Gaps in the Seventh Circuit's Reasoning in *Lantz*

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Last year the Tax Court invalidated an IRS regulation that imposed a two-year time limit on claims for equitable innocent spouse relief, based on the rationale that Congress acted intentionally when it imposed the two-year time limit on other types of innocent spouse relief but not on equitable claims for relief. The Seventh Circuit reversed the Tax Court on this issue. Significant gaps in the reasoning of the Seventh Circuit opinion raise serious questions about the correctness of its holding.

Background

Section 6013(a) authorizes the filing of joint income tax returns by married couples, subject to specified restrictions and limitations. Section 6013(d)(3) provides that, if a joint return is filed, "the liability with respect to the tax shall be joint and several." In recognition that the joint and several liability rule in section 6013(d)(3) may, under some circumstances, produce inappropriately harsh results, Congress has, since 1971, included in the code explicit provisions setting forth circumstances when "innocent spouse" relief may be available. Since 1998, the rules for innocent spouse relief have been contained in section 6015.

Section 6015 provides three distinct routes to innocent spouse relief, set forth in three different subsections. Two of those subsections, 6015(b) and (c), contain explicit two-year limits on claims for innocent spouse relief, starting with the time when the IRS begins collection activities concerning the individual seeking relief.[1] The third subsection, 6015(f), contains no time limit on claims for innocent spouse relief.

Section 6015(b) and section 6015(c) contain requirements that must be satisfied in order for relief to be available. For example, section 6015(b) requires that the joint return reflect "an understatement of tax attributable to erroneous items of one individual filing the joint return."[2] Section 6015(c) requires that the individual seeking relief either no longer be married to the other individual or be legally separated or living apart.[3] Section 6015(f) is more general than section 6015(b) and section 6015(c). Section 6015(f) provides that if, "taking into account all the facts and circumstances, it is inequitable to hold the individual liable,"[4] and "relief is not available . . . under subsection (b) or (c),"[5] then "the Secretary may relieve such individual of such liability."

The IRS and Treasury promulgated a regulation that imposes the same two-year limit on claims for relief under section 6015(f) that is imposed by the statutory terms of section 6015(b) and section 6015(c) on claims for relief under those two subsections.[6] A taxpayer who filed her request for relief under section 6015(f) beyond the two-year limit, and who was denied relief solely on that basis, challenged the validity of the two-year limit, as applied to claims for relief under section 6015(f).[7]

Based on applicable precedent in the Seventh Circuit,[8] to which the case would be appealable, the Tax Court evaluated the challenge to the regulation under the two-step standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[9] After noting that *Chevron* step one requires the use of traditional tools of statutory construction to determine whether Congress had an intent on the question at issue,[10] a 12-judge majority of the Tax Court[11] held that, in light of the explicit statutory inclusion of a two-year limit in section 6015(b) and section 6015(c) and the absence of any time limit in section 6015(f), the regulation's application of this two-year limit on claims for relief under section 6015(f) was invalid both under *Chevron* step one, as contrary to congressional intent, and under *Chevron* step two as unreasonable. The court said:

> We find that by explicitly creating a 2-year limitation in subsections (b) and (c) but not subsection (f), Congress has "spoken" by its audible silence. Because the regulation imposes a limitation that Congress explicitly incorporated into subsections (b)

[1]Section 6015(b)(1)(E); section 6015(c)(3)(B).
[2]Section 6015(b)(1)(B).
[3]Section 6015(c)(3)(A)(i).
[4]Section 6015(f)(1).
[5]Section 6015(f)(2).
[6]*See* reg. section 1.6015-5(b)(1); T.D. 9003 (July 18, 2002), *Doc 2002-16606, 2002 TNT 138-1*.
[7]*Lantz v. Commissioner*, 132 T.C. 8 (2009), *Doc 2009-7979, 2009 TNT 65-8*.
[8]*See Bankers Life & Casualty Co. v. United States*, 142 F.3d 973 (7th Cir. 1998), *Doc 98-12811, 98 TNT 76-8*.
[9]467 U.S. 837 (1984).
[10]*Id.* at 843 n.9.
[11]Five judges dissented. The Justice Department briefs repeatedly misstate the vote count in the Tax Court as being 11 to 5 when it was in fact 12 to 5. *See* Brief for Appellant at 3, 12, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345); Brief for Appellant at 3, *Mannella v. Commissioner*, No. 10-1308 (3d Cir. 2010).

> and (c) but omitted from subsection (f), it fails the first prong of *Chevron*. . . .
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> For the same reasons we believe section 1.6015-5(b)(1), Income Tax Regs., fails the first step of the *Chevron* test, we find that the regulation is impermissible [under *Chevron* step two] because it is contrary to the intent of Congress.[12]

The Tax Court noted that its conclusion gained additional support from the fact that relief under section 6015(f) is by the terms of the provision specifically made available only if relief is *not* available under section 6015(b) or section 6015(c), and that a taxpayer's failure to meet the explicit statutory two-year limits in section 6015(b) and section 6015(c) is an obvious circumstance when relief might not be available under section 6015(b) or section 6015(c).

The Seventh Circuit, in a panel opinion by Judge Richard Posner, reversed the Tax Court.[13] The purpose of this article is to identify and discuss gaps in the Seventh Circuit's reasoning in support of its holding reversing the Tax Court. The most significant gaps in reasoning relate to two of the principal reasons presented by Judge Posner for disagreeing with the Tax Court majority, and thus call into question the correctness of the Seventh Circuit's result.

Russello's 'Disparate Inclusion or Exclusion'

The first significant gap in the Seventh Circuit's reasoning in *Lantz* is Judge Posner's derisive and dismissive rejection of the Tax Court's rationale that Congress had spoken by its silence in imposing two-year limits in section 6015(b) and (c) but no time limit in section 6015(f). Judge Posner does not merely disagree with the Tax Court on this point. He suggests, in effect, that the Tax Court's position was baseless and absurd.

It is this aspect of Judge Posner's opinion that is undoubtedly its most questionable feature. His opinion suggests that the Tax Court simply invented an entirely novel principle of statutory interpretation to the effect that Congress may be viewed as speaking with silence when it includes explicit limitations in some provisions of a statute but omits corresponding limitations in other parallel provisions of the same statute:

> Even if our review of statutory interpretations by the Tax Court were deferential, we would not accept "audible silence" as a reliable guide to congressional meaning. "Audible silence," like Milton's "darkness visible" or the Zen *koan* "the sound of one hand clapping," requires rather than guides interpretation. Lantz's brief translates "audible silence" as "plain language," and adds (mysticism must be catching) that "Congress intended the plain language of the language used in the statute."
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> Whatever any of this means, the Tax Court's basic thought seems to have been that since some statutes (in this case, some provisions of a statute) prescribe deadlines, whenever a statute (or provision) fails to prescribe a deadline, there is none. . . . It's as if Illinois passed a statute authorizing the issuance of drivers' licenses containing the licensee's Zodiacal sign but specifying no deadline for application, and the Driver Services Department, which is responsible for issuing licenses, promulgated a regulation requiring that application for the special license be filed one month before the expiration of the driver's current license. Would anyone say that the state legislature had by its "audible silence" forbidden the Department to impose a deadline?[14]

Judge Posner's characterization of the principle applied by the Tax Court as "mysticism," his comparison of this principle to "Milton's 'darkness visible' or the Zen *koan* 'the sound of one hand clapping,'" and his use of dismissive language such as "whatever any of this means" suggests that he must have believed that the 12 judges in the Tax Court majority were engaged in baseless judicial activism, or worse. However, Judge Posner's tone is surprising not only because of its harshness but also because the statutory construction principle that was applied by the Tax Court majority is, despite his rhetoric, exceedingly well-established.

The principle of statutory interpretation that the Tax Court majority applied, and that is derided by Judge Posner, was given its most familiar formulation in the Supreme Court's decision in *Russello v. United States*[15]:

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.[16]

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[12]132 T.C. at 139, 141.

[13]*Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010). The same issue is currently pending in five other circuits. *See Mannella v. Commissioner*, No. 10-1308 (3d Cir.); *Coulter v. Commissioner*, No. 10-680 (2d Cir.); *Jones v. Commissioner*, No. 10-1985 (4th Cir.); *Buckner v. Commissioner*, No. 10-2056 (6th Cir.); *Carlile v. Commissioner*, No. 10-72578 (9th Cir.). (Ed. note: for the Tax Court decision in *Mannella,* see *Doc 2009-8425* or *2009 TNT 69-2*. *Coulter* was an unreported stipulated decision.) After the Seventh Circuit issued its opinion in *Lantz*, the IRS issued CC-2010-011, *Doc 2010-13823, 2010 TNT 120-19*, directing, among other things, that Chief Counsel "attorneys should continue to argue that the two-year rule deadline, as enunciated in the regulations, is valid in all docketed cases" in the Tax Court, and noting that "Chief Counsel will not settle or concede the two-year deadline issue in any docketed case," that "the validity of the two-year deadline is a significant issue, as evidenced by the Office's designation of the issue for litigation," and that "appeals in several additional circuits are currently being considered."

After this article was completed, another article discussing the Seventh Circuit opinion and reaching similar conclusions was published. *See* Bryan T. Camp, "Interpreting Statutory Silence," *Tax Notes*, Aug. 2, 2010, p. 501, *Doc 2010-13289*, or *2010 148-6*. Also, this article was completed before the filing of the taxpayer's brief in *Coulter.*

[14]607 F.3d at 481, 484-485.

[15]464 U.S. 16 (1983).

[16]*Id.* at 23 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

The Tax Court did not cite *Russello* for this principle, but instead cited reiterations of this principle from somewhat later decisions of the Supreme Court that quoted the foregoing language from *Russello*.[17] However, the taxpayer's brief in the Seventh Circuit did cite *Russello* repeatedly, including a citation immediately after the words Judge Posner quotes in the passage from his opinion quoted earlier.[18]

The extremely well-established nature of the *Russello* principle is demonstrated by the fact that, in addition to *Russello* itself and the two Supreme Court decisions cited by the Tax Court, numerous other Supreme Court decisions have applied the *Russello* principle, including at least one decision involving a deadline.[19] The *Russello* principle is likewise not unknown in the Seventh Circuit.[20] Thus, Judge Posner's derisive dismissal of the Tax Court's reliance on this very well-established principle is difficult to understand or explain.

Another frequently-cited Supreme Court decision, *King v. St. Vincent's Hospital*,[21] a decision that the taxpayer cited repeatedly in her brief to the Seventh Circuit,[22] provides additional support for the Tax Court's conclusion that statutory silence regarding a time-based requirement can be meaningful in light of the context provided by the inclusion of time-based requirements in parallel provisions. The Court in that case concluded that the absence of any durational requirement in one subsection of a statutory provision should be interpreted, in light of the explicit inclusion of durational requirements in other subsections of the same provision, to mean that there was in fact no durational requirement in the subsection when none was stated.

In response to policy-based arguments against that interpretation, the Court explained the basis for its holding:

> But to grant all this is not to find equivocation in the statute's silence, so as to render it susceptible to interpretive choice. On the contrary, the verbal distinctions underlying the hospital's arguments become pallid in the light of a textual difference far more glaring than any of them: while, as noted, subsection (d) is utterly silent about any durational limit on the service personnel, other subsections of § 2024, protecting other classes of full-time service personnel, expressly limit the periods of their protection. . . . Given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, we infer that the simplicity of subsection (d) was deliberate, consistent with a plain meaning to provide its benefit without conditions on length of service.
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> In so concluding, we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.[23]

It is difficult to read the foregoing passage and not see its clear application to the issue regarding the proper interpretation of section 6015(f).

The Concept of 'Borrowing' Statutes of Limitations

After rejecting as "mysticism" the notion applied by the Tax Court that Congress might express clear meaning by silence, Judge Posner accepts the government's argument that the basis for deciding the case should be found

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[17]*City of Chicago v. Envtl. Def. Fund.*, 511 U.S. 328, 338 (1994) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)).

[18]*See* Brief for Appellee at 7, 14, 20, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345). The government's opening brief in the Seventh Circuit characterized the principle of statutory construction applied by the Tax Court as "a *non sequitur*." (Emphasis in original.) *See* Brief for Appellant at 22, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345).

[19]*See, e.g., General Motors Corp. v. United States*, 496 U.S. 530, 538 (1990) ("Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in section 110(a)(3)(A)," (citing and quoting *Russello*)); *Kucana v. Holder*, 130 S.Ct. 827, 837-838 (2010); *Carcieri v. Salazar*, 129 S.Ct. 1058, 1065 (2009); *United States ex rel. Eisenstein v. City of New York*, 129 S.Ct. 2230, 2235 (2009); *Dean v. United States*, 129 S.Ct. 1849, 1854 (2009); *Nken v. Holder*, 129 S.Ct. 1749, 1759 (2009); *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 383-384 (2006); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002); *Duncan v. Walker*, 533 U.S. 167, 173 (2001); *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000); *Bank of America National Trust & Savings Association v. 203 North La Salle Street Partnership*, 526 U.S. 434, 450 (1999); *Hohn v. United States*, 524 U.S. 236, 250 (1998); *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 418 (1998); *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Bates v. United States*, 522 U.S. 23, 29-30 (1997); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 95 (1994); *Custis v. United States*, 511 U.S. 485, 492 (1994); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *Brown v. Gardner*, 513 U.S. 115, 120 (1994); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 106 (1987); *Rodriguez v. United States*, 480 U.S. 522, 525 (1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

[20]*See, e.g., River of Life Kingdom Ministries v. Village of Hazel Crest*, 585 F.3d 364, 374 (7th Cir. 2009); *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008); *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 547 (7th Cir. 2003); *Lara-Ruiz v. INS*, 241 F.3d 934, 942 (7th Cir. 2001); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 983 (7th Cir. 1999); *McNutt v. Board of Trustees, University of Illinois*, 141 F.3d 706, 709 (7th Cir. 1998); *United States v. Jarrett*, 133 F.3d 519, 539 (7th Cir. 1998); *Batanic v. INS*, 12 F.3d 662, 668 (7th Cir. 1993); *United States v. Doig*, 950 F.2d 411, 414-415 (7th Cir. 1991). In only one of the foregoing Seventh Circuit cases in which the *Russello* principle was applied (*Lara-Ruiz*) was Judge Posner a member of the panel. I have not attempted the task of assembling a comprehensive catalog of cases in which the *Russello* principle has been applied in the other circuits.

(Footnote continued in next column.)

[21]502 U.S. 215 (1991).

[22]*See* Brief for Appellee at 13, 18-19, 21, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345).

[23]502 U.S. at 220-221 (citations omitted). Justice Souter did not cite *Russello* in his opinion for the Court in *King v. St. Vincent's Hospital*, perhaps because he wanted to emphasize that the *Russello* principle of disparate inclusion or exclusion is simply a more specific application of the general principle that "the meaning of statutory language . . . depends on context."

instead in precedent applying a principle of statutory construction that he apparently finds more congenial than the *Russello* principle, namely, the concept of ''borrowing'' statutes of limitations to apply to substantive claims that are created by federal statutory provisions when no statute of limitations is explicitly provided in the statute creating the claim.[24] That reliance by Judge Posner on precedents relating to ''borrowed'' statutes of limitations provisions is the second principal gap in the Seventh Circuit's reasoning. What is most immediately disconcerting about Judge Posner's reliance on those ''borrowing'' precedents is that, as his own quotation from one of them makes clear, they invoke the concept of Congress speaking by silence that Judge Posner has just dismissively derided the Tax Court for applying.

Judge Posner describes those borrowing precedents as follows:

> Courts even say that in borrowing a statute of limitations from one statute for use in another they are doing Congress's will: ''Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that *Congress intends by its silence* that we borrow state law.''[25]

That reliance on precedents relating to borrowed statutes of limitations is questionable for more than one reason. First, the grounding of those precedents on the concept of meaningful statutory silence is fundamentally inconsistent with Judge Posner's dismissive rejection of the Tax Court's reliance on the same concept. Even more significantly, none of the authorities cited by Judge Posner on borrowing statutes of limitations deal with statutory contexts remotely resembling the statutory context at issue here, namely when two subsections of a single statutory provision impose fixed time limits and a third subsection of the same statutory provision imposes no such fixed deadline.[26]

While the *Russello* principle is more general than the borrowed statute of limitations principle in the sense that the *Russello* principle is not focused specifically on time limits, the *Russello* principle nevertheless is more narrowly focused in the sense that it is not based solely on bare statutory silence, but rather on the more powerful concept that omission of a requirement in one provision gains meaning from the inclusion of that requirement in one or more closely related provisions. Judge Posner's conclusion that the congressional intent reflected in the borrowed statute of limitations precedents takes priority over the congressional intent reflected in the *Russello* principle is surprising. It is hard to understand the conclusion that Congress would have expected that courts or agencies would ''borrow'' a limitation period from one subsection of a single statutory provision and apply that borrowed limitation period to another subsection of the same statutory provision in which no time limit was stated, when that approach is so clearly contrary to the highly intuitive — and highly authoritative — *Russello* principle, and when none of the borrowed statutes of limitations cases involve borrowing from a different subsection of the same statutory provision.[27]

An additional significant reason why Judge Posner's reliance on the borrowed statutes of limitations cases is questionable relates to the fundamental difference between the nature of the statutory claims for which the concept of borrowed statutes of limitations has been applied and the nature of the claim for innocent spouse relief established by section 6015(f). The borrowing precedents relied on by Judge Posner relate to statutes of limitations that apply to claims that give a claimant a right to recovery against another party. However, a claim for innocent spouse relief is very different because innocent spouse relief is merely a potential *defense* against *another party's* claim for recovery, namely, the government's claim for unpaid taxes.

Innocent spouse relief is not a type of claim for recovery to which a statute of limitations is ordinarily applied. In the context of the type of factual situation in which innocent spouse relief may be an issue, the only genuine claim for a type of recovery to which a statute of limitations would ordinarily apply is the government's claim for unpaid taxes. The claim for innocent spouse relief represents merely a potential *defense* against the *government's claim* for unpaid taxes. A claim for innocent spouse relief has no meaning or significance outside the context of the government's claim for unpaid taxes and produces no recovery that is separate from the government's claim. Innocent spouse relief is merely relief from the government's claim for unpaid taxes.

According to Judge Posner, ''Courts 'borrow' a statute of limitations from some other statute in order to avoid the absurdity of allowing suits to be filed centuries after the claim on which the suit was based arose.''[28] That

[24]*See* Brief for Appellant at 33-34, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345). This concept of borrowing statutes of limitations is applied in cases when statutory provisions establishing substantive claims by one party against another party do not include explicit time periods within which those claims may be enforced. Most commonly, federal courts borrow statutes of limitations provisions for federal statutory claims from the closest corresponding state law claim. Sometimes, however, federal courts borrow statute of limitations provisions for federal statutory claims from similar federal statutory provisions. *See, e.g., Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

[25]607 F.3d at 482 (quoting *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. at 147). (Emphasis added.)

[26]For a discussion of this point, see Brief for Appellee at 19-21, *Mannella v. Commissioner*, No. 10-1308 (3d Cir. June 9, 2010).

[27]Judge Posner also accepts the government's additional argument that the imposition of the two-year limit on claims under section 6015(f) is supported by authorities accepting agency impositions of time limits on statutory claims when the statute is silent on a time limit, but those authorities are equally distinguishable on the ground that none of them involved a statutory provision in which the *Russello* principle would have been applicable. Likewise, none of those authorities involved a statutory claim that simply represented a defense against another party's claim for recovery.

[28]607 F.3d at 482.

rationale justifying the borrowing of a statute of limitations based on the need to cut off stale claims at some point short of eternity clearly loses all of its force when the claim that is at issue is not itself a claim for recovery but rather merely a potential *defense* against *another party's claim* for recovery.

None of the authorities cited by Judge Posner as support for the principle of borrowing a statute of limitations involved a situation in which the claim that was held subject to a time limitation was merely a defense against another party's claim for recovery. Although the taxpayer's brief in the Seventh Circuit did not explicitly make the argument that a defense against another party's claim for recovery is not the type of legal ''right'' that should be subject to this borrowed statute of limitations concept, the taxpayer's brief clearly did argue, extensively and vigorously, that the borrowed statute of limitations concept should not be applied to a claim for innocent spouse relief because the government's claim for unpaid taxes is itself subject to an explicit statute of limitations, which necessarily acts as a time limit on the claim for innocent spouse relief.[29]

In response to that argument in the taxpayer's brief, Judge Posner made the questionable contention that the fact that the government's claim for unpaid taxes has a 10-year statute of limitations is merely ''an external circumstance that as a practical matter creates a time limit.''[30] The notion that the statute of limitations that applies to the government's claim for unpaid taxes is merely an ''external circumstance,'' which only by happenstance imposes a time limit on a taxpayer's claim for innocent spouse relief, even though that claim for relief exists only as a defense against the government's claim for unpaid taxes, is surprising.[31]

There are other questionable aspects to the Seventh Circuit opinion along with the foregoing principal gaps in reasoning.

The Flawed 'Undercutting' Rationale

To support his conclusion that it was reasonable and proper for the IRS and Treasury to impose the same two-year limit on claims for relief under section 6015(f) that is explicitly imposed by the statutory terms of sections 6015(b) and 6015(c) on claims for relief under those subsections, Judge Posner accepts the government's argument that having no fixed time limit under section 6015(f) would ''undercut'' the two-year limit in section 6015(b) and 6015(c), in light of the fact that most taxpayers who would qualify for relief under section 6015(f) would also qualify for relief under section 6015(b) or section 6015(c). There are a number of considerations that answer that argument. The first consideration is that if Congress had believed that the two-year limit in section 6015(b) and section 6015(c) was of such overriding importance that it would be undercut if any relief were ever available under section 6015(f) beyond this time limit, then Congress would certainly have imposed this time limit on claims under section 6015(f) as well.

A second consideration that addresses the argument that failure to impose a two-year limit under section 6015(f) would undercut the two-year limit in section 6015(b) and section 6015(c) is the fact that relief under section 6015(f) is not mandatory, in contrast to relief under 6015(b) and 6015(c). Therefore, a taxpayer who fails to seek relief within the two-year period prescribed by section 6015(b) and section 6015(c) loses the significant benefit of the firm and fixed entitlement to relief that those subsections provide.[32] That serious negative consequence of failing to meet the statutory two-year limit is more than sufficient to answer the ''undercutting'' argument.

Another significant consequence of this discretionary aspect of relief under section 6015(f), as well as the fact that relief under section 6015(f) is based on a consideration of ''all the facts and circumstances,'' is that it would unquestionably have been reasonable and appropriate for the IRS and Treasury to require a showing of specific facts and circumstances explaining why innocent spouse relief was not sought within the two-year period prescribed by section 6015(b) and (c) before allowing discretionary equitable relief under section 6015(f) for claims for relief submitted outside that time period. The ability of the IRS and Treasury to impose a requirement for a showing of a good reason for delay is an additional important factor that should clearly address any concerns that the time limits in section 6015(b) and section 6015(c) would be ''undercut'' if relief were available under section 6015(f) beyond a two-year limit.[33] The taxpayer's brief in the Seventh Circuit did not make the argument that any concern about ''undercutting'' the two-year limit in section 6015(b) and section 6015(c) could properly be

[29] *See* Brief for Appellee at 7-8, 17-18, 24, 28, 29-31, 33-35, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345).

[30] 607 F.3d at 482.

[31] To the extent that a claim for innocent spouse relief might, under unusual circumstances, give rise to a claim for a refund of taxes previously paid, section 6015 itself makes clear that the normally applicable statute of limitations on refund claims remains applicable. *See* section 6015(g)(1). In its reply brief in the Seventh Circuit, the government argues that the existence of the explicit two-year limit in section 6015(b) and 6015(c) answers the argument that a statute of limitations is unnecessary or inappropriate under section 6015(f) in light of the statute of limitations on the government's claim for unpaid taxes. *See* Reply Brief for Appellant at 12-13, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345). That response by the government misses the point. The issue is not whether a time limit is appropriate as a matter of congressionally adopted policy. The issue is instead whether it is appropriate under these circumstances to apply the concept of borrowing a statute of limitations when none is explicitly stated in the statute. Congress's policy decision to impose a two-year time limit on claims under section 6015(b) and section 6015(c) does not affect the fact that the rationale underlying the borrowing concept, namely that otherwise claims could be brought forever, is simply not applicable here, because the claim for innocent spouse relief is merely a defense against the government's claim for unpaid taxes.

[32] *See* Brief for Appellee at 18, *Mannella v. Commissioner*, No. 10-1308 (3d Cir. June 9, 2010).

[33] For a discussion of this point, see *id.* at 18-19.

addressed by requiring a showing of good reasons why relief was not sought within the two-year limit, but the brief did demonstrate persuasively that, in this taxpayer's case, there were clearly good reasons explaining the delay, and it argued that the position of the IRS and Treasury "would completely cut off the rights to taxpayers without any regard for the facts and circumstances that prevented them from filing within the two-year limitations period."[34]

Even though the taxpayer did not explicitly make the argument, it is difficult to imagine that it would not have occurred to Judge Posner that the IRS and Treasury could easily have required a showing of good cause before granting relief outside the two-year period, instead of imposing an absolute two-year bar. It is equally difficult to imagine that Judge Posner would have concluded that the availability of this alternative approach had to be excluded from the analysis on the ground that the taxpayer waived the benefit of the argument by not explicitly articulating it, when the taxpayer had in fact presented a persuasive case for the existence of good cause for delay in her particular circumstances and had argued that ignoring the reasons for a taxpayer's delay in seeking relief was unreasonable. Nevertheless, Judge Posner's opinion does not address the alternative approach of requiring a demonstration of a good reason for failing to seek relief within the two-year period.

As an amicus brief that was filed in the Seventh Circuit in support of the taxpayer's position forcefully and persuasively argues,[35] the effect of the two-year rule in the regulations is that, contrary to the statutory directive, "all the facts and circumstances" are not taken into consideration in the determination as to whether innocent spouse relief is appropriate if the taxpayer fails to meet the two-year limit. Instead, the only fact or circumstance that is considered in such a case is the fact that relief was requested more than two years after the first collection activity.

Judge Posner accepts the government's argument that, because relief under section 6015(f) is discretionary (if the conditions for relief under section 6015(f) are satisfied, "the Secretary *may* relieve such individual of such liability"), the discretionary nature of the relief authorizes the adoption of rules excluding specific categories of applicants. He agrees with the government that this conclusion is supported by the Supreme Court's decision in *Lopez v. Davis*, 531 U.S. 230 (2001).

The issue in that case was substantially different from the issue in *Lantz*. The statutory provision at issue in that case stated that "the period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a [substance abuse] treatment program may be reduced by the Bureau of Prisons." The Bureau of Prisons adopted a rule categorically excluding from eligibility for early release prisoners who possessed a firearm in connection with the nonviolent offense for which they were convicted (as well as prisoners previously convicted of violent offenses). The Supreme Court upheld the rule:

> The Bureau reasonably concluded that an inmate's prior involvement with firearms, in connection with the commission of a felony, suggests his readiness to resort to life-endangering violence and therefore appropriately determines the early release decision.[36]

In contrast to the statutory provision at issue in *Lopez v. Davis*, which included no explicit guidance for the exercise of agency discretion, section 6015(f) includes the much clearer guidance that "taking into account all the facts and circumstances, it is inequitable to hold the individual liable." Nevertheless, Judge Posner accepts the government's argument that, because section 6015(f) says "may" rather than "shall," it was reasonable and appropriate for the IRS and Treasury to adopt a rule that excluded from relief certain taxpayers on a basis *other than* whether, "taking into account all the facts and circumstances, it is inequitable to hold the individual liable." *Lopez v. Davis* does not support this conclusion.

When Does Section 6015(f) Apply?

Another consideration that is relevant to the validity of imposing a two-year limit under section 6015(f), in light of the fact that relief is available under section 6015(f) only if relief is *not* available under section 6015(b) or section 6015(c), is the question of what circumstances would make relief available under section 6015(f) if a two-year limit is imposed. The fact that section 6015(b), like section 6015(f), also includes a requirement that "taking into account all the facts and circumstances, it is inequitable to hold the other individual liable" raises a potential superfluity issue as to whether there are any circumstances where section 6015(f) could apply if the same two-year limit that applies to section 6015(b) is made applicable to section 6015(f). The presence of that requirement in both section 6015(b) and section 6015(f) clearly makes it necessary to consider the comparative scope of the two subsections.

One clear way that section 6015(f) is broader than section 6015(b) is that relief under section 6015(b) is limited by the explicit terms of section 6015(b) to cases in which the tax liability on the tax return was understated, whereas section 6015(f) does not include this requirement but instead by its explicit terms applies in the underpayment case. Therefore, section 6015(b) does not apply in cases in which the tax was correctly stated on the return but the tax liability was not fully paid, while section 6015(f) can apply under those circumstances.

The conference report specifically stated that this was one area where relief under section 6015(f) could be broader than relief under section 6015(b). However, the conference report also made clear that relief under section 6015(f) was not intended to be *limited* to this class of cases:

[34]*See* Brief for Appellee at 42, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345).

[35]*See* Brief as Amicus Curiae for Center for Fair Administration of Taxes, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345).

[36]531 U.S. at 244.

> The conferees do not intend to limit the use of the Secretary's authority to provide equitable relief to situations where tax is shown on a return but not paid. The conferees intend that such authority be used where, taking into account all the facts and circumstances, it is inequitable to hold an individual liable for all or part of any unpaid tax or deficiency shown on a return.[37]

Therefore, the question is what other types of cases could be covered by section 6015(f) that are not covered by section 6015(b), in order to give effect to the congressional intent that is so clearly expressed in the foregoing statements from the conference report. The only other specific requirement that applies under section 6015(b) but that might be avoided under section 6015(f) is the requirement that the spouse requesting relief must not have had knowledge of the understatement of tax. However, in light of the fact that knowledge of the understatement is clearly a negative factor in deciding whether it is inequitable to hold the spouse requesting relief liable, it seems highly unlikely that this class of cases is the entire universe that the conferees had in mind as the class that might receive relief under section 6015(f) that would be unavailable under section 6015(b) (beyond the cases in which there was an underpayment but no understatement).

In light of the requirement under both section 6015(b) and section 6015(f) that, ''taking into account all the facts and circumstances, it is inequitable to hold [the spouse seeking relief] liable,'' the category of cases when, for some good reason, relief was not sought within the two-year period prescribed by section 6015(b) represents the only meaningful candidate for being the type of case contemplated by the conference report when (apart from the distinction between underpayments and understatements) application of section 6015(f) would be available but relief under section 6015(b) is not available. Consequently, the two-year limit imposed by the regulations on claims under section 6015(f) is contrary to the intent that was clearly expressed in the conference report that relief under section 6015(f) was intended to be broader than relief under section 6015(b) in ways other than the distinction between underpayments and understatements.

Additional Considerations

The government's argument that imposing a two-year limit under section 6015(f) is justified because all three types of relief should be considered at the same time makes sense, but that argument only has force in a case when *some* type of relief was in fact sought during the two-year period.[38] This consideration does not justify denying all relief after two years when there has never been any previous request for relief within the two-year period. The government's argument is directed at cases when there are multiple successive claims for relief, but that is not what is at issue here.

The obvious solution to that concern would be a more targeted rule directed at situations presenting multiple successive claims for relief, when a claim was made under section 6015(b) or section 6015(c) within the two-year period but then was followed by a claim under section 6015(f) outside the two-year period. Moreover, the government's argument that imposing a two-year limit on all categories of claims makes it easier for the IRS to process claims for innocent spouse relief ignores the fact that the statutory test for granting relief under section 6015(f), namely, ''taking into account all the facts and circumstances, it would be inequitable to hold the individual liable,'' does not leave any room for any serious contention that one of the relevant facts and circumstances, in determining whether it is inequitable to hold the individual liable, is what is most convenient for the IRS.

Judge Posner accepts the government's argument that imposition of a two-year limit under section 6015(f) is supported by the fact that section 6015(f) begins with the words ''under procedures prescribed by the Secretary.'' Judge Posner accepts the government's argument that establishing a deadline is a ''procedure.'' While he acknowledges that section 6015(b) also includes the introductory language ''under procedures prescribed by the Secretary,'' but nevertheless includes an explicit two-year limit, which suggests that establishing a time limit is not encompassed within the language ''under procedures prescribed by the Secretary,'' he concludes that the fact that the heading of section 6015(b) also includes the word ''procedures'' negates any implication that the parallel introductory language in section 6015(b) and section 6015(f) would otherwise create.

Once again, however, it is the *Russello* principle that is the elephant in the room. If it were not for the inclusion of a two-year limit in section 6015(b) and section 6015(c) and the omission of any time limit in section 6015(f), there might be a question as to whether imposing a time limit would come within the scope of permitted ''procedures'' under section 6015(f), although the statutory requirement to consider ''all the facts and circumstances'' would remain a strong countervailing consideration.[39] Nevertheless, as the Court noted in *King v. St. Vincent's Hospital* regarding the *Russello* principle, ''the verbal distinctions underlying the [contrary] arguments become pallid in the light of a textual difference far more glaring

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[37]H.R. Rep. No. 105-599, at 254 (1998) (Conf. Rep.). The taxpayer quoted this language from the conference report in her brief in the Seventh Circuit. *See* Brief for Appellee at 16, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 99-3345). However, Judge Posner's opinion does not refer to this language in the conference report nor does his opinion give any serious consideration to the question of whether imposing a two-year time limit under section 6015(f) leaves this subsection with a scope sufficiently broader than section 6015(b) to give effect to congressional intent. For a discussion of this issue, see Brief for Appellee at 4-5, 16-17, 30-32, *Mannella v. Commissioner*, No. 10-1308 (3d Cir. June 9, 2010).

[38]*See* Brief for Appellant at 25, 45-46, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (No. 09-3345).

[39]However, the taxpayer in *Mannella* argues that statutes of limitations are necessarily substantive rather than procedural. *See* Brief for Appellee at 6-7, 22-24, *Mannella v. Commissioner*, No. 10-1308 (3d Cir. June 9, 2010).

than any of them,'' namely, in the present case, the explicit inclusion of a two-year limit in section 6015(b) and section 6015(c) and the omission of any time limit in section 6015(f).

'Long and Painstaking Consideration'

There is a striking contrast between the tone of Judge Posner's opinion at the start and its tone at the end. The rhetoric that was stridently dismissive of the Tax Court at the beginning becomes considerably milder at the end. If the tone earlier had resembled the tone at the end, the opinion might have seemed somewhat less questionable. Perhaps the two other members of the Seventh Circuit panel persuaded Judge Posner that the initial portion of his opinion had considerably overstated the merits of his position.

At the end, Judge Posner says, ''the arguments against the Tax Court's interpretation of subsection (f) as barring a fixed deadline *may not be conclusive*, though they are powerful.''[40] This is a drastic change of tone from Judge Posner's earlier, derisive dismissal of the Tax Court's conclusion. However, what Judge Posner cites next as the factor that tips the scale is that Treasury regulations are given deference accompanied by the bald assertion that Treasury ''promulgates regulations only after long and painstaking consideration.''[41] While the foregoing generalization regarding ''long and painstaking consideration'' is undoubtedly correct in the great majority of cases, it is inappropriate to make this generalization a presumption to be applied in all cases without considering whether there is any evidence that the generalization is in fact true in a particular case.[42]

Judge Posner cites nothing in support of the conclusion that this generalization is accurate in the case of the decision to apply the two-year limit to claims for relief under section 6015(f). The IRS first announced the two-year limit for claims under section 6015(f) in Notice 98-61,[43] which was issued less than five months after the enactment of section 6015(f), and reiterated this time limit in Rev. Proc. 2000-15,[44] before incorporating it in proposed regulations[45] and then in final regulations. In none of those documents was any explanation of the reason for the imposition of the time limit provided. Nothing in this record provides any support for the conclusion that the decision to apply the two-year limit to claims under section 6015(f) was the result of ''long and painstaking consideration.''

Conclusion

The significant gaps in reasoning in Judge Posner's opinion for the Seventh Circuit in *Lantz* call into question the correctness of the result. Although it is perhaps theoretically or hypothetically possible that a Court of Appeals opinion might be written making a persuasive case that the Tax Court's decision in *Lantz* was wrong, it is difficult to imagine what that opinion might say. In any event, the opinion Judge Posner wrote for the Seventh Circuit is not that opinion.

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[40]607 F.3d at 486 (emphasis added).

[41]*Id.*

[42]In *Chevron*, one of the important factors cited by the Court as supporting the conclusion that the agency's interpretation was reasonable was the fact that ''the agency considered the matter in a detailed and reasoned fashion.'' 467 U.S. at 865.

[43]1998-2 C.B. 756, *Doc 98-35729, 98 TNT 235-12*.

[44]2000-1 C.B. 447, *Doc 2000-2048, 2000 TNT 12-4*.

[45]REG-106446-98 (Jan. 17, 2001), *Doc 2001-1611, 2001 TNT 11-14*.