

News Analysis: Fighting for Supreme Court Review of the 6-Year Statute

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The tax bar is mostly convinced that the Supreme Court will grant certiorari in the coming term to hear one of the cases decided by several circuit courts involving an extended statute of limitations period due to alleged overstated basis resulting in omissions from gross income. But with only one case likely to be granted certiorari, taxpayers and the government are jockeying to have their preferred case be the one the Supreme Court reviews, each deeming theirs the best candidate for a decision providing resolution on how to construe section 6501(e).

The likeliest certiorari candidate is *Beard v. Commissioner*, in which the Seventh Circuit held for the government back in January. The taxpayers in *Beard* submitted the first certiorari petition to the Supreme Court in June, and the government recently filed an acquiescence to that request. Consequently, the Supreme Court should consider the petition at its first conference of the new term on September 26. (For the appellate decision in *Beard v. Commissioner*, No. 09-3741 (7th Cir. 26, 2011), see *Doc 2011-1764* or *2011 TNT 18-10*. For the cert. petition (No. 10-1553), see *Doc 2011-15566* or *2011 TNT 138-12*. For the government's reply, see *Doc 2011-17770*.)

Certiorari petitions have also been filed in several other cases addressing section 6501(e), but those applications are not as far along in the filing process and are unlikely to be ready for consideration on September 26. However, several practitioners have told Tax Analysts that the Supreme Court clerk's office is aware of the multiple certiorari petitions on the issue, increasing the likelihood that the justices may hold off on making an immediate decision until all parties have finished filing their briefings and responses.

The government is half-heartedly appealing its two appellate losses. In *Home Concrete* (Fourth Circuit), the government filed its certiorari petition on August 3, with a taxpayer response due September 2. In *Burks* (Fifth Circuit), the government filed for certiorari on August 11, with a taxpayer response due on September 12. Viewing the Seventh Circuit opinion as highly favorable, the government's petitions in the two cases argue that the Court should grant certiorari in *Beard* and hold off on a certiorari decision in these two cases until the final disposition in *Beard*. It is an open question whether the taxpayers in *Burks* and *Home Concrete* will oppose the government's petition for certiorari or, given inevitable Supreme Court review, see their cases as better scenarios for a taxpayer win and acquiesce in asking for review. (For the appellate decision in *Home Concrete & Supply LLC v. United States*, No. 09-2353 (Feb. 7, 2011), see *Doc 2011-2674* or *2011 TNT 26-7*. For the petition for cert. (No. 11-139), see *Doc 2011-17772*. For the appellate decision in *Burks v. United States*, Nos. 09-11061, 09-60827 (Feb. 9, 2011), see *Doc 2011-2857* or *2011 TNT 28-12*. For the petition for cert. (No. 11-178), see *Doc 2011-17771*.)

A petition for certiorari in *Grapevine Imports* (Federal Circuit) was filed on August 5; the government has a September 9 response date. (For the appellate decision in *Grapevine Imports Ltd. v. United States*, No. 2008-5090 (Mar. 11, 2011), see *Doc 2011-5233* or *2011 TNT 49-14*. For the petition for cert. (No. 11-163), see *Doc 2011-17773*.)

No certiorari petition has been filed yet in *Intermountain* because the taxpayer on August 5 asked the D.C. Circuit for a rehearing. With the petition for rehearing *en banc* denied in the Tenth Circuit, a petition for review of *Salman Ranch* is also expected to be filed soon. (For the opinion in *Intermountain Insurance Service of Vail LLC et al. v. Commissioner*, No. 10-1204 (June 21, 2011), see *Doc 2011-13510* or *2011 TNT 120-10*. For the appellate decision in *Salman Ranch Ltd. v. Commissioner*, No. 09-9015 (May 31, 2011), see *Doc 2011-11714* or *2011 TNT 105-16*.)

"The Supreme Court knows it has multiple pending cert petitions, and it seems pretty clear they will grant cert in one of them," said Patrick J. Smith of Ivins, Phillips & Barker. "If the people at the Court know there are several cases out there with the same issue but with slightly different postures, they might well wait until more of them are in front of them to see what the arguments are," he said. "For example, the D.C. Circuit's *Intermountain* decision was very well written, even if wrongly decided, but no petition has been filed yet."

But Alan I. Horowitz of Miller & Chevalier said he thought *Beard* was the hands-down favorite for certiorari. "I believe it is not much of a race, as the government allowed *Beard* to get there first, and that case will be ready for the Court to rule on at its first conference," he said. "The government deliberately and successfully played its cards to get *Beard* in front of *Home Concrete*."

Although some have questioned whether the Court might punt on hearing *Beard* because the Seventh Circuit did not address the validity of the section 6501(e) regulations, Horowitz said such speculation is doubtful to have much sway. "The winning party can defend the outcome on other grounds not relied upon by the court of appeals, so the government can argue that the regulations save its interpretation even if the Court disagrees with the Seventh Circuit's reasoning on *Colony* and the statute," he said.