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## ARTICLES

### THE EFFECT OF A TAXPAYER ADVOCATE ORDER ON TOLLING THE TAXPAYER STATUTE OF LIMITATIONS

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#### I. INTRODUCTION

Statutes of limitations for taxes are rules that protect both the government and its citizens from old tax claims.<sup>1</sup> These rules are important because they allow both parties to focus their energies on current and future concerns without being encumbered by potential claims from the

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1. See *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments*] (“The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations . . . .”); Note, *Estoppel of Taxpayer to Set Up Statute of Limitations Where Government Is Led to Defer Tax Assessment by Taxpayer’s Misrepresentation of Law*, 45 YALE L.J. 178, 179 (1935) (“The purpose of the Federal Statute of Limitations as to tax claims is to prevent the taxpayer from being subjected to belated assessments which, being unexpected, may prove unduly burdensome.” (footnote omitted)).

past.<sup>2</sup> Time periods are generally fixed through either statutory or case law<sup>3</sup> but may be adjusted by mutual agreement<sup>4</sup> or certain administrative actions.<sup>5</sup> An administrative action may automatically suspend (or “toll”) the running of the statute of limitations or may leave it unaffected.

Disturbingly, there are still areas where it is unclear whether an administrative action tolls the statute of limitations. This concern was recently raised with the Internal Revenue Service Taxpayer Advocate Service (TAS). In *Rothkamm v. United States*,<sup>6</sup> the question was whether petitioning to the TAS tolled the statute while the TAS considered the case.<sup>7</sup> The Court of Appeals for the Fifth Circuit held yes, the “application tolled the running of the statute of limitations under the plain language [of the statute].”<sup>8</sup> With a growing backlog in the TAS and an ever-shrinking budget for the IRS in general,<sup>9</sup> the ruling in the *Rothkamm* case protects taxpayers when they seek help from the IRS but have difficulty receiving prompt assistance.<sup>10</sup> However, at this time, such protection is limited to the Fifth Circuit; other circuits have yet to weigh in on this issue.

We begin with a discussion of what statutes of limitations are and their history generally and as applied to federal individual taxation. After this

2. *Developments, supra* note 1, at 1185; Note, *supra* note 1, at 179; cf. *Toussie v. United States*, 397 U.S. 112, 114–15 (1970) (“Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate criminal liability.”), *superseded by statute other grounds*, Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(31), 85 Stat. 348, 352–53 (codified as amended at 50 U.S.C. app. § 462(d) (Supp. II 1972)).

3. *Statute of Limitations*, CORNELL U.L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/statute\\_of\\_limitations](https://www.law.cornell.edu/wex/statute_of_limitations) [<https://perma.cc/WF2M-F3YZ>].

4. *Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77, 79 (D.C. Cir. 1998) (holding that parties may agree to suspend a statute of limitations).

5. For example, I.R.C. § 7811(d) (2012) suspends the statute of limitations from the date of the taxpayer’s application to the National Taxpayer Advocate until the date of decision.

6. *Rothkamm v. United States*, 802 F.3d 699 (5th Cir. 2015).

7. *Id.* at 702.

8. *Id.* at 714.

9. Lisa Rein, *The IRS Hung Up on Taxpayers 8.8 Million Times This Year. And There’s More Bad News About Customer Service*, WASH. POST (July 16, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/07/16/the-irs-hung-up-on-taxpayers-8-8-million-times-this-year-and-theres-more-bad-news-about-customer-service/> [<https://perma.cc/TMK9-CZ52>]; CHUCK MARR & CECILE MURRAY, CTR. ON BUDGET & POL’Y PRIORITIES, *IRS FUNDING CUTS COMPROMISE TAXPAYER SERVICE AND WEAKEN ENFORCEMENT 1*, 3–5 (2016), <http://www.cbpp.org/sites/default/files/atoms/files/6-25-14tax.pdf> [<https://perma.cc/ECM5-BS8R>].

10. See *Rothkamm*, 802 F.3d at 714.

background, we next discuss what administrative actions will toll statutes of limitations. In the next section, we explain the history and procedures of the TAS, including factors it considers when accepting a petition and its caseload trends. Following this, we recount the *Rothkamm* case, especially as it applies to the statute of limitations for cases being considered by the TAS. Finally, in our last section, we discuss the limitations and implications of the *Rothkamm* case and conclude with a recommendation that similar reasoning should be adopted either formally by Congress or the IRS, or informally by the other circuits.

## II. STATUTES OF LIMITATIONS

### A. *Definition of Statute of Limitations*

A statute of limitations is “[a]ny law that bars claims after a certain period of time passes after an injury. The period of time varies depending on the jurisdiction and the type of claim.”<sup>11</sup> For individuals in the United States, federal individual income tax claims that can be barred normally pertain to assessing and collecting taxes, and the taxpayer’s right to sue for a refund or the recovery of seized property.<sup>12</sup> Most, if not all, statutes of limitations in federal individual income tax law are statutory;<sup>13</sup> however, while some statutes of limitations may “come from judicial common law,”<sup>14</sup> there are only a few early examples of judicially created statutes of limitations for taxes.<sup>15</sup>

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11. *Statute of Limitations*, *supra* note 3.

12. *See infra* Appendix 1.

13. *See infra* Appendix 1.

14. *Statute of Limitations*, *supra* note 3; *see also* Mitchell A. Lowenthal et al., Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1015 n.12 (1980) (“Common law time bars are judicially created limitations on rights of action. Examples of common law time bars include: the rule against perpetuities [sic], the common law year-and-a-day murder rule, the presumption of death after seven years absence, and the presumption of satisfaction on notes after the lapse of 20 years.”).

15. *See* JOHN D. LAWSON, *THE LAW OF PRESUMPTIVE EVIDENCE* 308 (A.L. Bancroft & Co. 1885) (“Independently of a statute of limitations or in the absence of one, after a lapse of twenty years the law raises a presumption of the payment of . . . taxes . . . .”); *id.* at 320 (citing cases applying the twenty-year presumption to taxes); *cf.* *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 713 (1966) (White, J., dissenting) (“Courts have not always been reluctant to ‘create’ statutes of limitations, the common-law doctrine of prescription by which judgments are presumed to have been paid after the lapse of 20 years being just one example.” (citations omitted)).

*B. Legal History*

Statutes of limitations trace their history, in some form or another, to ancient Roman law.<sup>16</sup> Roman law was first written down on the Twelve Tables in 451 B.C., which became “the foundation of the whole fabric of Roman law.”<sup>17</sup> One of the Twelve Tables’ laws dealt with the concept of *usucapio*, which created a new title to property by use and the passage of time.<sup>18</sup> Part three of Table VI provided for a prescriptive title to unowned property after possession for one year for movable property and two years for real property.<sup>19</sup> This idea evolved from the passage of time creating rights to also limiting remedies in later Roman law.<sup>20</sup> Several centuries later, the Roman concept of prescription appeared in English law in the 1200s and affected challenges to ownership of land.<sup>21</sup> In 1236, real-property actions were prohibited if the livery of seisin occurred “prior to a given date, such as the coronation of Henry II.”<sup>22</sup> Tying a statute of limitations to a historical event proved to be bad policy as it created differing lengths of time for the same types of claims,<sup>23</sup> so, in the 1540s, fixed time periods were established.<sup>24</sup> Eighty years later, “[t]he Limitations Act of 1623 mark[ed] the beginning of the modern law of

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16. Paul D. Swanson, Note, *Limitless Limitations: How War Overwhelms Criminal Statutes of Limitations*, 97 CORNELL L. REV. 1557, 1562 (2012); see also Lowenthal et al., *supra* note 14, at 1020–21.

17. ANDREW STEPHENSON, A HISTORY OF ROMAN LAW 120–22 (Fred B. Rothman & Co. 1992) (1912).

18. David D. Snyder, *Possession: A Brief for Louisiana’s Rights of Succession to the Legacy of Roman Law*, 66 TUL. L. REV. 1853, 1876–77 (1992); see also RUDOLPH SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW § 64, at 318 (James Crawford Ledlie, trans., 3d ed. 1907) (“By usucapio, or prescription, we mean the acquisition of ownership by continuous possession.”).

19. See STEPHENSON, *supra* note 17, at 130; Snyder, *supra* note 18, at 1876 n.105.

20. MAX RADIN, HANDBOOK OF ROMAN LAW § 134, at 361–65 (1927) (describing the evolution from *usucapio* to prescription to the limitation on actions created by Justinian that barred actions after thirty years).

21. See *Developments*, *supra* note 1, at 1177.

22. *Id.*; see also W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW 118 (F.H. Lawson ed., 2d rev. ed. 1974) (“The [right of action] was barred, not by a fixed period of limitation, but by some historical event . . . .”). *Livery of seisin* was the medieval ritual used in England to transfer ownership of land. *Livery of seisin*, BLACK’S LAW DICTIONARY (10th ed. 2009).

23. See *Developments*, *supra* note 1, at 1177 (“These statutes obviously became less effective with the passage of time.”).

24. *Id.*

limitations on personal actions in the common law.”<sup>25</sup> This act ascribed differing limitation periods for different types of actions brought before the King’s courts,<sup>26</sup> including “prohibit[ing] actions to recover land” where the right to the claim was more than twenty years old.<sup>27</sup> The purposes behind the Limitations Act of 1623 were varied, but they included keeping “inconsequential claims” from being brought, “minimiz[ing] the hardship[s] . . . on poor defendants,” and giving “liberal provisions for disabilities, the essence of which remains to this day.”<sup>28</sup>

Colonial governments in what became the United States adopted statutes of limitations for criminal cases.<sup>29</sup> In 1652, the colony of Massachusetts established a one-year statute of limitations for prosecuting misdemeanor offenses.<sup>30</sup> Statutes of limitations then spread through the colonies and to the federal government.<sup>31</sup> In 1790, the First Congress of the United States established statutes of limitations for criminal activities.<sup>32</sup> Originally, the only tolling provision was for individuals “fleeing from justice.”<sup>33</sup> “This represented the sole means by which a prosecutor might pause the statute of limitations.”<sup>34</sup> Over time, however, the relatively short statutes of limitations were expanded, allowing for longer times to prosecute crimes.<sup>35</sup> Along with this expansion came more mechanisms for tolling the time for the limitations.<sup>36</sup> Now at both the federal and state levels, statutes of limitations govern the great majority of civil and criminal actions.<sup>37</sup> The United States Supreme Court has held that the purpose of criminal statutes of limitations is to “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.”<sup>38</sup>

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25. *Id.* at 1178 (footnotes omitted).

26. *Id.*

27. *Id.* at 1177.

28. *Id.* at 1178.

29. Swanson, *supra* note 16, at 1562.

30. *Id.* at 1562 n.27.

31. *See id.* at 1562–63.

32. *Id.* at 1562.

33. *Id.* at 1563 (quoting An Act for the Punishment of Certain Crimes against the United States, ch. 9, § 32, 1 Stat. 112, 119 (1790)).

34. *Id.*

35. *See id.*

36. *Id.*

37. *Developments, supra* note 1, at 1179.

38. *Toussie v. United States*, 397 U.S. 112, 114–15 (1970), *superseded by statute on*

Civil statutes of limitations share a similar rationale.<sup>39</sup>

*C. Statutes of Limitations Specific to Federal Individual Income Tax*

1. Assessment of Taxes

The most commonly used statutes of limitations in taxation pertain to the assessment and collection of taxes and taxpayers' claims for refunds. Refer to Appendix 1 for a summary of common provisions. The assessment of federal individual income tax has a statute of limitations ending three years from the latter of the date that the return was filed or the date the return was due.<sup>40</sup> For income from pass-through entities, the "return" is that of the beneficial owner, such as a partner in a partnership, rather than the entity itself.<sup>41</sup> Spouses who initially filed separate returns but who later wish to file a joint return instead have a three-year statute of limitations to file this amendment after the separate returns were filed or originally due, "without regard to any extension of time granted to either spouse."<sup>42</sup> This amendment is not allowed if either spouse has: (a) filed a petition with the Tax Court in response to a notice of deficiency; (b) filed suit to reclaim any of that year's tax; (c) signed a closing agreement for that tax year; or (d) compromised any civil or criminal case involving that year's tax.<sup>43</sup> Once a joint return is filed, the taxpayers may not file separate returns after the due date unless either spouse died during the tax year<sup>44</sup> or the IRS prepared and filed the original, separately filed returns.<sup>45</sup> In situations where no return is filed, there is no statute of limitations.<sup>46</sup> Likewise, there is no statute of limitations for a substitute return executed

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*other grounds*, Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(31), 85 Stat. 348, 352–53 (codified as amended at 50 U.S.C. app. § 462(d) (Supp. II 1972)).

39. *Cf.* *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944) (reasoning in a civil case that "[s]tatutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared").

40. I.R.C. § 6501(a) (2012).

41. Treas. Reg. § 301.6501(c)–1(g)(4) (2016).

42. I.R.C. § 6013(b)(1)–(2).

43. *Id.* § 6013(b)(2)(B)–(D).

44. Treas. Reg. § 1.6013–1(a), (d)(5) (2016).

45. *See* *Millsap v. Comm’r*, 91 T.C. 926, 937–38 (1988) (allowing individuals to contest substitute returns filed by the IRS).

46. Treas. Reg. § 301.6501(c)–1.

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by the IRS.<sup>47</sup> The IRS uses the same procedures for assessing and collecting, regardless of whether it is for interest or the original tax.<sup>48</sup>

## 2. Collection of Taxes

IRS efforts to collect a tax by levy or court proceeding must begin within ten years of the tax's assessment, less than ninety days after an installment agreement's expiration, or prior to an installment agreement's expiration if it has been ten years and the IRS has already released the levy.<sup>49</sup> In addition to collecting tax, the IRS may also offset a taxpayer's federal tax refund with debts the taxpayer owes to federal agencies (such as overpayment of Social Security)<sup>50</sup> and for other "past-due, legally enforceable nontax debt[s]" (such as child support).<sup>51</sup> Previous erroneously issued federal income tax refunds can be recouped provided that action begins within two years after paying the refund or five years if any part of the erroneous refund was caused by the taxpayer's "fraud or misrepresentation of a material fact."<sup>52</sup>

## 3. Filing Claims for Credits or Refunds

The statute of limitations for a taxpayer filing for a federal income tax credit or refund is generally three years after the return was filed or due, or two years from the time the tax was paid, whichever is later.<sup>53</sup> Where no return is filed, only the two years after the tax was paid applies.<sup>54</sup> However, several exceptions exist. In the case of claimed refunds or credits based on either "bad debts" or "worthless securities," the statute expires in seven years, not three.<sup>55</sup> For credits and refunds relating to net

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47. I.R.C. § 6501(b)(3).

48. Treas. Reg. § 301.6601-1(f)(1) (2016).

49. I.R.C. § 6502(a); Treas. Reg. § 301.6502-1(a) to (b)(1) (2016).

50. 31 U.S.C. § 3716(a) (2012); *see also* SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM: GN 02201.029(A)(2) THE TREASURY OFFSET PROGRAM (TOP) (2016), <http://policy.ssa.gov/poms.nsf/lnx/0202201029> [<https://perma.cc/32FJ-BQ3J>].

51. 31 C.F.R. § 285.2(b)(1) (2015); *see also* Office of Child Support Enf't, *Federal Tax Refund Offset Program*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Apr. 6, 2015), <https://www.acf.hhs.gov/css/resource/federal-tax-refund-offset-program-information-for-families> [<https://perma.cc/G4WZ-KY6K>].

52. I.R.C. § 6532(b) (2012); Treas. Reg. § 301.6532-2 (2016).

53. I.R.C. §§ 6511(a), 6501(b)(1) (2012).

54. *Id.*

55. *Id.* § 6511(d)(1). The statute further provides:

operating losses and net capital loss carrybacks:

[T]he period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss or net capital loss which results in such carryback, or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later.<sup>56</sup>

The same is true for an unused credit carryback: The statute runs until three years after the due date for the tax return where the credit originated.<sup>57</sup> If any portion of the credit carryback is “attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year,” the statute of limitations is also three years from the due date of the return containing the origination of the carryback, as extended.<sup>58</sup> The statute of limitations on credits and refunds for foreign taxes is ten years from the due date of the return.<sup>59</sup> Taxpayers filing suit to recover taxes, penalties, and interest may not do so until six months after filing their claim for a refund and must sue within two years of the IRS mailing the taxpayer a notice that part of the claim was disallowed.<sup>60</sup>

#### 4. Transfers

Where a tax liability is transferred to another party, the statute of limitations must be adjusted.<sup>61</sup> The statute of limitations for transferee

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If the claim for credit or refund relates to an overpayment on account of the effect that the deductibility of such a debt or loss has on the application to the taxpayer of a carryback, the period shall be either 7 years from the date prescribed by law for filing the return for the year of the net operating loss which results in such carryback or the period prescribed in paragraph (2) of this subsection, whichever expires the later.

*Id.*

56. *Id.* § 6511(d)(2).

57. *Id.* § 6511(d)(4)(A).

58. *Id.*

59. *Id.* § 6511(d)(3)(A).

60. I.R.C. § 6532(a)(1) (2012).

61. See *Columbia Pictures Indus., Inc. v. Comm’r*, 55 T.C. 649 (1971), where the court found the statute of limitations for a transferee had expired, reasoning:

The fundamental purpose of a statute of limitations is to prevent the litigation of stale claims at a time when the basic facts may have become obscured by the

liability is one year after the original taxpayer's statute of limitations expires if the transferee is an initial transferee; for subsequent transferees, the statute of limitations is either one year after the previous transferee's statute of limitations expires or three years after the original taxpayer's statute of limitations expires, whichever is sooner.<sup>62</sup> Where the original taxpayer or initial transferee is the subject of a collection lawsuit in a United States district court, the statute of limitations for assessment ends "1 year after the return of execution" of that proceeding,<sup>63</sup> except in the case of fiduciaries, where the statute of limitations ends the later of "1 year after the liability arises" or the expiration of the statute of limitations for collecting the underlying tax.<sup>64</sup>

### 5. False or Fraudulent Returns

Statutes of limitations are also adjusted for large omissions, criminal or false returns, or willfully evaded taxes. For gross omission of income, defined as an omission of 25% or more of the return's stated gross income, the statute of limitations is six years after the return was filed or due, whichever is later.<sup>65</sup> Beginning July 2015, a basis overstatement is considered an omission from gross income.<sup>66</sup> Where a listed transaction<sup>67</sup>

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passage of time. This fundamental concept underlying statutes of limitations is particularly apropos with regard to the liability of transferees who may be called upon to litigate the tax liability of an unrelated party after the facts and evidence which gave rise to the purported liability have become stale and obscure.

*Id.* at 661 (footnote omitted).

62. I.R.C. § 6901(c) (2012); Treas. Reg. § 301.6901-1(c)(1) to (2) (2016).

63. I.R.C. § 6901(c)(2); Treas. Reg. § 301.6901-1(c)(3); *see also Columbia Pictures*, 55 T.C. at 656 (explaining that this exception only applies to court proceedings in federal district court brought to collect tax obligations, not Tax Court proceedings). "Return of execution" refers to a court officer (e.g., sheriff or marshal) bringing back and filing with the court the writ of execution used to collect a judgment. *See Execution*, BLACK'S LAW DICTIONARY (10th ed. 2009); *Return*, BLACK'S LAW DICTIONARY (10th ed. 2009); FED. R. CIV. P. 69(a) (governing writs of execution).

64. I.R.C. § 6901(c)(2)-(3); Treas. Reg. § 301.6901-1(c)(3) to (4).

65. I.R.C. § 6501(e)(1)(A) (2012); Treas. Reg. § 301.6501(e)-1(a) (2016).

66. On July 31, 2015, the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2005, 129 Stat. 443, 456, amended § 6501(e)(1)(B) so that an overstated basis now constitutes an omission of gross income, superseding *United States v. Home Concrete & Supply*, 132 S. Ct. 1836 (2012), which had held that "the provision does not apply to an overstatement of basis," *id.* at 1839.

67. "A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction." IRS, Instructions for Form 8886, at 1 (Mar. 2011), <https://www.irs.gov/pub>

is omitted, the statute of limitations is one year after the earlier of the date that the required information is furnished to the IRS or the date that a material advisor<sup>68</sup> to the listed transaction satisfies the list maintenance requirements found in § 6112.<sup>69</sup> The statute of limitations for criminal prosecutions is generally three years from the date of the offense,<sup>70</sup> but this increases to six years for defrauding the federal government, deliberately trying to avoid paying a tax, deliberately helping with a spurious return, not filing a return or paying a tax, making false statements, intimidating federal employees, violating tax laws as a federal employee, or participating in a conspiracy to violate tax laws.<sup>71</sup> There is no statute of limitations where one files a false return or willfully attempts to evade tax.<sup>72</sup>

In addition to the statute of limitations applying to individual income taxpayers, there may be additional statutes of limitations for individuals acting in the role of employer,<sup>73</sup> trustee,<sup>74</sup> partner,<sup>75</sup> or estate beneficiary

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/irs-pdf/i8886.pdf [https://perma.cc/B74X-Y7F3]; see also I.R.C. § 6707A(c) (2012).

68. A “material advisor,” is someone who is paid a certain amount to “provide[] any material aid, assistance, or advice . . . carrying out” a listed transaction. I.R.C. § 6111(b)(1) (2012). For listed transactions, the payment threshold is either \$10,000 (if substantially all the tax benefits are for an individual) or \$25,000 (if for a business). IRS, Instructions for Form 8918, at 1 (Dec. 2011), <https://www.irs.gov/pub/irs-pdf/i8918.pdf> [https://perma.cc/2M8A-GRLR].

69. I.R.C. § 6501(c)(10).

70. I.R.C. § 6531 (2012).

71. *Id.*

72. § 6501(c)(1)–(2); cf. I.R.C. § 7454(a) (2012) (stating the IRS carries the “burden of proof” in cases involving tax fraud).

73. See, e.g., John Keenan & Andrew Brewster, *IRS Analyzes Whether Third-Party Employment Tax Returns Are Sufficient to Start Assessment Statute of Limitation*, 46 TAX ADVISER 52, 52–54 (2015) (discussing Chief Counsel Advice that “analyzed . . . whether an employment tax return prepared and filed by third party on behalf of an employer was sufficient to commence the period of limitation on assessment for the employer under Sec. 6501.”).

74. See, for example, *Smith v. SunTrust Bank*, 754 S.E.2d 117, 123–26 (Ga. Ct. App. 2014), where a line item on an account statement reporting a sale to a straw man did not start the statute of limitations against the trustee for the sale; however, a detailed report from the trustee to the beneficiaries would have started it. See also *Beck v. Mueller*, No. 2013AP518, 2014 WL 1810113, at \*3–4 (Wis. Ct. App. 2014), where the Wisconsin Court of Appeals ruled that the trust beneficiaries’ claims against the trustee were time-barred because the beneficiaries had notice of the trustee’s actions and their claims thus accrued before the trustee filed his formal accounting. See UNIF. TRUST CODE § 1005 (UNIF. LAW COMM’N 2010) (providing the statutes of limitations against a trustee for breach of trust).

75. See IRS, INTERNAL REVENUE MANUAL § 8.19.9.3 (May 23, 2008) [hereinafter IRM], [https://www.irs.gov/irm/part8/irm\\_08-019-009.html](https://www.irs.gov/irm/part8/irm_08-019-009.html) [http://perma.cc/V6WG-P

or donor owing gift taxes.<sup>76</sup> There are also less-formal policy decisions that can functionally affect a taxpayer's statute of limitations. For example, the IRS Office of Appeals may refuse to accept a taxpayer's case where there is a short amount of time remaining on a statute of limitations unless the taxpayer agrees to extend it.<sup>77</sup> And as mentioned earlier, an administrative action may automatically toll a statute of limitations.<sup>78</sup>

### III. TOLLING THE STATUTE OF LIMITATIONS FOR EQUITABLE AND ADMINISTRATIVE REASONS

#### A. *Equitable Tolling*

Equitable tolling is a court-created rule intending “to prevent unjust or technical forfeitures of the right to a trial on the merits” because a statute of limitations unfairly expired.<sup>79</sup> For example, equitable tolling can restore fairness in enforcing a statute of limitations.<sup>80</sup> Usually, this occurs when the purpose of a statute of limitations—preventing surprises caused by the

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DRM] (stating the statute of limitations for non-TEFRA pass-through entities is controlled at the investor level, necessitating that extensions of the statute of limitations for adjustments proposed to the pass-through entity's returns must be protected by securing a statute extension from each investor in the pass-through entity). Contrast this to the rules under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. Law 97-248, § 402, 96 Stat. 324, 648 (1982) (codified as amended at I.R.C. § 6221 (2012) (repealed 2015)), where the statute of limitations for each investor is determined “at the partnership level.” (While I.R.C. § 6221 (2012) was repealed and replaced by the Bipartisan Budget Act of 2015, Pub. L. No. 11-74, § 1101, 129 Stat. 584, 625-26, effective for tax years following December 31, 2017, both versions retain the “at the partnership level” standard.).

76. According to F.S.A. 2015-22-01F (May 29, 2015), if a gift tax return is filed to start the statute of limitations, adequate disclosures must also be made for the statute of limitations to run. Consider two related cases where gift tax returns were not filed, so the statute of limitations, which would have expired had the return been filed, had not yet started to the detriment of the taxpayer. *Estate of Redstone v. Comm’r*, 145 T.C. (CCH) 4155 (2015) (holding a deceased taxpayer's transfer to a trust was not a taxable gift). However, in a related Tax Court case, *Redstone v. Comm’r*, 110 T.C.M. (CCH) 564 (2015), the taxpayer voluntarily made a transfer to his children that was deemed a completed gift for gift tax purposes. *Id.* at 565. The IRS assessed gift tax decades after what would have been the expiration of the statute of limitations had a gift tax return been filed. *Id.* at 569.

77. See IRM, *supra* note 75, § 8.6.1.6.5(3) (Oct. 1, 2016) (discussing this procedure); *id.* § 25.6.23.6.6 (Mar. 3, 2015).

78. See *supra* note 5.

79. See, e.g., *Hopkins v. Kedzierski*, 170 Cal. Rptr. 3d 551, 558 (Cal. Ct. App. 2014) (quoting *McDonald v. Antelope Valley Cmty. Coll.*, 194 P.3d 1026, 1031 (Cal. 2008)).

80. See *id.* at 559.

revival of stale claims—has already been met for a defendant with both parties having been put on notice in some other way than a timely filing.<sup>81</sup>

In 2010, the United States Supreme Court addressed the issue of what constitutes equitable tolling of a statute of limitations in the case *Holland v. Florida*.<sup>82</sup> At issue in *Holland* was whether courts could consider an appeal for habeas corpus filed on behalf of an inmate sentenced to death when it was filed past the one-year federal statute of limitations.<sup>83</sup> The inmate had written several letters to his attorney “emphasizing the importance” of filing the petition in a timely manner.<sup>84</sup> The attorney, however, did not meet the statutory deadline for filing, and the lower courts refused to hear the petition.<sup>85</sup> In overturning the lower courts, the Supreme Court noted the statute of limitations at issue was not jurisdictional.<sup>86</sup> A jurisdictional statute of limitations is one that “sets forth ‘an inflexible rule requiring dismissal whenever’ its ‘clock has run.’”<sup>87</sup> When a statute of limitations is not jurisdictional, there is “‘a rebuttable presumption’ in favor ‘of equitable tolling.’”<sup>88</sup> To qualify for equitable tolling, the Court held that the petitioner would have to show the following: “‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.”<sup>89</sup> The Court noted that these were factual elements and remanded the case to the lower courts for fact finding.<sup>90</sup> In doing so, the Court further clarified these elements.<sup>91</sup> To satisfy the first element, a petitioner would only need to prove that he or she exercised “reasonable diligence,” and not the “maximum feasible diligence.”<sup>92</sup> The second prong requires

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81. *See id.* at 559–60 (describing a case where a plaintiff had mistakenly claimed workers’ compensation benefits causing his subsequent personal injury claim to be filed after the statute of limitations had expired).

82. *Holland v. Florida*, 560 U.S. 631 (2010).

83. *Id.* at 634–35.

84. *Id.* at 637–39.

85. *Id.* at 643.

86. *Id.* at 645.

87. *Id.* (quoting *Day v. McDonough*, 547 U.S. 198, 208 (2006)).

88. *Id.* at 645–46 (emphasis omitted) (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95–96 (1990)).

89. *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The Court clarified in *Menominee Indian Tribe v. United States*, 136 S. Ct. 750 (2016) that both of these two requirements need to be satisfied as distinct elements for equitable tolling, not “together as two factors in a unitary test.” *Id.* at 756.

90. *Holland*, 560 U.S. at 653–54.

91. *Id.* at 652–53.

92. *Id.* at 653 (first quoting *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996); and then

extraordinary circumstances and not merely “garden variety” circumstances or those caused by simple negligence.<sup>93</sup> The subject matter of the case matters; the Court in *Holland* noted that a case for habeas corpus is more likely the purview of equitable tolling than a case for tax collection or land claims, especially when there is a long statute of limitations.<sup>94</sup>

### *B. Administrative Tolling*

Tolling tax-related statutes of limitations is fairly well established. In Appendix 2 we have collected and summarized the many commonly suspended statutes of limitations. For example, issuing a tax deficiency notice suspends the statute of limitations.<sup>95</sup> If a taxpayer and the IRS mutually agree, however, a notice of deficiency may be rescinded through the proper filing of Form 8626,<sup>96</sup> which causes the suspended statute of limitations to resume the date the notice is rescinded.<sup>97</sup> Where a taxpayer with an additional liability files an amended return within sixty days of the expiration of the three-year rule for assessment and collection, the statute of limitations is extended to sixty days after the day the return is received by the IRS.<sup>98</sup> For federal bankruptcy cases, the statute of limitations for tax assessment and collection is tolled during the automatic stay.<sup>99</sup> Additionally, the IRS is prohibited from assessing tax for sixty days after the stay is lifted and from collecting for six months after.<sup>100</sup> In the case of a capital loss, net operating loss, or credit carryback, the filing date of the original return, not the date of the return to which the carryback is made, determines the statute of limitations, thus extending potential deficiency assessments pertaining to the carryback year.<sup>101</sup> Once a tax is assessed, collection by either court proceedings or levy is generally allowed for ten years after the date of assessment.<sup>102</sup> A court proceeding to collect tax

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quoting *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008)).

93. *Id.* at 652 (quoting *Irwin*, 498 U.S. at 96).

94. *Id.* at 647.

95. I.R.C. § 6503(a)(1) (2012).

96. See IRM, *supra* note 75, § 4.8.9.28.6 (July 9, 2013) (explaining the required steps for agreed rescission).

97. I.R.C. § 6212(d) (2012).

98. I.R.C. § 6501(c)(7) (2012).

99. See I.R.C. § 6503(h) (2012).

100. *Id.*

101. § 6501(a), (h), (j).

102. I.R.C. § 6502(a) (2012).

extends the time a levy can be used, extending it until the tax liability is paid or no longer enforceable.<sup>103</sup>

### 1. Deficiency Notice for Income, Estate, or Gift Tax

A deficiency notice for income, estate, or gift tax, known as a 90-Day Letter, tolls the statute of “limitations for assessment and collection for 90 days” from its mailing for taxpayers within the United States (150 days for those outside the United States) “plus an additional 60 days . . . in either case.”<sup>104</sup> Should the taxpayer challenge the deficiency in Tax Court, the statute of limitations tolls until sixty days after the Tax Court reaches a final decision.<sup>105</sup> If, however, the “Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment,” the taxpayer may recover the overpayment.<sup>106</sup>

### 2. Other Administrative Extensions

Retired military receive a special extension of limitations if their retiree pay gets reduced due to a retroactive determination of disability benefit eligibility.<sup>107</sup> The three-year period is extended to one year after the date of the determination, but the extension does not apply to tax years beginning more than five years before the determination.<sup>108</sup>

The three-year period of limitations for credits or refunds under § 6511 of the Internal Revenue Code (I.R.C.) is equitably tolled while an individual is financially disabled, meaning the person is medically shown to suffer from a “physical or mental impairment” that is expected to last at least a year, and the person has no guardian.<sup>109</sup> Congress added this provision after a Supreme Court decision held that § 6511 did not allow any equitable tolling.<sup>110</sup> This has been referred to as “statutory equitable

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103. *Id.*

104. Treas. Reg. § 301.6503(a)-1 (2016).

105. *Id.*

106. I.R.C. § 6512(b)(1) (2012).

107. I.R.C. § 6511(d)(8)(A) (2012).

108. *Id.* § 6511(d)(8)(A)-(B).

109. *Id.* § 6511(h).

110. Compare S. REP. NO. 105-174, at 60 (1998) (“The Committee believes that, in cases of severe disability, equitable tolling should be considered in the application of the statutory limitations on the filing of tax refund claims.”), with *United States v. Brockamp*, 519 U.S. 347, 354 (1997) (“Congress did not intend the ‘equitable tolling’ doctrine to apply to § 6511’s time limitations.”), *superseded in part by statute*, Internal Revenue Service

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tolling,”<sup>111</sup> but the courts and the IRS allow only limited use of this exception.<sup>112</sup>

## 3. Carryback Deficiencies

For excess foreign-tax-credit carrybacks, the limitation for assessing deficiency is extended for one year after the associated return from which the carryback was made expires.<sup>113</sup> For general business-credit carrybacks (including the research credit<sup>114</sup>) and net operating loss carrybacks, the statute of limitations for assessing deficiencies related to the carryback is suspended based on the tax year from which the carryback originated.<sup>115</sup> Similarly, for carrybacks created by other credits and capital losses, the statute of limitations will be based on the expiration of the associated loss or credit year.<sup>116</sup>

## 4. Foreign Assets

Disclosure of foreign assets and income for the Foreign Account Tax Compliance Act (FATCA) generally provides a statute of limitations of three years.<sup>117</sup> The limitation increases to six years if the taxpayer (including a Passive Foreign Investment Corporation) omits at least 25% of gross income or “more than \$5,000 of income attributable to one or more assets required to be reported under [FATCA].”<sup>118</sup> Even so, the statute of limitations is tolled “until the information required to be reported under [§§] 1295(b), 1298(f), 6038, 6038A, 6038B, 6046, 6046A, 6048 or

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Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3202(a), 112 Stat. 685, 740 (codified at I.R.C. § 6511(h)). In other words, Congress enacted § 6511(h) specifically to supersede *Brockamp* and to extend a limited “equitable tolling” exception to § 6511’s time limitations. See S. REP. NO. 105-174, at 60.

111. See *Bowman v. IRS*, No. CIV S-09-0167 MCE GGH PS, 2010 WL 1780194, at \*3 (E.D. Cal. Apr. 30, 2010).

112. See, e.g., *Abston v. Comm’r*, 691 F.3d 992, 994–95 (8th Cir. 2012) (describing the multiple requirements to qualify as “financially disabled” and concluding the petitioner failed to qualify).

113. I.R.C. § 6501(i) (2012).

114. IRM, *supra* note 75, § 21.7.4.4.8.3.4 (May 13, 2016).

115. I.R.C. § 6501(h).

116. *Id.*; I.R.C. § 6213(b)(3) (2012).

117. Kevin E. Packman & Mauricio D. Rivero, *The Foreign Tax Compliance Act*, J. ACCT., Aug. 2010, at 44, 46; see also § 6501(a).

118. § 6501(e)(1)(A); Packman & Rivero, *supra* note 117, at 46.

. . . 6038D is provided to the IRS.”<sup>119</sup> For compliance with foreign bank account reporting, the statute of limitations is also six years from the date of the transaction.<sup>120</sup>

### 5. Installment Agreements

For installment agreements related to tax assessments, the statute of limitations for collection may be tolled for ninety days beyond the period of the written installment agreement.<sup>121</sup> Tax Court petitions toll the statute of limitations from the petition’s filing to sixty days after the final court decision.<sup>122</sup> Applications filed with the TAS for a Taxpayer Assistance Order (TAO) will toll the statute of limitations from their filing date until the date of the decision.<sup>123</sup> With written consent between the IRS and the taxpayer, all taxes imposed, except estate taxes, may be extended beyond the statutory limitation as long as the consent is executed before the initial limitation expires.<sup>124</sup>

### 6. Wrongful Liens or Seizures

Wrongful seizure by the IRS tolls the statute of limitations for the period beginning “from the date [the] property (including money) is wrongfully seized” until thirty days after the property is returned or a judgment secured;<sup>125</sup> and in some cases, equitable tolling may also apply.<sup>126</sup> In the case of wrongful liens on a third-party owner, the period of suspension begins on the date the owner is entitled to a certificate of discharge.<sup>127</sup> Tolling ends thirty days after the IRS releases the property, or after a final judgment, whichever happens first.<sup>128</sup>

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119. Packman & Rivero, *supra* note 117, at 46–47.

120. 31 U.S.C. § 5321(b)(1) (2012).

121. I.R.C. § 6502(a)(2)(A) (2012).

122. I.R.C. § 6503(a)(1) (2012).

123. I.R.C. § 7811(d) (2012).

124. I.R.C. § 6501(c)(4) (2012).

125. I.R.C. § 6503(f)(1).

126. *See, e.g.,* Volpicelli v. United States, 777 F.3d 1042, 1047 (9th Cir. 2015). The Ninth Circuit reaffirmed that § 6532’s nine-month “limitations period . . . is not jurisdictional and may be equitably tolled.” *Id.* at 1046–47. For further discussion, see *infra* Section V.A.

127. I.R.C. § 6503(f)(2).

128. *Id.*

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## 7. Protective Claims and Filings

A protective claim may be filed when the statute of limitations is about to expire and some material uncertainty as to the correct tax treatment still exists.<sup>129</sup> The form of the claim may be “a formal claim or an amended return” showing the additional refund, but a particular dollar amount does not have to be stated.<sup>130</sup> The statute of limitations for filing a protective claim generally ends concurrent to the end of the statute of limitations for the tax law pertaining to the nature of the claim.<sup>131</sup>

Additionally, taxpayers may make protective filings of forms to start the statute of limitations.<sup>132</sup> For example, a taxpayer who inherited an IRA or is over the age of seventy and a half may strategically choose to file Form 5329, *Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts*, every year, even in years when one does not seem to be needed, in order for the statute of limitations on the assessment of the 50% under-withdrawals penalty to expire.<sup>133</sup>

## 8. Mitigation

Mitigation provisions are provided for correcting erroneous treatment

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129. See Edward M. Robbins, Jr., *IRS Protective Claims for Refund*, TAXLITIGATOR: OUR BLOG (Apr. 27, 2014), <http://www.taxlitigator.com/irs-protective-claims-for-refund-by-edward-m-robbins-jr/> [<https://perma.cc/LVT9-KYZF>]. See generally I.R.S. Gen. Couns. Mem. 38,786 (Aug. 13, 1981), which gives additional guidance and examples of when protective claims might be appropriate.

130. Robbins, *supra* note 129.

131. See IRM, *supra* note 75, § 21.5.3.4.7.3 (Oct. 1, 2015); *id.* § 4.25.9.3 (Jan. 7, 2014) (describing the period of limitation for protective claims of estate taxes).

132. See *Cross-Border Activities: Benefits of Filing “Protective” Returns*, BUCHANAN, INGERSOLL & ROONEY PC (July 2, 2015), <http://www.bipc.com/files/Publication/e043d4f8-c054-466f-97cd-30a40f46471b/Presentation/PublicationAttachment/98aad283-7f23-4e-ec-8290-16b362805794/cross%20border.pdf> [<https://perma.cc/FA8W-5PNV>] (discussing the benefit of protective claims for offshore activities).

133. Cf. *Paschall v. Comm’r*, 137 T.C. 8, 15–17 (2011) (holding that by not filing the correct return, Form 5329, in the years following a failed attempt to restructure a traditional IRA to a Roth IRA, the petitioners failed to start § 6501(a)’s three-year statute of limitations, meaning that “the tax could be assessed ‘at any time’” and the IRS demand letters eight years later were not time barred (quoting I.R.C. § 6501(c)(3) (2012))). See generally IRS, Instructions for Form 5329, at 5, 7–8 (Dec. 30, 2015), <https://www.irs.gov/pub/irs-pdf/i5329.pdf> [<https://perma.cc/MCD2-PLHJ>] (describing when the form is needed and the late- or under-withdrawal penalties); Bruce M. Bird, Michael Sinkey & William J. Smith, *Tax Strategies Involving the Ability to Recharacterize a Roth IRA*, J. TAX’N, Nov. 2014, at 223, 225 & n.13 (same).

of an item such as an “inclusion, exclusion, omission, . . . recognition, . . . nonrecognition,” or deduction in a taxable year closed by the statute of limitations.<sup>134</sup> Generally, this occurs if the IRS or taxpayer has treated the same position taken during an open taxable year inconsistently with that of a closed taxable year.<sup>135</sup> If the IRS’s position was inconsistent, a refund is allowed.<sup>136</sup> Alternatively, if the taxpayer’s position was caused by an inconsistent position he or she took in a prior year that is closed, no refund is allowed once the statute of limitations expires.<sup>137</sup> Should a taxpayer’s position from a prior, closed year result in an additional tax liability, additional assessment is only allowed if the taxpayer (not the IRS) maintained the inconsistent position.<sup>138</sup> Such adjustments to closed years will suspend the statute of limitations, modifying it so that one year remains from the date of determination.<sup>139</sup>

As mentioned above, there are still areas where it is unclear whether an administrative action tolls the statute. For example, in *Rothkamm*, the question before the court was whether petitioning to the TAS tolled the statute while the TAS considered the case.<sup>140</sup>

#### IV. THE TAXPAYER ADVOCATE’S OFFICE

Taxpayers experiencing financial difficulty, significant hardship, or an adverse action by the IRS can seek assistance by filing an application with the TAS through the Office of the National Taxpayer Advocate (NTA).<sup>141</sup>

##### A. History

In 1979, Congress created the Office of the Taxpayer Ombudsman (now referred to as the NTA) “to serve as the primary advocate, within the IRS, for taxpayers.”<sup>142</sup> The NTA has “statutory authority to issue Taxpayer Assistance Orders” to help taxpayers dealing with “significant hardships”

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134. Treas. Reg. §§ 1.1311(a)–1(a), 1.1311(a)–2(a), 1.1311(b)–1(a) (2016).

135. § 1.1311(a)–1(b).

136. § 1.1311(b)–1(b)(1).

137. *Id.* § 1.1311(b)–1(b)(2).

138. § 1.1311(a)–1(b).

139. Treas. Reg. § 1.1314(b)–1(b) (2016).

140. *Rothkamm v. United States*, 802 F.3d 699, 709–10 (5th Cir. 2015).

141. 1 NAT’L TAXPAYER ADVOCATE, FY 2015 OBJECTIVES REPORT TO CONGRESS app. I, at 177, 179–80 (2014).

142. *Id.* at 177.

resulting from how the IRS administers federal tax laws.<sup>143</sup> Additionally, this office provides, at a minimum, semi-annual reports to Congress about the “problems taxpayers are experiencing and what can be done to address them.”<sup>144</sup> Since 1996, the NTA’s position is similar in stature to the Chief Counsel.<sup>145</sup> The TAS has several functions:

- To assist taxpayers in resolving problems with the IRS;
- To identify areas in which taxpayers have problems in dealings with the IRS;
- To the extent possible, propose changes in the administrative practices of the IRS to mitigate those identified problems; and
- To identify potential legislative changes which may be appropriate to mitigate such problems.<sup>146</sup>

*B. Reasons the Taxpayer Advocate Will Consider a Case*

The NTA uses several factors in determining whether a taxpayer is suffering or about to suffer a significant hardship:

- (1) The taxpayer is experiencing economic harm or is about to suffer economic harm.
- (2) The taxpayer is facing an immediate threat of adverse action.
- (3) The taxpayer will incur significant costs if relief is not granted (including fees for professional representation).
- (4) The taxpayer will suffer irreparable injury or long-term adverse impact if relief is not granted.
- (5) The taxpayer has experienced a delay of more than 30 days to resolve a tax account problem.
- (6) The taxpayer did not receive a response or resolution to their problem or inquiry by the date promised.
- (7) A system or procedure has either failed to operate as

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143. *Id.*

144. *Id.* at 178 (quoting STAFF OF J. COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 21 (Comm. Print 1996)).

145. *Id.* at 177.

146. *Id.* at 177–78 (citing Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 101, 110 Stat. 1452, 1453–54 (1996) (codified as amended at I.R.C. § 7802(d)(2)(A) (2012))).

intended, or failed to resolve the taxpayer's problem or dispute within the IRS.

- (8) The manner in which the tax laws are being administered raise considerations of equity, or have impaired or will impair the taxpayer's rights.
- (9) The NTA determines compelling public policy warrants assistance to an individual or group of taxpayers.<sup>147</sup>

Ultimately, this list is nonexclusive, giving the NTA discretion to consider other factors.<sup>148</sup> The NTA considers factors (5), (6), and (7), taken together, to be a result of a "Systemic Burden," which is defined as "[c]ases in which an IRS process, system, or procedure has failed to operate as intended, and as a result the IRS has failed to timely respond to or resolve a taxpayer issue."<sup>149</sup> Recently, however, delay times have been commonplace enough that, as of October 1, 2011, a single-issue Systemic Burden inquiry is no longer sufficient to establish a TAS case.<sup>150</sup>

### C. *Reduced Service from the IRS Is Mainstream*

In its 2014 annual report to Congress, the NTA was candid and matter-of-fact about the "most serious problem facing U.S. taxpayers": *Taxpayer Service Has Reached Unacceptably Low Levels and Is Getting Worse*.<sup>151</sup>

147. IRS, Form 911, Request for Taxpayer Advocate Service (and Application for Taxpayer Assistance Order), at 2 (OMB No. 1545-1504) (Feb. 2015) [hereinafter Form 911], <https://www.irs.gov/pub/irs-pdf/f911.pdf> [<https://perma.cc/6HL5-TQUV>].

148. H.R. REP. NO. 105-599, at 215 (1998) (Conf. Rep.), as reprinted in 1998 U.S.C.C.A.N. 288, 309.

149. 1 NAT'L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT TO CONGRESS 537 (2015) [hereinafter 2015 ANNUAL REPORT].

150. IRM, *supra* note 75, § 13.1.7.3 (Feb. 4, 2015).

151. 1 NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 3 (2014) [hereinafter 2014 ANNUAL REPORT]; see also *IRS Service at 'Unacceptably Low Levels'* (*USA Today*), TAXPAYER ADVOC. SERV. (Jan. 14, 2015), <http://www.taxpayeradvocate.irs.gov/news/irs-service-at-unacceptably-low-levels-usa-today> [<https://perma.cc/Y8EV-YTBE>] (citing Kevin McCoy, *IRS Service at 'Unacceptably Low Levels,' USA TODAY* (Jan. 14, 2015, 10:45 AM), <http://www.usatoday.com/story/money/business/2015/01/14/irs-taxpayer-service-deteriorates/21690533/> [<https://perma.cc/B9TG-AWJ9>]); *IRS Cuts Taxpayer Services as Filing Returns Gets Harder* (*Associated Press*), TAXPAYER ADVOC. SERV. (Jan. 14, 2015), <http://www.taxpayeradvocate.irs.gov/news/irs-cuts-taxpayer-services-as-filing-returns-gets-harder-associated-press> [<https://perma.cc/2STD-QE5N>] (citing Stephen Ohlemacher, *Need Help Filing Out Your Tax Return? Don't Call the IRS*, NEWS & OBSERVER (Jan. 14, 2015, 1:23 PM), <http://www.newsobserver.com>

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One article summarized the report's findings well: "Citing the IRS' [own] service projections . . . , the report warns that taxpayers will likely find it more difficult to get help with basic issues," including:

- The IRS is unlikely to answer half of the telephone calls it receives from taxpayers.
- Callers who manage to get through are expected to face hold times that exceed 30 minutes on average and "run considerably longer" during peak hours.
- The agency won't answer any questions except "basic" inquiries during the annual January-to-April tax-filing season. Later in the year, the IRS won't answer any tax-law questions at all.
- More than half of the correspondence received by the agency won't receive timely handling.

"When the IRS does not answer the calls its taxpayers are making to it, and when it does not timely read and respond to the letters its taxpayers are sending it, the tax system goes into a downward spiral," wrote National Taxpayer Advocate Nina Olson, whose office was created to help taxpayers resolve problems with the IRS.

"Taxpayers do not get answers to their questions, so they must either pay for advice they would otherwise obtain for free, or they proceed without any advice at all, leading to future compliance problems," and more burden for the taxpayer and more work for the IRS, added Olson.

The report said the projected service gap is the top problem faced by U.S. taxpayers. The new warning followed a year in which the IRS received sharp criticism over allegations it improperly targeted conservative tax-exempt groups for increased scrutiny.<sup>152</sup>

Deficient taxpayer service remained in the list of most serious problems in NTA's 2016 report to Congress.<sup>153</sup> Slow IRS response times leave less

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/news/business/article10221890.html [https://perma.cc/U3YE-C3HA]).

152. McCoy, *supra* note 151 (quoting 2014 ANNUAL REPORT, *supra* note 151, at viii).

153. 1 NAT'L TAXPAYER ADVOCATE, 2016 ANNUAL REPORT TO CONGRESS 64; *see also id.* at 48 ("To simply report on the top 20 problems . . . would require us to repeat much of the same data and propose many of the same solutions year to year.").

time within the statute of limitations for taxpayers to respond to IRS positions and defend their tax claims.

*D. Taxpayer Assistance Orders and Statutes of Limitations*

According to I.R.C. § 7811, which provides guidance on issuing TAOs, taxpayers' statutes of limitations are suspended while the request is pending.<sup>154</sup> In addition, § 7811(b) provides that, "The terms of a Taxpayer Assistance Order may require the Secretary within a specified time period—(1) to release property of the taxpayer levied upon, or (2) to cease any action, take any action as permitted by law, or refrain from taking any action, with respect to the taxpayer."<sup>155</sup> Section 7811 also provides guidance on interpreting *hardship* (economic harm, significant costs, negative long-term effects, resolution delays, and impairment of taxpayer rights)<sup>156</sup> and understanding the requirements for releasing taxpayer liens.<sup>157</sup> Should the TAS determine a TAO is not warranted, taxpayers receive a written explanation.<sup>158</sup>

V. THE *ROTHKAMM* CASE

In *Rothkamm v. United States*, Kathryn Rothkamm applied for assistance with the TAS after the IRS levied over \$73,000 of her personal assets by seizing a certificate of deposit to satisfy her husband's tax liabilities, even though she filed a separate return.<sup>159</sup> After the TAS closed her case and the IRS denied an administrative claim, Rothkamm sued the IRS in the United States District Court for the Middle District of Louisiana, citing § 7426(a)(1), which allows for civil actions for a wrongful levy of property.<sup>160</sup> This section states:

If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was

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154. I.R.C. § 7811(d) (2012).

155. *Id.* § 7811(b)(1)–(2).

156. *Id.* § 7811(a)(2); IRM, *supra* note 75, § 13.1.7.2 (Feb. 4, 2015).

157. I.R.C. § 7811(b)(1).

158. IRM, *supra* note 75, § 13.1.7.2.3 (Feb. 4, 2015).

159. *Rothkamm v. United States*, 802 F.3d 699, 700–01 (5th Cir. 2015).

160. *Id.* at 701.

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wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.<sup>161</sup>

The district court determined that Rothkamm's suit was untimely because she filed fourteen months after the levy.<sup>162</sup> Rothkamm argued that her claim was timely because her April 30, 2012 TAS application tolled the period for filing an administrative claim until a decision was rendered, which was October 11, 2012; thus, making her May 15, 2013 claim timely, extending the limitation until January 1, 2014, according to § 7811(d).<sup>163</sup> It reads:

The running of any period of limitation with respect to any action described in subsection (b) shall be suspended for—

(1) the period beginning on the date of the taxpayer's application under subsection (a) and ending on the date of the National Taxpayer Advocate's decision with respect to such application, and

(2) any period specified by the National Taxpayer Advocate in a Taxpayer Assistance Order issued pursuant to such application.<sup>164</sup>

The district court rejected the tolling argument, relying on *Demes v. United States*.<sup>165</sup> In *Demes*, the United States Court of Federal Claims stated:

According to I.R.C. § 7811(a), upon such an application, the National Taxpayer Advocate may issue a Taxpayer Assistance Order if, in his determination, the taxpayer is suffering a significant hardship due to the administration of the Internal Revenue Code. This provision does not go to the tolling of the statute of limitations in court, but rather confers the IRS with

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161. I.R.C. § 7426(a)(1) (2012).

162. *Rothkamm*, 802 F.3d at 700–01.

163. *Id.* at 701–02.

164. I.R.C. § 7811(d) (2012).

165. *Rothkamm v. United States*, No. 3:13-cv-00589-BAJ-RLB, 2014 WL 4986884, at \*3 (M.D. La. Sept. 15, 2014) (citing *Demes v. United States*, 52 Fed. Cl. 365 (Fed. Cl. 2002)), *rev'd*, 802 F.3d 699.

discretion to effect tolling upon a taxpayer's request. Plaintiffs therefore cannot sue in a court for a refund under this provision, nor can the court use it as a basis to toll the statute of limitations in plaintiffs' case.<sup>166</sup>

The district court further stated that there was a lack of clarity as to whether a taxpayer subject to wrongful levy is statutorily considered a "taxpayer," agreeing with the IRS's argument that Rothkamm "is not a taxpayer under any definition because she was not subject to a tax,"<sup>167</sup> relying on *United States v. Williams*<sup>168</sup> and *EC Term of Years Trust v. United States*.<sup>169</sup> In *Williams*, the petitioner "paid a tax under protest to remove a lien."<sup>170</sup> As such, the Court determined the petitioner was a qualifying taxpayer and allowed to sue for a refund.<sup>171</sup> *EC Term of Years Trust* involved a wrongful levy on a trust that missed the filing deadline to challenge the levy under I.R.C. § 7426(a)(1) and attempted to use 28 U.S.C. § 1346(a)(1), which deals with tax-refund administrative claims filed within two years.<sup>172</sup> The Court held that the Trust was limited to only filing under the wrongful-levy claims of I.R.C. § 7426, whose nine-month limitation had expired.<sup>173</sup> Similarly, Rothkamm's suit was dismissed as untimely because, whether she was a taxpayer or not, the district court concluded only IRS actions could toll a statute of limitations under § 7811(d).<sup>174</sup>

Rothkamm appealed to the United States Court of Appeals for the Fifth Circuit, where the district court's decision was reversed and remanded.<sup>175</sup> Appendix 3 summarizes the timeline of events for *Rothkamm*. The appellate court agreed with Rothkamm that she was a taxpayer subject to levy for the liability of another taxpayer and as such

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166. *Demes*, 52 Fed. Cl. at 373.

167. *Rothkamm*, 2014 WL 4986884, at \*2-3 (quoting Government's Supplemental Brief in Support of Motion to Dismiss for Lack of Jurisdiction at 1)).

168. *United States v. Williams*, 514 U.S. 527 (1995).

169. *EC Term of Years Tr. v. United States*, 550 U.S. 429 (2007).

170. *Williams*, 514 U.S. at 529.

171. *Id.*

172. *EC Term of Years Tr.*, 550 U.S. at 431-33.

173. *See id.* at 435-36.

174. *Rothkamm v. United States*, No. 3:13-cv-00589-BAJ-RLB, 2014 WL 4986884, at \*2-3 (M.D. La. Sept. 15, 2014), *rev'd*, 802 F.3d 699 (5th Cir. 2015); *see also Rothkamm*, 802 F.3d at 702.

175. *Rothkamm*, 802 F.3d at 714.

was entitled to assistance with the TAS.<sup>176</sup> The Fifth Circuit noted that because § 7811 does not define “taxpayer,” the definition defaults to the definition found in § 7701(a)(14), which is “any person subject to any internal revenue tax.”<sup>177</sup> The court ruled that the district court’s conclusion that Rothkamm was not the taxpayer was in error as she was the individual who actually paid the tax.<sup>178</sup>

Disagreeing with the district court, the Fifth Circuit found that the clear and specific language of § 7811(d)(1) expressly allowed tolling from the time the TAS was filed until it reached its decision.<sup>179</sup> The court stated:

[T]he taxpayer may pursue a TAO without fear that the process—which Congress expressly designed to assist taxpayers—will prejudice her administrative or judicial rights in the event she does not obtain TAO relief. Subsection (d)’s plain language means that neither the IRS nor the taxpayer is any worse off when a taxpayer decides to pursue TAO relief because all relevant statutes of limitations are tolled. Under the plain terms of the statute, this tolling occurs automatically until the National Taxpayer Advocate reaches a decision on the TAO application, without regard to any discretion on the part of the IRS.<sup>180</sup>

The Fifth Circuit stated that the statute’s language is straightforward and benefits both the IRS in its collection actions as well as taxpayers seeking property release from wrongful-levy actions under § 6532(c),<sup>181</sup> which has a nine-month limitation to file a wrongful-levy suit (though it can be extended to the lesser of twelve months from the filing of a § 6343(b) request for return of property or six months from the request’s denial).<sup>182</sup>

The Fifth Circuit cited various cases that support tolling during a TAO.<sup>183</sup> The cases the court cited, *United States v. Carinos Ambulance*

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176. *See id.*

177. *Id.* at 704 (quoting I.R.C. § 7701(a)(14) (2012)).

178. *See id.* at 708.

179. *Id.* at 710.

180. *Id.*

181. *Id.* at 709–10.

182. I.R.C. § 6532(c) (2012).

183. *Rothkamm*, 802 F.3d at 710.

*Service*,<sup>184</sup> *United States v. Turner (In re Turner)*,<sup>185</sup> and *United States v. Gore (In re Gore)*,<sup>186</sup> among others, confirmed that § 7811(d) tolling occurs from the submission date of the TAS application until the date a decision is made. This confirmation further supported the interpretation that the language of the statute does not restrict either the taxpayer or government: “The running of any period of limitation with respect to *any action* described in subsection (b) shall be suspended . . . .”<sup>187</sup>

According to the Fifth Circuit, the district court’s citation to § 7811(c) that noted the ability of the government to modify a TAO through written explanation had no connection with the issue of tolling.<sup>188</sup> Additionally, the district court had referenced Treasury Regulation § 301.7811–1(b), which says, “[a] taxpayer’s right to administrative or judicial review will not be diminished or expanded in any way as a result of the taxpayer’s seeking assistance from TAS,”<sup>189</sup> leading the lower court to construe the regulation to provide discretionary tolling only for the IRS.<sup>190</sup> The Fifth Circuit found this interpretation problematic and unrelated to tolling and consequently in error, citing instead Treasury Regulation § 301.7811–1(e)(1) to (3) as support for I.R.C. § 7811(d)’s suspension of the limitation statute.<sup>191</sup> This regulation states:

(1)*In general.* The running of the applicable period of limitations for any action which is the subject of a taxpayer assistance order shall be suspended for the period beginning on the date the Ombudsman receives an application for a taxpayer assistance order in the form, manner, and time specified in paragraph (b) of this section and ending on the date on which the Ombudsman makes a determination with respect to the application, and for any additional period specified by the Ombudsman in an order issued pursuant to a taxpayer’s application. . . .

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184. *United States v. Carinos Ambulance Serv.*, 654 F. Supp. 2d 52, 59–60 (D.P.R. 2009).

185. *Turner v. United States (In re Turner)*, 182 B.R. 317, 329 (Bankr. N.D. Alaska 1995).

186. *Gore v. United States (In re Gore)*, 182 B.R. 293, 304 (Bankr. N.D. Alaska 1995).

187. I.R.C. § 7811(d) (2012) (emphasis added).

188. *Rothkamm*, 802 F.3d at 711.

189. *Id.* at 711 (quoting Treas. Reg. § 301.7811–1(b) (2015)).

190. *Id.* at 713.

191. *Id.* at 711–12.

(2) *Date of decision.* The “date on which the Ombudsman makes a decision with respect to the application” is the date on which the taxpayer’s request for a taxpayer assistance order is denied, or agreement is reached with the involved function of the Service, or a taxpayer assistance order is issued (except that when the taxpayer assistance order is reviewed by an official who may modify or rescind the taxpayer assistance order as provided in paragraph (d) of this section, the decision date is the date on which such review is completed).

(3) *Periods suspended.* The periods of limitations which are suspended under section 7811(d) are those which apply to the taxable periods to which the application for a taxpayer assistance order relate or the taxable periods specifically indicated in the terms of a taxpayer assistance order.<sup>192</sup>

But in his dissent, Judge Higginbotham agreed with the rationale of the district court and *Demes v. United States*, finding the language of § 7811 applicable to IRS actions only.<sup>193</sup> He pointed to the House Conference Report for the Technical and Miscellaneous Revenue Act of 1988, where amendments to the TAO statute of limitations support the view of IRS-only actions.<sup>194</sup> Judge Higginbotham further noted that IRS Form 911, *Request for Taxpayer Advocate Service Assistance*, contained analogous language that should have warned the taxpayer that tolling was at the IRS’s discretion only.<sup>195</sup> For example, the form’s instructions explain that, “The Taxpayer Advocate Service will generally ask the IRS to stop certain activities while your request for assistance is pending (for example, lien filings, levies, and seizures).”<sup>196</sup> Additional cautionary language from Form 911 warns the taxpayer that the IRS is allowed to suspend the statute of limitations; however, per instructions, taxpayer-applicants are not given this allowance to redetermine a deficiency.<sup>197</sup>

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192. Treas. Reg. § 301.7811-1(e)(1) to (3) (2016).

193. *Rothkamm*, 802 F.3d at 717–18 (Higginbotham, J., dissenting); *see also* *Demes v. United States*, 52 Fed. Cl. 365, 373 (Fed. Cl. 2002) (holding that § 7811(a) “does not go to the tolling of the statute of limitations in court . . . nor can the court use it as a basis to toll the statute of limitations”).

194. *Rothkamm*, 802 F.3d at 717 & n.13; *see also* 2 H.R. REP. NO. 100-1104, at 215 (1988) (Conf. Rep.), *as reprinted in* 1988 U.S.C.C.A.N. 4530, 5275.

195. *Rothkamm*, 802 F.3d at 718 (quoting Form 911, *supra* note 147, at 4).

196. Form 911, *supra* note 147, at 3.

197. *Id.* at 4.

Most tellingly, the form includes this stark warning set off in a special note:

The signing of this request allows the IRS by law to suspend any applicable statutory periods of limitation relating to the assessment or collection of taxes. However, it does not suspend any applicable periods for you to perform acts related to assessment or collection, such as petitioning the Tax Court for redetermination of a deficiency or requesting a Collection Due Process hearing.<sup>198</sup>

As the dissent noted, providing taxpayers with a means to extend deadlines through filing Form 911, as the majority held, in effect expands the “right to administrative or judicial review—such as by extending the period of limitation—through seeking TAS assistance,” in contradiction of Treasury Regulation § 301.7811-1(b),<sup>199</sup> potentially creating countless unforeseen administrative challenges.<sup>200</sup>

A. *Precedent Supports Equitable Tolling for Rothkamm*

While *Holland v. Florida* briefly referenced the tolling of tax-related statutes of limitations in its larger discussion of equitable tolling,<sup>201</sup> several major tax cases on tolling statutes of limitations preceded it. Earlier in *United States v. Brockamp*,<sup>202</sup> the Supreme Court reversed the Ninth Circuit and disallowed tolling of a statute of limitations for two taxpayers who had claimed a refund under I.R.C. § 6511 for an erroneously paid tax.<sup>203</sup> The taxpayers in *Brockamp* both filed their claims after the statute of limitations expired, claiming that either senility or alcoholism caused the untimely filings and that mitigated the taxpayers’ fault.<sup>204</sup>

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198. *Id.*

199. *Rothkamm*, 802 F.3d at 721.

200. *See id.* at 719 (“The majority’s efforts to save Rothkamm from her unexplained oversight may ultimately have a serious impact on the IRS’s ability to collect on unpaid tax liabilities.”).

201. *Holland v. Florida*, 560 U.S. 631 (2010).

202. *United States v. Brockamp*, 519 U.S. 347 (1997), *superseded in part by statute*, Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3202(a), 112 Stat. 685, 740 (codified at I.R.C. § 6511(h)(1) (2012)).

203. *Id.* at 348, 354.

204. *Id.* at 348.

Although it was not discussed in *Rothkamm*, Rothkamm likely had a valid argument for equitably tolling the statute of limitations. In *Holland*, the court addressed the factual differences between *Brockamp* and *Holland*,<sup>205</sup> and these differences seem to allow *Holland*'s rationale to apply in the *Rothkamm* case as well. First, *Brockamp* involved a statute that “‘se[t] forth its time limitations in unusually emphatic form’ . . . [and] used ‘highly detailed’ and ‘technical’ language that, linguistically speaking, cannot easily be read as containing implicit exceptions.”<sup>206</sup> This statute “reiterate[d] its limitations several times in several different ways.”<sup>207</sup> Commenting on the specificity of the statute’s language, the Court in *Brockamp* noted:

Section 6511 says, first, that a

“[c]laim for . . . refund . . . of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed . . . within 2 years from the time the tax was paid.”

It then says that

“[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed . . . unless a claim for . . . refund is filed . . . within such period.”

It reiterates the point by imposing substantive limitations:

“If the claim was filed by the taxpayer during the 3-year period . . . the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. . . .”

And

“[i]f the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the

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205. *Holland*, 560 U.S. at 646–47.

206. *Id.* at 646 (first alteration in original) (quoting *Brockamp*, 519 U.S. at 350).

207. *Id.* (alteration in original) (quoting *Brockamp*, 519 U.S. at 351).

filing of the claim.<sup>208</sup>

Since in *Rothkamm*, the issue of tolling of the statute of limitations was addressed as a direct statutory interpretation of § 7811(d)(1), the court had no need to address policy arguments behind tolling statutes of limitations generally.<sup>209</sup> However, the majority opinion seems consistent with those same policy considerations.

When applying equitable tolling factors to the facts of *Rothkamm*, it seems that equitable tolling ought to be allowed under fairness principles. The limitation statute at issue in *Rothkamm*, § 6532(c)(1), is a much simpler statute that provides: “[E]xcept as provided by paragraph (2),<sup>210</sup> no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.”<sup>211</sup> *Brockamp* had noted that a simple statute of limitations provision “us[ing] fairly simple language . . . can [be] read as containing an implied ‘equitable tolling’ exception.”<sup>212</sup>

The Court in *Holland*, further examining the “highly detailed” statute creating the limitations in *Brockamp*, noted that it “related to an ‘underlying subject matter,’ nationwide tax collection, with respect to which the practical consequences of permitting tolling would have been substantial.”<sup>213</sup> While *Rothkamm* involves a case before the TAS with potentially far-reaching consequences,<sup>214</sup> like *Holland*, there are also substantial differences between it and *Brockamp*. In *Rothkamm*, the petitioner had a good-faith reason to assume that filing a petition with the TAO tolled the statute of limitations.<sup>215</sup> Even if the TAO statute’s tolling provision under § 7811(d) were found not to apply, the petitioner took overt action in the case.<sup>216</sup> This activism stands in contrast to the passiveness in *Brockamp*, where the petitioners, after leaving the entire

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208. *Brockamp*, 519 U.S. at 351 (citations omitted) (quoting I.R.C. § 6511(a), (b) (2012)).

209. *See Rothkamm v. United States*, 802 F.3d 699, 709–10 (5th Cir. 2015).

210. The referenced section, I.R.C. § 6532(c)(2) (2012), extends the statute of limitations when an action is brought under I.R.C. § 6343(b) (2012) for return of property.

211. § 6532(c)(1).

212. *Brockamp*, 519 U.S. at 350.

213. *Holland v. United States*, 560 U.S. 631, 646 (2010) (quoting *Brockamp*, 519 U.S. at 352).

214. *See Rothkamm*, 802 F.3d at 702.

215. *See id.* at 701 (noting that *Rothkamm* asked the TAS for assistance within two weeks of the demand letter).

216. *See id.*

matter dormant for a period of time, then decided to try to reactivate the case by tolling the statute of limitations.<sup>217</sup> The reasonable diligence shown in *Rothkamm* satisfies *Holland*'s first prong for equitable tolling, proof that a taxpayer "has been pursuing his rights diligently."<sup>218</sup> The second prong in the *Holland* analysis was likely met in *Rothkamm* as well.<sup>219</sup> The fact *Rothkamm* had to rely on a statute, § 7811(d), that was at best unclear on its applicability to the case, could constitute an extraordinary circumstance that did not allow the petitioner to state a claim earlier.<sup>220</sup>

Finally, while the facts of the case are not as likely to be as sympathetic as a petition for habeas corpus to allow equitable relief, *Rothkamm*'s petitioner is a much more sympathetic figure than the petitioners in *Brockamp*. First, the statute of limitations in *Rothkamm* was very short, allowing only a nine-month period for relief if not tolled.<sup>221</sup> The Court in *Holland* noted that longer statutes of limitations are less likely to allow tolling than shorter ones.<sup>222</sup> Further, while *Rothkamm* and *Brockamp* both involved tax issues, *Rothkamm* involved a taxpayer attempting to reclaim property the government wrongfully levied.<sup>223</sup> This is more sympathetic than the situation in *Brockamp*, where the petitioners had, on their own accord, overpaid the government and later petitioned for a refund.<sup>224</sup> In addition to trying to retrieve the property within two weeks of the levy, the argument for equitable remedies is much stronger where the government is taking action against a taxpayer, especially when the underlying tax liability belongs to someone else, than where a taxpayer simply overpays taxes.

It should also be noted that the Ninth Circuit allowed equitable tolling in a wrongful-levy action brought under § 7246(a) in the case *Volpicelli v. United States*.<sup>225</sup> At issue in *Volpicelli* was a levy brought against the

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217. *Brockamp*, 519 U.S. at 348.

218. *See Holland*, 560 U.S. at 649; *see also supra* notes 89–90 and accompanying text.

219. *See id.* The second prong for equitable tolling requires a petitioner to show "that some extraordinary circumstance stood in his way." *Id.*

220. *See id.*

221. I.R.C. § 6532(c)(1) (2012); *see also Rothkamm*, 802 F.3d at 701.

222. *See Holland*, 560 U.S. at 647.

223. *See Rothkamm*, 802 F.3d at 701.

224. *See United States v. Brockamp*, 519 U.S. 347, 348 (1996), *superseded in part by statute*, Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3202(a), 112 Stat. 685, 740 (codified at I.R.C. § 6511(h)(1) (2012)).

225. *Volpicelli v. United States*, 777 F.3d 1042, 1047 (9th Cir. 2015).

plaintiff when he was ten years old.<sup>226</sup> The seized property was thought to belong to the plaintiff's father.<sup>227</sup> The plaintiff "did not find out about the levy until after he turned 18."<sup>228</sup> After discovering the levy, the plaintiff brought the wrongful-levy action.<sup>229</sup> The Ninth Circuit held that the normal nine-month limitation period specified in § 6532(c) could be equitably tolled for the eight-year period prior to discovery.<sup>230</sup> The court distinguished *Brockamp*, noting that § 6532(c) was not jurisdictional and had stark differences from § 6511.<sup>231</sup> This distinction is significant because the government did not appeal the Ninth Circuit's decision, leading some observers to conclude that equitable tolling applies to any case brought under § 6532.<sup>232</sup>

*B. Taxpayer Advocate Service Assistance and  
the Statutory Language of § 7811*

The TAS, described on Form 911 as "your voice at the IRS," commits to assisting a taxpayer when an IRS office fails to help and such failure potentially causes "harm."<sup>233</sup> As Judge Higginbotham identified in his dissent, the form is simple;<sup>234</sup> it takes about thirty minutes to complete, requires only basic taxpayer information, provides an area to describe both the specific tax issue and the relief requested, and is supposed to get a response from the TAS within a week.<sup>235</sup> Taxpayers are instructed to call the TAS if they do not get a response within one week,<sup>236</sup> but the form does not address how to get assistance beyond such a call (which may require a voice message and extensive wait for a return call). Further instructions assure that the TAS will "generally ask the IRS" to "stop certain activities" concerning "lien filings, levies, and seizures"; however,

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226. *Id.* at 1043.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 1047.

231. *Id.* at 1046.

232. Robin L. Greenhouse, Andrew R. Roberson & K. Christy Vouri, *Equitable Tolling and Tax Refund Suits*, 148 TAX NOTES 767, 771 (2015).

233. Form 911, *supra* note 147, at 3. Form 911's full title is "Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order)." *Id.* at 1.

234. *Rothkamm v. United States*, 802 F.3d 699, 718–19 (5th Cir. 2015) (Higginbotham, J., dissenting).

235. Form 911, *supra* note 147, at 3–4.

236. *Id.* at 3.

taxpayers are clearly warned that such tolling of the statute of limitations applies only to the IRS for assessment or collection.<sup>237</sup> Taxpayers are not provided a suspension for “acts related to assessment or collection, such as petitioning the Tax Court for redetermination of a deficiency or requesting a Collection Due Process hearing.”<sup>238</sup> An allowance for written statements in lieu of Form 911 is provided in Treasury Regulation § 301.7811–1(b), thus expanding taxpayer avenues for assistance beyond the form.<sup>239</sup>

The Fifth Circuit’s ruling in *Rothkamm* “disrupt[s] a carefully structured regime for the resolution of disputes between the IRS and property owners”<sup>240</sup> by allowing statutory tolling in contrast with the administrative provisions that say taxpayers will not be provided with such tolling as a result of a request for TAS assistance.<sup>241</sup> Additionally, the language of § 7811(d), “[t]he running of any period of limitation with respect to *any action* described in subsection (b) shall be suspended,” clearly references the IRS and not the taxpayer when read together with the wording found in § 7811(b), which states that a TAO “may require the Secretary”—meaning the IRS—“to cease . . . or refrain from taking *any action*.”<sup>242</sup> Further, Treasury Regulation § 301.7811–1(e)(1) to (3) contribute to the inconsistencies because they discuss tolling in a more general sense: “The running of the applicable period of limitations for any action which is the subject of a taxpayer assistance order shall be suspended . . . .”<sup>243</sup> This regulation provides no delineation between actions of the taxpayer and actions of the IRS, further contributing to the importance of the case.

### *C. Rothkamm Appears to Be Equitable Based on the Current Tax Environment*

While it seems that the court reached the right result, the equitable tolling argument may be a stronger justification for the decision. It has

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237. *Id.* at 3–4.

238. *Id.* at 4.

239. Treas. Reg. § 301.7811–1(b) (2016).

240. *Rothkamm v. United States*, 802 F.3d 699, 715 (5th Cir. 2015) (Higginbotham, J., dissenting).

241. *See id.* at 714 (majority opinion) (holding the plaintiff’s “TAO application tolled the running of the statute of limitations”).

242. I.R.C. § 7811(d) (2012) (emphasis added).

243. Treas. Reg. § 301.7811–1(e)(1) (2016).

been increasingly difficult for taxpayers to get timely responses and help from the IRS.<sup>244</sup> Phones go unanswered; hold times are extensive; correspondence is often delayed or inefficient.<sup>245</sup> If a taxpayer requests assistance and the request is greatly delayed or goes unheeded, should that be held against the taxpayer? The IRS believes it should, and the agency will no doubt argue that point against taxpayers across the country as seen in *Rothkamm*. As such, the *Rothkamm* decision appears to have a broader implication than just the Fifth Circuit, a fact the Office of the National Taxpayer Advocate noted in its report to Congress.<sup>246</sup>

The NTA's Annual Report to Congress included *Rothkamm* as an important case in its Legislative Recommendations, pointing to the significance of the court's decision regarding the tolling of the statute of limitations with the filing of a TAO.<sup>247</sup> The TAS is most concerned with *Rothkamm*'s interpretation of § 7811(d) and the tolling for taxpayers or third parties missing a statute of limitations.<sup>248</sup> According to the report, the TAS fears that by giving precedent for the filing of a Form 911 to extend deadlines, *Rothkamm* has created a complicated and unfair process for taxpayers who do not apply, those whose applications are delayed, or those who incorrectly apply for assistance.<sup>249</sup> Further, the TAS is concerned that IRS computer programming lacks the capacity to track applications.<sup>250</sup> Accordingly, the NTA recommends § 7811(d) be clarified or repealed.<sup>251</sup>

## VI. CONCLUSION

Statutes of limitations are important because they allow both parties to focus their energies on current and future issues without being encumbered by potential claims from periods in the distant past.<sup>252</sup> However, because of the inequity that can come from rigid enforcement of an arbitrary bright-line limitation, statutes of limitations may be

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244. See Rein, *supra* note 9 (“The Internal Revenue Service hung up on customers calling for help 8.8 million times [in 2015] . . .”).

245. *Id.*

246. 2015 ANNUAL REPORT, *supra* note 149, at 284, 317.

247. See *id.* at 317.

248. See *id.* at 316–17.

249. See *id.*

250. *Id.* at 323.

251. *Id.* at 320.

252. See, e.g., *Toussie v. United States*, 397 U.S. 112, 114–15 (1970), *superseded by statute on other grounds*, Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(31), 85 Stat. 348, 352–53 (codified as amended at 50 U.S.C. app. § 462(d) (Supp. II 1972)).

tolled—sometimes by statute or through common-law equitable tolling. In *Rothkamm*, the question was whether a statute tolled the statute of limitations while the TAS considered the taxpayer’s wrongful-levy case.<sup>253</sup> The Fifth Circuit interpreted the statute in such a way that tolling was appropriate, allowing the taxpayer additional time to file suit for return of her IRS-seized property.<sup>254</sup> By interpreting the statute in such a way, it muddied an already-unclear area of the law.<sup>255</sup> A better way would have been to apply *Holland*’s two-prong test for equitable tolling: if the court finds the taxpayer was reasonably diligent and extraordinary circumstances caused the missed deadline, the court should grant the equitable tolling.<sup>256</sup> Nevertheless, this case is important because it allows more time for taxpayers (at least in the Fifth Circuit) to defend their interests when invoking their right to TAS assistance.<sup>257</sup>

However, Congress should clarify by statute, or the IRS by rule, the effect that working with the TAS has on tolling the statute of limitations. The holding in *Rothkamm* would make an excellent foundation for the statute or rule. In lieu of congressional or administrative action, all federal appellate circuits should either follow *Rothkamm* or apply *Holland*’s equitable tolling, especially during this time of diminishing IRS responsiveness to taxpayer inquiries and appeals. With untimely service from the IRS and increasingly limited service from the NTA, taxpayers’ ability to resolve problems within the statute of limitations is more difficult and costly, creating a greater need for equitable-tolling relief than in the past.

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253. See *Rothkamm v. United States*, 802 F.3d 699, 709 (5th Cir. 2015) (“By its plain terms, § 7811(d)(1) applies to toll the running of any statute of limitations for any action described in § 7811(b) . . .”).

254. *Id.* at 709–10.

255. See 2015 ANNUAL REPORT, *supra* note 149, at 317.

256. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

257. *Rothkamm*, 802 F.3d at 701.