something, and it has to
24 be a valid claim. A valid claim has to be a return. The
25 statutory language requires that it state the grounds upon

1 which the tax court finds there's a overpayment.

2 In this very case, the IRS employed the
3 taxpayer's return to determine that there was, in fact, an
4 overpayment.

5 QUESTION: Mr. Schwartz, under your
6 interpretation, when would section 6512(b)(3)(B) ever act
7 as a bar to claiming a refund?

8 MR. SCHWARTZ: Your Honor, if the notice of
9 deficiency was mailed more than 3 years from the due date
10 of the return, that would be at a time when the taxpayer
11 could not have --

12 QUESTION: But you don't look to that subsection
13 to give me that answer. What -- when would that
14 subsection serve as a bar under your view?

15 MR. SCHWARTZ: I don't understand the question,
16 Your Honor. The --

17 QUESTION: It just seemed to me that under your
18 interpretation, (b)(3)(B) just would never apply to give
19 effect to your --

20 QUESTION: It's never a bar, but it's a tolling
21 provision, isn't that your answer?

22 MR. SCHWARTZ: Your Honor, our view of
23 6512(b)(3)(B) is that it's basically -- if the statute of
24 limitations was open to the taxpayer on the date that the
25 notice was mailed, then it's open to him in the tax court,

1 that he -- the tax court can grant him a refund, so if the
2 notice was mailed after 3 years from the due date, then
3 under no circumstances could the taxpayer recover.

4 QUESTION: Well, I think everybody agrees with
5 that.

6 QUESTION: So the statute of limitations
7 wouldn't have run, on your theory, but the bar to recovery
8 of money would have.

9 MR. SCHWARTZ: That's correct. The statute of
10 limitations on filing, in theory, as Justice Breyer
11 suggested, that goes on forever. Treasury Reg
12 6402-3(a)(5) says that a return showing an overpayment
13 constitutes a claim for refund, and it's deemed filed on
14 the same day, so a return filed several years after the
15 due date would be a timely claim, but the limitation on
16 amount would limit the taxpayer to the amount paid in the
17 3 years preceding the filing of the return, so there's no
18 danger of stale claims, and there's no danger of a stale
19 claim here.

20 The second reason that this --

21 QUESTION: On that -- in that same vein, then
22 can you tell us under what circumstances the 2-year look-
23 back would apply when the Commissioner -- when the
24 Commissioner sends a notice of deficiency?

25 The Commissioner sends a notice of deficiency.

1 When would the 2-year look-back ever come into play?

2 MR. SCHWARTZ: The 2-year look-back would come
3 into play the same way it would come into play if we were
4 not dealing with the tax court, and that is where the
5 2 years from the date the tax is paid provides for a
6 longer period of limitation than 3 years from the date the
7 return was filed, and that could come up in connection
8 with an audit.

9 For example, if a taxpayer, 1990 tax year, his
10 due date is April 15, 1991. That's the date that the
11 taxes are paid, and pursuant to an audit 2 years later he
12 makes an additional payment. He has 2 years to claim a
13 refund for the taxes paid pursuant to the audit, but only
14 3 years to claim the taxes that were paid on the due date.

15 QUESTION: So your view of the 2-year look-back
16 is, it can only work to the taxpayers advantage --

17 MR. SCHWARTZ: That is correct.

18 QUESTION: -- when it turns out to be longer
19 than the 3 years from the return filing.

20 MR. SCHWARTZ: That is correct. In the case of
21 a return-required tax, the only 2-year rule that applies
22 is the first 2-year rule.

23 QUESTION: How do you square your notion that
24 claim means a valid claim, that is, a claim accompanying a
25 return, with the language of 6511(a), which says a claim

1 for credit or refund of an overpayment in respect to which
2 the taxpayer is required to file a return shall be filed
3 within 3 years, blah, blah, blah, and then at the end of
4 that sentence, or if no return was filed by the taxpayer
5 within 2 years from the time the tax was paid.

6 That clearly contemplates a claim being made
7 without a return having been filed.

8 MR. SCHWARTZ: Your Honor, there are several
9 reasons why that second 2-year rule does not apply to a
10 taxpayer who's required to file a return.

11 QUESTION: I'm not -- I don't want to know when
12 the 2-year rule -- I want to know how it squares with your
13 notion that when the statute says claim, it means a valid
14 claim, that is, a claim accompanied by a tax return.
15 That's your principle.

16 MR. SCHWARTZ: My principle is that a valid
17 claim for refund where no original return has been filed
18 must be on a tax return.

19 QUESTION: Must be on a tax return. Well, that
20 doesn't square with the language of 6511(a). It clearly
21 contemplates a claim where no return has been filed.

22 MR. SCHWARTZ: That's for nonreturn-required
23 taxes. That second 2-year rule is for nonreturn-required
24 taxes, such as transferee liability.

25 QUESTION: It doesn't read that way. Claim for

1 credit of any tax in respect of which tax, the taxpayer is
2 required to file a return.

3 QUESTION: Where are you reading from?

4 QUESTION: 6511(a).

5 MR. SCHWARTZ: Your Honor, may I explain?

6 The -- there are two or three reasons why that
7 second 2-year rule where no return has been filed does not
8 apply to Mr. Lundy.

9 The first is, if -- the first 3-year rule,
10 3 years from the date the return is filed, or 2 years from
11 the date the tax is paid, whichever is later, covers all
12 possible situations, because if you assume that an
13 original claim could be filed that was not a return, it
14 would be covered by that first 2-year rule, making the
15 second 2-year rule surplusage.

16 The second reason is, if the -- if it was
17 possible to file a claim for refund that -- where no
18 original return has been filed, it would be limited by the
19 first 2-year rule, because the first 2-year rule would
20 provide a longer period of time than the 3-year rule, so
21 that the second 2-year rule would be surplusage.

22 The second reason is, if, as the IRS contends,
23 that the first sentence of 6511(a) applies to return-
24 required taxes, including the second 2-year rule, or if no
25 return was required, and the second sentence of 6511(a)

1 applies to stamps, then there's no rule to cover
2 nonreturn-required taxes, so that second 2-year rule,
3 which is surplusage for a return-required tax, must apply
4 to nonreturn-required tax.

5 Third, as originally enacted in 1954, the
6 statute provided for a limitation period of 3 years from
7 the due date. It was an absolute minimum 3-year period,
8 so that that second 2-year rule, or if no -- 2 years from
9 the date the tax was paid if no return was filed, could
10 not possibly apply to a return-required tax.

11 In fact, the tax court in this very case stated
12 that under the '54 code as originally enacted, the
13 taxpayer would have been entitled to a refund even under
14 the deemed claim theory because it was filed within 3
15 years from the due date.

16 Now, Congress in 1958 extended that period of
17 time. The amendment in 1958 was to improve the taxpayer's
18 position to provide that he would be able -- because the
19 Commissioner could assess a deficiency within 3 years from
20 the date the return was filed, but the taxpayer was
21 limited to 3 years from the date the return was due, so as
22 the tax court acknowledged that he could have recovered
23 under the language as originally enacted, the tax court
24 judge acknowledged that the purpose of the '58 amendment
25 was to extend the time for filing, and yet what the tax

1 court said was, somehow Congress did not perhaps analyze
2 all the effects of this language.

3 And Your Honor, I submit that this legislative
4 history is convincing evidence that a taxpayer is entitled
5 to a minimum of 3 years.

6 QUESTION: I don't really see how you avoid the
7 language. I mean, it's -- I've been struggling with it.
8 It seems just like somebody says -- to your son you say,
9 I'll give you all the ice cream you could have eaten at
10 the drug store if you'd been there.

11 I mean, if, it sort of means -- I can't get it
12 work any other way. It's working like a that. It's
13 working like, I'll tell you how much I'll give you. I'll
14 give you the amount you could have eaten if you'd been
15 there.

16 And then if you twist it around the way you want
17 to twist it, the thing sort of hangs in the air. I can't
18 figure out how to get there.

19 MR. SCHWARTZ: You're talking about the --

20 QUESTION: Of (B), the key language here,
21 6512(b)(3)(B).

22 MR. SCHWARTZ: Oh --

23 QUESTION: It looks like -- the question, it
24 seemed to me is whether that comma after (d) means that
25 you should read the if like a which, whereas they want to

1 read it like a that, and I don't see how you can avoid
2 it, to tell you the truth. I put that so you can explain
3 to me how you could.

4 One way is, you get the word claim to mean
5 refund, you see. I mean, you get -- not refund, return.
6 You get the word claim to include a return. That would do
7 it, except you run into problems elsewhere across the
8 page, where they quite clearly distinguish it.

9 MR. SCHWARTZ: Well --

10 QUESTION: But I can't think of any other way to
11 do it.

12 MR. SCHWARTZ: Your Honor, I'd like to get back
13 to the claim. I would like to address --

14 QUESTION: Yes. Yes, if claim includes return,
15 then you've got it.

16 MR. SCHWARTZ: Right. There's two --

17 QUESTION: But the difficulty with that is that
18 only the section before they talk about claims and they
19 talk about returns, and there's a whole phrase there that
20 doesn't make too much sense unless they mean to leave open
21 the possibility that you could have a claim that didn't
22 have a return.

23 MR. SCHWARTZ: Well --

24 QUESTION: But then is there any other -- are
25 you -- is there any other reading of this language that

1 gets you where you want?

2 MR. SCHWARTZ: Well, the legislative history.

3 QUESTION: I understand -- I like legislative
4 history, too, but nonetheless you do have to deal with the
5 language that they enacted, and that's why I'm looking to
6 see is there any other reading of that language, other
7 than a claim including the word return, that will get you
8 where you want to go.

9 MR. SCHWARTZ: Well, Your Honor, the IRS has
10 contended that the language is plain throughout the
11 litigation, but it is not plain. Our interpretation of
12 the statute is that -- the statute doesn't say, as if a
13 claim was -- had been filed, or assuming that.

14 QUESTION: It doesn't. It says, if.

15 MR. SCHWARTZ: If.

16 QUESTION: That's right. I --

17 MR. SCHWARTZ: And if is a conditional.

18 QUESTION: Yes. Well, you can use it, though,
19 and that's why I use the ice cream example, I'll give you
20 all you could have eaten if you'd been there. That's
21 all -- that doesn't mean, if you had been there, then
22 something else would have happened. It's a limitation.
23 It means how much you're going to get. So we use the word
24 if sometimes like that.

25 MR. SCHWARTZ: In this context, Your Honor --

1 the problem has arisen because Congress took the short cut
2 of incorporating the general statute of limitations into
3 6512, and the triggering points, the triggering points for
4 the limitation periods in 6511 are couched in terms of
5 claim for refund, because an administrative claim for
6 refund is a prerequisite to the granting of an
7 administrative refund or the jurisdiction of the district
8 court.

9 So it -- the statute's not self-executing when
10 it's incorporated by reference into 6512, and so there had
11 to be a reference to the word claim to trigger the
12 limitation periods in 6511, because the taxpayer would not
13 have filed a claim for refund in the tax court because
14 that's not a prerequisite, and this has always been
15 interpreted as a reference date for application of the
16 limitation periods in the tax court, so that if the
17 statute was open to the taxpayer on that date, if he could
18 have filed a timely claim for refund on the date that the
19 notice was mailed, he's entitled to a refund in the tax
20 court. That's the understanding of Congress.

21 On page 22 of our brief, we quote from a 60 --
22 1963 Senate report, and it says, since the 1954 enactment,
23 moreover, the Internal Revenue Service has in practice
24 interpreted the law as permitting the refund of amounts
25 where valid claims have been timely filed, as well as

1 where those claims could have been filed on the date of
2 the mailing of the notice of deficiency.

3 QUESTION: What did the 1962 Senate report
4 accompany?

5 MR. SCHWARTZ: It accompanied the addition of a
6 provision that allowed -- the provision accompanied
7 (b) (3) (C), which allows the tax court to grant a refund
8 where the claims have been filed prior to the mailing of
9 the notice of deficiency.

10 QUESTION: That's not one of the sections
11 involved here.

12 MR. SCHWARTZ: It's not, but this clearly
13 indicates the existence of a longstanding administrative
14 practice and Senate approval --

15 QUESTION: Well, it indicates the approval by a
16 Senate committee of something that has been done over a
17 period of years, or that the Senate committee thinks has
18 been done over a period of years. I mean, are we
19 supposed to take that as a substitute for reading the
20 statutes and the rulings?

21 MR. SCHWARTZ: No, Your Honor, but I think a
22 fair reading of the statute is that there is no deemed
23 claim, that it's a reference date so that the taxpayer
24 is -- if he could have filed a valid claim for refund on
25 the date the notice was mailed, he's entitled to a refund.

1 QUESTION: That's a plausible argument. I don't
2 think much is added to it by quoting a 1962 Senate report.

3 MR. SCHWARTZ: Well, Your Honor, there's other
4 evidence of the longstanding administrative practice of
5 the Service to grant refunds under these circumstances.
6 For one, I would -- the explosion of cases that occurred
7 since 1991 and 1992, this Court in Fribourg Navigation
8 stated that where you have an explosion in litigation
9 where before there was none, it is strong evidence of the
10 longstanding administrative practice.

11 You have the facts of this very case, where once
12 the taxpayer dropped his petition in the mail box, under
13 the IRS theory of this case, he was barred by the statute
14 of limitations, and yet the IRS answered the complaint,
15 they dealt with him for a year, they made him submit 160-
16 some pages of documents --

17 QUESTION: Well, I don't think he was barred by
18 the statute of limitations. Assuming that he made a
19 tremendous amount of money and filed a return 10 years
20 down the line, I assume that -- and that return had been
21 filed promptly, I assume that within the period of that
22 look-back he could have gotten the earlier refund that he
23 was seeking, couldn't he, or am I wrong about that?

24 MR. SCHWARTZ: No, Your Honor. Once he
25 petitions the tax court under 6512(a) he's precluded from

1 thereafter going to the district court, so he was out of
2 luck, and once he filed that petition in the tax court, he
3 had no way of ever getting his refund back.

4 QUESTION: Well, I guess I'm assuming that he
5 promptly dismisses and then later on makes money, pays the
6 money, and then asks for some of it back.

7 MR. SCHWARTZ: But the tax court acquires
8 deficiency and refund jurisdiction the moment that the
9 taxpayer files his petition in response to the notice.
10 Once that occurs, he's thereafter barred from going to the
11 district court and seeking a refund, so he sort of got
12 caught in the crack.

13 QUESTION: He can't dismiss?

14 MR. SCHWARTZ: No. Once the tax court acquires
15 jurisdiction, that's it. He's out of luck.

16 QUESTION: He cannot dismiss --

17 QUESTION: I understand this --

18 QUESTION: He cannot dismiss the suit that he
19 brought?

20 MR. SCHWARTZ: He's not bringing the suit. He's
21 responding to the notice of deficiency.

22 QUESTION: I understand, but he's the one that
23 takes the initiative in getting it before the tax court.

24 MR. SCHWARTZ: Your Honor, my understanding is
25 that once he files a petition, that's final. The tax

1 court acquires jurisdiction, and thereafter the tax court
2 is precluded -- excuse me, the taxpayer is precluded from
3 ever going to another court.

4 QUESTION: Well, what is your -- do you have a
5 textual basis for that understanding that he cannot
6 dismiss?

7 MR. SCHWARTZ: 6512(a), Your Honor.

8 QUESTION: Does it say he can't dismiss?

9 MR. SCHWARTZ: I don't have the statute in front
10 of me --

11 QUESTION: Okay.

12 MR. SCHWARTZ: -- but it precludes him from
13 thereafter filing a suit in the district court.

14 QUESTION: So long as he stays in the tax court,
15 but if he gets out of the tax court --

16 MR. SCHWARTZ: He can't get out of the tax
17 court, Your Honor.

18 QUESTION: He cannot dismiss.

19 MR. SCHWARTZ: That's correct.

20 QUESTION: But in answer to the question about,
21 couldn't you revive a stale claim by paying a little bit
22 years down the road, don't you -- aren't you still bound
23 by the look-back period that you can't go more than
24 3 years -- you can't get back money that you paid more
25 than 3 years ago?

1 MR. SCHWARTZ: You mean assuming that he somehow
2 would be able to file a refund suit?

3 QUESTION: In other words, doesn't the look --
4 the very purpose of the look-back provision to stop that
5 kind of thing where you, many years down the road, pay a
6 small piece, a small overpayment, claim that back, and
7 then -- and use that as leverage to go 7 years back to get
8 the rest of the overpayment? Isn't that the very purpose
9 of having these look-back provisions?

10 MR. SCHWARTZ: Yes, but the look-back rule is
11 the teeth of the limitation provisions, and prevents stale
12 claims.

13 But Your Honor, this case is very much like
14 Williams, because the very purpose of the tax court is to
15 assist taxpayers like Mr. Lundy to allow him to contest an
16 asserted deficiency without first -- without prepaying,
17 and yet, once he filed his petition in the tax court, he
18 was in a position where he had no realistic alternative,
19 and no remedy, because his only choice once that notice of
20 deficiency is mailed to him is either to prepay the tax
21 and file a suit in the district court, or go to the tax
22 court, where he forfeits his refund, so that remedy --

23 QUESTION: Maybe that's one of the penalties for
24 not filing a tax return when you're supposed to. I mean,
25 there are all sorts of penalties. Isn't it conceivable

1 that this is one of them?

2 MR. SCHWARTZ: Your Honor, there are penalties.
3 There's a penalty for late filing, 6651, but confiscation
4 of your refund is not one of those penalties.

5 QUESTION: Well, that remains to be seen. I
6 mean --

7 (Laughter.)

8 QUESTION: But the mere notion that this is
9 unthinkable doesn't strike me as self-evident. I mean, we
10 begin with a taxpayer who didn't file a tax return when he
11 should have.

12 MR. SCHWARTZ: That's correct, Your Honor, but
13 if we assume that Mr. Lundy had a neighbor in the same
14 position who overpaid his '87 income taxes, the return was
15 due on April 15, '88, and he also was late filing, but he
16 never got a notice of deficiency, he filed on the same
17 date, on December 28, more than 2 but less than 3 years,
18 he'd get his refund. Mr. Lundy didn't. Or --

19 QUESTION: Which is an inducement to the
20 taxpayer to get moving. I mean, you can't say it's
21 irrational.

22 MR. SCHWARTZ: But Your Honor --

23 QUESTION: No taxpayer would be in this bind if
24 they filed the tax return within 2 years, is that right?

25 MR. SCHWARTZ: That's correct, but Congress has

1 afforded taxpayers a 3-year grace period, and this is
2 taken away from them by the mailing of a notice of
3 deficiency. Why --

4 QUESTION: That's the question. Has Congress
5 done that, or has Congress said, if you wait beyond
6 2 years, you're in jeopardy of getting that notice of
7 deficiency first.

8 MR. SCHWARTZ: But Congress has not said that.
9 That's nowhere to be found in the statute.

10 QUESTION: That's what we're arguing about in
11 this case, I take it.

12 MR. SCHWARTZ: Well, Your Honor --

13 QUESTION: I still don't see how you read the
14 statute -- I mean, you know, I -- it makes sense for
15 Congress to say, everybody gets 3 years. It also makes
16 sense to say, if you don't file your return, you get 2
17 years. Maybe they ought to say, 2 years if you don't file
18 your return, 3 years if you do. Maybe it's a little
19 different, whether it's -- but what does it say? I can't
20 work out -- I mean, I can't figure out any way to get
21 it --

22 MR. SCHWARTZ: Our interpretation is that the
23 taxpayer is in the same position in the tax court as he
24 would be in the district court, the claims court, or
25 filing an administrative claim for refund.

1 QUESTION: How would Congress have said what the
2 Government says it said more clearly than what is here?
3 You apparently -- I gather from an earlier comment you
4 apparently think it would have been, the problem is that
5 (3) (B), what was it, 6512(b) (3) (B) does not say, as if on
6 the date of the mailing, but just if on the date of the
7 mailing, but it couldn't possibly say as if.

8 Within the period which would be applicable, as
9 if on the date of the mailing? No. I mean, the way to
10 say what the Government says it says is precisely what is
11 written here, within the period that would be applicable
12 under section 6511 if on the date, not as if. I wouldn't
13 put an as in there. They would be totally incoherent.

14 MR. SCHWARTZ: But that's what the Government
15 does in all of its briefs. They say, as if --

16 QUESTION: No, no --

17 MR. SCHWARTZ: -- assuming that.

18 QUESTION: No, you say that it requires as if,
19 in order to get to their interpretation, but it seems to
20 me their interpretation is precisely what's written
21 there -- within the period which would be applicable if
22 the notice of deficiency had been filed. I don't know how
23 you get an as if there. It doesn't make sense at all.

24 MR. SCHWARTZ: The language is not clear, Your
25 Honor.

1 My time is limited. I --

2 QUESTION: It seems perfectly clear to me.

3 MR. SCHWARTZ: My time is limited. I'd like to
4 take the opportunity to persuade you that the claim should
5 be considered a return.

6 There are two other reasons that claim in this
7 context must be considered to be return. Treasury Reg
8 6402-2(b) requires that a claim contain the detailed
9 statement of the grounds upon which the claim is based.
10 That, again, is the same information that if on a document
11 submitted to the IRS under case law and under a '74
12 revenue ruling would constitute a return and finally, and
13 most important, Regulation 6402-3(a)(1) requires, whereas
14 here no original return has been filed, that the taxpayer
15 must file his claim on a return.

16 So the IRS is asking you to ignore its own
17 regulations and treat the claim referred to in
18 6512(b)(3)(B) as a defective claim, and I think that's an
19 impermissible construction. I think you have to attribute
20 to Congress an intent that that claim is a valid claim.

21 QUESTION: Whereas I guess you take the position
22 that in 6511(a) the term claim can include valid claims
23 and invalid claims that have to be corrected to become
24 valid, and the 2-year rule would apply to the invalid
25 claim.

1 MR. SCHWARTZ: Well, Your Honor --

2 QUESTION: And then if -- you know, one filed
3 without a return.

4 MR. SCHWARTZ: Well, I think the key thing here
5 is that a claim filed on a return, that a return showing
6 an overpayment, is the equivalent of a claim under the
7 Treasury regs -- own regulations.

8 Thank you.

9 QUESTION: Thank you, Mr. Schwartz.

10 Mr. Jones, you have 2 minutes remaining.

11 REBUTTAL ARGUMENT OF KENT L. JONES

12 ON BEHALF OF THE PETITIONER

13 MR. JONES: Thank you.

14 The principal contention that Respondent raises
15 here was not addressed by the court of appeals and has not
16 been accepted by any court. That contention is that a
17 claim for refund and a return are synonymous concepts.

18 Congress plainly didn't intend that. They use
19 the terms quite distinctly and separately. They make the
20 periods of limitation and the refund periods depend upon
21 which came first and how long apart they were, so to reach
22 the conclusion that respondent seeks would literally make
23 nonsense out of 6511(a), 6511(b), and 6512(b).

24 No court has supported that assertion.

25 The suggestion that somehow this problem would

1 be cured if the respondent could have filed a timely claim
2 is simply off the point. A taxpayer can always file a
3 claim for refund at any time, but that doesn't alter the
4 limitations that apply when the refund claim is filed.

5 For example, in this case, if they had filed --
6 if respondent had filed a refund claim on the date the
7 notice of deficiency was issued, he would have been
8 limited to the 2-year refund period, because as of that
9 date he had filed no return.

10 Respondent simply ignores what's the principal
11 dilemma that he faces. That is, that he was delinquent in
12 filing his return, and Congress made that delinquency
13 relevant in determining the refund jurisdiction of the tax
14 court.

15 QUESTION: The question, Mr. Jones -- you can
16 answer yes or no -- can a taxpayer dismiss a petition
17 filed with the tax court?

18 MR. JONES: If I could answer yes or no --

19 QUESTION: Once a tax court has him --

20 MR. JONES: -- Justice Scalia, I certainly
21 would. I have to admit, I don't know.

22 I have looked at 6512(a). It doesn't say. It
23 simply says that when you have this tax court case, no
24 other court can decide whether there's a refund, and
25 neither can the Commissioner. It doesn't say whether that

1 case could be dismissed and a subsequent case filed.

2 It's possible the Commissioner has taken a
3 position on that, so I'm reluctant to make an argument on
4 it not knowing what position we may have taken.

5 Thank you very much.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.

7 The case is submitted.

8 (Whereupon, at 11:02 a.m., the case in the
9 above-entitled matter was submitted.)

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