No. 11-763

In the Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

R AND J PARTNERS, ROBERT M. NALLEY, TAX MATTERS PARTNER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As a general matter, the Internal Revenue Service (IRS) has three years to assess additional tax if the agency believes that the taxpayer's return has understated the amount of tax owed. 26 U.S.C. 6501(a). That period is extended to six years, however, if the taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the [taxpayer's] return." 26 U.S.C. 6501(e)(1)(A). The questions presented are as follows:

1. Whether an understatement of gross income attributable to an overstatement of basis in sold property is an "omi[ssion] from gross income" that can trigger the extended six-year assessment period.

2. Whether a final regulation promulgated by the Department of the Treasury, which reflects the IRS's view that an understatement of gross income attributable to an overstatement of basis can trigger the extended six-year assessment period, is entitled to judicial deference.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Commissioner of Internal Revenue, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is not reported but is available at 2011 WL 4348332. The opinion of the Tax Court (App., *infra*, 6a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 11a-36a.

STATEMENT

1. As a general matter, the Internal Revenue Service (IRS) has three years to assess additional tax if the agency believes that the taxpayer's return has understated the amount of tax owed. 26 U.S.C. 6501(a). That period is extended to six years, however, if the taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the [taxpayer's] return." 26 U.S.C. 6501(e)(1)(A). The question presented in this case is whether that six-year assessment period applies to a tax-avoidance scheme that operated by overstating a taxpayer's basis in property.

a. When a taxpayer sells property, any "[g]ain[]" that he realizes from the sale contributes to his "gross income." 26 U.S.C. 61(a)(3). The taxpayer's gain, however, is not the sale price of his property. Rather, it is the sale price minus the taxpayer's capital stake in the sold asset, which is generally the amount paid to obtain the property, as adjusted by various other factors. 26 U.S.C. 1012. For tax purposes, that capital stake is commonly referred to as the taxpayer's "basis" in property. 26 U.S.C. 1011(a). Because the taxable income from a property sale is generally determined by subtracting the taxpayer's basis from the property's sale price, an overstatement of basis will typically decrease the amount of the taxpayer's gain (and thus the amount of federal income-tax liability) that is attributable to the sale.

This case involves a particular kind of tax shelter, known as a Son-of-BOSS (Bond and Option Sales Strategy) transaction. In a Son-of-BOSS transaction, a taxpayer uses some mechanism, often a short sale, to artificially increase his basis in an asset before the asset is sold. A short sale is a sale of a security that the seller does not own or has not contracted for at the time of the sale. To close the short sale, the seller is obligated to purchase and deliver the security at some point in the future, often by using the proceeds from the short sale itself. Typically in a Son-of-BOSS transaction, a taxpayer enters into a short sale and transfers the proceeds as a capital contribution to a partnership. The partnership then closes the short sale by purchasing and delivering the relevant security on the open market. See *Beard* v. *Commissioner*, 633 F.3d 616, 617-618 (7th Cir. 2011), petition for cert. pending, No. 10-1553 (filed June 23, 2011).

When the taxpayer and partnership file their tax returns for the year in which a transaction of the kind described above occurs, they are required under 26 U.S.C. 722, 723, and 752 to report their taxable bases in the partnership. The taxpayer's basis in the partnership is called an "outside basis," while the partnership's basis in its own assets is called an "inside basis." See *Kornman & Assocs., Inc.* v. *United States*, 527 F.3d 443, 456 n.12 (5th Cir. 2008). In a Son-of-BOSS transaction, when computing both "outside" and "inside" basis, the taxpayer and the partnership include the short-sale proceeds contributed to the partnership, without decreasing that amount by the corresponding obligation (*i.e.*, to close the short sale by purchasing and delivering the relevant security) that the partnership has assumed. As a result, the taxpayer either generates a large paper loss that can be used to offset capital gains on other unrelated investments, or turns what would otherwise have been a sizeable capital gain into a smaller taxable gain or even a capital loss.[1] See *Beard*, 633 F.3d at 618.

b. This case involves a Texas partnership called R and J Partners (RJP) that was owned by respondent Robert M. Nalley and one of his companies, RMN Investments, LLC (RMN). In 1998, respondent contracted to sell his stock in four businesses, which would have generated approximately $7.8 million in capital gains. See 7166-06, Resp't's Objection to Pet'r's Mot. for Summ. J. 2-3 (T.C. Feb. 3, 2009) (Gov't Obj.). To minimize his anticipated tax liability from those transactions, respondent (through RMN) entered into a short sale of a United States Treasury Note, receiving cash proceeds of $10.25 million. *Id.* at 3. Respondent then contributed $7.8 million of that amount, along with the obligation to close out a corresponding portion of the short sale, to RJP. *Ibid.* RJP subsequently closed its portion of the short sale by purchasing and delivering Treasury Notes for approximately $7.8 million. See 7166-06, Amended

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[1] In 2000, the IRS issued a notice informing taxpayers that Son-of-BOSS transactions were invalid under the tax laws. See Notice 2000-44, 2000-36 I.R.B. 255 (describing arrangements that unlawfully "purport to give taxpayers artificially high basis in partnership interests"). In the wake of that notice, courts largely have invalidated Son-of-BOSS transactions as lacking in economic substance. See, *e.g.*, *Jade Trading, LLC* v. *United States*, 80 Fed. Cl. 11, 45-46 (2007), aff'd in relevant part, 598 F.3d 1372, 1376-1377 (Fed. Cir. 2010). In 2004, the IRS offered a settlement to approximately 1200 taxpayers. Many taxpayers who had engaged in Son-of-BOSS transactions, however, either did not qualify, chose not to participate in the settlement, or had not yet been identified. See *Beard*, 633 F.3d at 618.

Pet. for Readjustment of Partnership Items Under Code Section 6226 4 (T.C. Oct. 9, 2008). In calculating his outside basis in RJP, respondent included the amount of the short-sale proceeds (approximately $7.8 million) that had been contributed to RJP, without reducing that amount to reflect RJP's offsetting obligation to close the short position. See Gov't Obj. 3.

Respondent then contributed his appreciated stock to RJP. See Gov't Obj. 4. RMN also assigned its interest in RJP to a different company, Smithdale Investors, Inc., that was owned by respondent. *Ibid.* RMN's assignment of its interest triggered the termination of the existing RJP partnership and the formation of a new partnership. See *ibid.*; see also 26 U.S.C. 708(b)(1)(B). The formation of that new partnership, in turn, permitted RJP to adjust, or "step up," its inside basis to equal respondent's outside basis. See 26 U.S.C. 743(b)(1), 754. Because respondent had inflated his outside basis (by including the short-sale proceeds contributed to RJP, without decreasing that amount by the offsetting obligation to close the short sale), RJP's new inside basis was similarly inflated by approximately $7.8 million. RJP then sold the appreciated stock and distributed the proceeds to respondent. See Gov't Obj. 4.

In August 1999, RJP filed its federal income-tax return for 1998. Because RJP's inside basis had been artificially inflated by $7.8 million, RJP reported only a modest capital gain of $2950 on the sale of the appreciated stock. See Gov't Obj. 5. And because RJP's partners were required to report their respective shares of any gain, respondent reported an income amount from the asset sale that was dramatically lower (by approximately $7.8 million) than it would have been if the Son-of-BOSS transaction had not been utilized.[2]

2. On January 13, 2006, the IRS issued a Final Partnership Administrative Adjustment (FPAA), decreasing RJP's basis in its assets and thereby substantially increasing respondent's taxable income for 1998. Respondent challenged the FPAA in the Tax Court, arguing that it was barred because it was issued after the expiration of the three-year assessment period provided by 26 U.S.C. 6501(a). The IRS contended that any assessments were governed instead by the extended six-year assessment period in 26 U.S.C. 6501(e)(1)(A), which applies when a taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return."[3]

The Tax Court granted summary judgment to respondent. App., *infra*, 6a-10a. The court relied on its earlier holding in *Bakersfield Energy Partners, LP* v. *Commissioner*, 128 T.C. 207 (2007), aff'd, 568 F.3d 767

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[2] Partnerships do not pay federal income tax, but they are required to file annual information returns reporting the partners' distributive shares of income, gain, deductions, or credits. See 26 U.S.C. 701, 6031; *Randell* v. *United States*, 64 F.3d 101, 103 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996). The individual partners also report their respective distributive shares on their federal income-tax returns. See 26 U.S.C. 701-704. Unpaid taxes are assessed against the individual partners.

[3] Although the FPAA was issued on January 13, 2006, more than six years after RJP filed its return in August 1999, the running of the six-year assessment period was suspended for 151 days (and thus extended to January 14, 2006) by reason of a summons served on respondent's law firm. See Gov't Obj. 1-2; see also 26 U.S.C. 7609(e)(2). Respondent does not dispute that if the six-year assessment period applies, the FPAA in this case was timely. See Gov't Obj. 5.

(9th Cir. 2009), that an understatement of gross income attributable to an overstatement of basis does not trigger the extended assessment period in Section 6501(e)(1)(A). App., *infra*, 8a-9a.

3. The court of appeals affirmed. App., *infra*, 1a-5a. The government conceded that the case was controlled, as a matter of circuit precedent, by the court of appeals' prior decision in *Burks* v. *United States*, 633 F.3d 347 (5th Cir. 2011), petition for cert. pending, No. 11-178 (filed Aug. 11, 2011). While recognizing that "[t]he circuits are split on this question," App., *infra*, 4a, the court of appeals explained that it was "bound by the decisions of the [Fifth] Circuit," *id.* at 5a, and it accordingly affirmed the Tax Court's judgment, see *ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the question whether an understatement of gross income attributable to an overstatement of basis in sold property is an "omi[ssion] from gross income" that can trigger the six-year assessment period in 26 U.S.C. 6501(e)(1)(A). On September 27, 2011, this Court granted the petition for a writ of certiorari in *United States* v. *Home Concrete & Supply, LLC*, No. 11-139 (*Home Concrete*), which presents the same issue. If the Court concludes in *Home Concrete* that an overstatement of basis in sold property can trigger the extended six-year assessment period, then the administrative adjustment at issue in this case was timely and the court of appeals erred in holding otherwise. Accordingly, the Court should hold this petition pending its decision in *Home Concrete*, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Home Concrete & Supply, LLC*, cert. granted, No. 11-139 (Sept. 27, 2011), and then disposed of as appropriate.

Respectfully submitted.

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DECEMBER 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-60675

R AND J PARTNERS, ROBERT M. NALLEY, TAX MATTERS PARTNER, PETITIONER-APPELLEE

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-APPELLANT

Filed: Sept. 19, 2011

Appeal from the Decision of the United States Tax Court (7166-06)

Before: HIGGINBOTHAM, DAVIS, and ELROD, Circuit Judges.

PER CURIAM:*

The Commissioner lodged this appeal from an order of the Tax Court granting the appellee's motion for summary judgment disposing of all the parties' claims. The resolution of this appeal depends upon a question of law, namely whether an understatement of income resulting

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

from an overstatement of the tax basis of sold property can qualify as an omission from gross income giving rise to the extended six-year period for tax assessment. Based upon a decision of this Court, *Burks v. United States,* 633 F.3d 347 (5th Cir. 2011), the Tax Court answered that question in the negative and granted the taxpayer's motion for summary judgment. The Commissioner agrees that *Burks* controls the law in the circuit on that question and that the Tax Court correctly applied that law, but took this protective appeal in an effort to obtain a review by the Supreme Court. We are, of course, bound by *Burks* and therefore affirm the judgment of the Tax Court.

I.

In 1998, Robert Nalley ("Nalley") began the process of selling stock that he owned in four companies and terminating his rights in a deferred compensation program. To avoid tax liability on the gains stemming from those actions, Nalley, as part of what is known as a "Basis Enhancing Transaction," formed R and J Partners ("the Partnership"). Nalley transferred the stock to the Partnership, and the Partnership sold it. That sale artificially enhanced Nalley's basis in the Partnership, which led to an understatement of the Partnership's capital gains.

In 2006, the Commissioner of Internal Revenue issued a Notice of Final Partnership Administrative Adjustment ("FPAA") with respect to the Partnership's 1998 tax year. The Partnership filed a petition with the Tax Court, asserting that the FPAA was issued after the expiration of the normal three-year assessment period and was therefore invalid. The Commissioner argued that the overstatement of Nalley's basis in the Partnership triggered § 6501(e)(1)(A) of the Internal Revenue Code, which provides for an extended six-year assessment period when a taxpayer "omits from gross income an amount properly includable therein which is in excess of 25 percent of the amount of gross income stated in the return."

The Tax Court granted the Partnership's motion for summary judgment, finding that an overstatement of basis did not qualify as an omission from gross income under I.R.C. § 6501(e)(1)(A) and therefore did not trigger the extended limitations period. The Tax Court relied both on its own precedent and on this Court's opinion in *Burks v. United States,* which held that the Supreme Court's decision in *Colony, Inc. v. Commissioner of Internal Revenue,* 357 U.S. 28 (1958), is controlling as to the current Tax Code.[1]

This appeal by the Commissioner followed.

II.

We apply the same standard of review to appeals of tax court decisions as apply to federal district court decisions.[2] We review a grant of summary judgment de novo, applying the same standards as the court below.[3] "Summary judgment is appropriate when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law."[4]

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[1] *Colony, Inc. v. Comm'r of Internal Revenue*, 357 U.S. 28, 36 (1958).

[2] *Powers v. Comm'r of Internal Revenue Serv.,* 43 F.3d 172, 175-76 (5th Cir. 1995).

[3] *Floyd v. Amite Cnty. Sch. Dist.,* 581 F.3d 244, 247 (5th Cir. 2009).

[4] *Id.* at 247-48.

III.

This appeal concerns a pure question of law: whether an overstatement of basis qualifies as an omission from gross income. As both parties acknowledge, that question was recently answered in the negative by this Court in *Burks v. United States,* 633 F.3d 347 (5th Cir. 2011). In *Burks,* this Court held that the Supreme Court's *Colony* decision, holding that an overstatement of basis cannot qualify as an omission from gross income, applies to the 1954 Tax Code as well as its 1939 predecessor and is therefore controlling precedent.[5] The Court in *Burks* also held that recent Treasury regulations interpreting omissions from gross income as including overstatement of basis are not entitled to *Chevron* deference, because the statutory language that those regulations purport to interpret is unambiguous.[6]

The circuits are split on this question. A pre-regulation Ninth Circuit decision held that *Colony* is controlling, but did not foreclose the possibility of reasonable Treasury regulations interpreting the statute.[7] The Fourth Circuit recently agreed with our reasoning that the *Colony* decision is controlling, and that the Treasury regulations are not entitled to *Chevron* deference.[8] Four circuits have adopted the Commissioner's view, holding either that *Colony* does not apply to the

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[5] *Burks v. United States,* 633 F.3d 347, 357-58 (5th Cir. 2009).

[6] *Id.* at 359-60. The Court also noted that even if they were entitled to deference, the regulations were inapplicable because they were promulgated during the pendency of the suit. *Id.* at 360 n.9.

[7] *Bakersfied Energy Partners v. Comm'r of Internal Revenue,* 568 F.3d 767, 778 (9th Cir. 2009).

[8] *Home Concrete & Supply v. United States,* 634 F.3d 249 (4th Cir. 2011).

1954 Code[9] or that the statute is ambiguous and we must defer to the regulations.[10]

IV.

This Court, however, is bound by the decisions of the Circuit and we, therefore, AFFIRM the judgment of the Tax Court.

[9] *Beard v. Comm'r of Internal Revenue,* 633 F.3d 616, 620 (7th Cir. 2011) (holding that *Colony* is not controlling).

[10] *Grapevine Imports v. United States,* 636 F.3d 1368, 1381 (Fed. Cir. 2011) (holding that the Treasury regulations are entitled to deference notwithstanding the applicability of *Colony*); *Salman Ranch, Ltd. v. Comm'r of Internal Revenue,* [647 F.3d 929,] 2011 WL 2120044, at *9 (10th Cir. 2011) (same); *Intermountain Ins. Serv. of Vail v. Comm'r of Internal Revenue Serv.,* 2011 WL 2451011 (D.C. Cir. 2011) (same).

APPENDIX B

UNITED STATES TAX COURT

Docket No. 7166-06

R AND J PARTNERS, ROBERT M. NALLEY, TAX MATTERS PARTNER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed: Oct. 23, 2009

ORDER AND DECISION

This case is one of two related cases before the Court on petitioner's motion for summary judgment filed on November 19, 2008.[1] The Court must decide whether the notice of final partnership administrative adjustment (FPAA) challenged in the petition was untimely because it was sent more than three years after the due date of the return for the year in issue or was timely because it was sent within the 6-year extended limitations period provided by section 6501(e)(1)(A).[2] While

[1] The parties have agreed that the Court's decision here will be binding on *Smithdale Partners v. Commissioner*, Docket No. 7165-06.

[2] All section references are to the Internal Revenue Code in effect for the year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

this Court's rulings have been consistent concerning similar matters, respondent asserts a Fifth Circuit decision presents a challenge to this Court's precedent. Compare *Bakersfield Energy Partners, LP v. Commissioner*, 128 T.C. 207 (2007), affd. 568 F.3d 767 (9th Cir. 2009), and *Phinney v. Chambers*, 392 F.2d 680 (5th Cir. 1968).

Background

On January 13, 2006, respondent mailed the FPAA with respect to the 1998 taxable year to R and J Partners (the partnership) proposing, among other things, a $7,785,914 increase in the net long-term capital gain amount that the partnership reported on its partnership return. Respondent claimed that the partnership overstated the basis in stocks it sold thus creating an understatement of income. The tax matters partner brought this suit to contest the adjustments made in the FPAA. Petitioner moved for summary judgment on the grounds that respondent issued the FPAA after the prescribed limitations period.

Both parties agree that the facts are not in dispute, and therefore this case is ripe for summary judgment. See Rule 121. We begin with the parties' arguments regarding the limitations period.

Discussion

Respondent concedes that he issued the FPAA after the general 3-year limitations period expired. See secs 6501(a), 6503(a), 6229(a). Respondent argues nonetheless that this Court maintains jurisdiction because a basis overstatement by the partnership extends the limitations period for assessing tax under either section

6229(c)(2) or section 6501(e)(1)(A). Respondent admits there was no such omission in the partnership's tax return for 1998, but claims that the partnership omitted gross income by understanding [*sic*] $7,785,648 of gain from its return. He therefore argues the FPAA was timely because the alleged ·understatement of gain on the partnership's return extended the partnership's limitations period to six years. Petitioner counters that *Bakersfield v. Commissioner*, *supra*, controls this case, and asserts that even if the partnership overstated its basis, that alone is not an omission from gross income.

Respondent does not argue that this case is distinguishable from *Bakersfield* but argues that *Bakersfield* was wrongly decided and that, in any event, the opinion of the Court of Appeals for the Fifth Circuit in *Phinney v. Chambers*, *supra*, is controlling here, because this case is appealable to the Court of Appeals for the Fifth Circuit. We disagree.

We have consistently held that a basis overstatement is not an omission from gross income. See *Bakersfield Energy Partners, LP v. Commissioner*, *supra* at 213-215. We applied the Supreme Court's holding in *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958) and stated that the extended limitations period applies where "specific income receipts have been 'left out' in the computation of gross income and not when an understatement of gross income resulted from an overstatement of basis." *Bakersfield Energy Partners, LP v. Commissioner, supra* at 213 (paraphrasing *Colony, Inc. v. Commissioner*, *supra*).

The Court of Appeals for the Ninth Circuit affirmed our opinion in *Bakersfield Energy Partners, LP v. Com-*

missioner, 568 F. 3d 767 (9th Cir. 2009). The Court of Appeals for the Federal Circuit also recently held that *Colony* controlled the disposition of a section 6501(e)(1)(A) case involving a basis overstatement. *Salman Ranch Ltd. v. Commissioner*, 573 F.3d 1362, 1377 (Fed. Cir. 2009); see also *Intermountain Ins. Service of Vail, LLC v. Commissioner*, T.C. Memo. 2009-195; *Beard v. Commissioner*, T.C. Memo. 2009-184. These cases have all concluded that mere understatement of income does not trigger the extended period of limitations.

We conclude that *Phinney v. Chambers* is not controlling. The *Phinney* court found that the 6-year statute of limitations applied to the taxpayer because she misstated the nature of that item of income. Unlike *Phinney*, petitioner's disclosure contains no misstatement of the nature of items of income that would place respondent "at a special disadvantage in detecting errors." The Commissioner could not identify the transaction in issue in *Phinney* because the taxpayer completely omitted the installment sale income from the return. Here, there is no improper labeling or misidentification. The partnership completely reported the transaction including the gross receipts, the cost or basis, and the net gain. The partnership also notified respondent that a section 754 election had been made. These disclosures did not mislead respondent or place him at a special disadvantage in detecting the error he alleges occurred. As a result, *Phinney* does not persuade this Court to overrule *Bakersfield* or to read any other limitations into *Colony*.

We have considered all arguments made in reaching our decision, and, to the extent not mentioned, we conclude that they are moot, irrelevant, or without merit. We conclude that 6-year extended limitations period provisions do not apply here because neither the partnership nor its partners omitted income from their returns. We therefore find that the limitations period for assessing tax against petitioner has passed.

Upon further consideration and for cause, it is

ORDERED that Petitioner's Motion for Summary Judgment, filed November 19, 2008, is granted. It is further

ORDERED AND DECIDED that the adjustments set forth in the notice of final partnership administrative adjustment (FPAA), which is the basis of this case, are barred by the 3-year limitations period in section 6501(a).

(Signed) Diane L. Kroupa
Judge

Entered: Oct. 23, 2009

APPENDIX C

1. 26 U.S.C. 275 (1934) provides:

Period of limitation upon assessment and collection. Except as provided in section 276—

(a) General rule. The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(b) Request for prompt assessment. In the case of income received during the lifetime of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within eighteen months after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of three years after the return was filed. This subsection shall not apply in the case of a corporation unless—

(1) Such written request notifies the Commissioner that the corporation contemplates dissolution at or before the expiration of such 18 months' period; and

(2) The dissolution is in good faith begun before the expiration of such 18 months' period; and

(3) The dissolution is completed.

(c) Omission from gross income. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

(d) Return filed before last day. For the purposes of subsections (a), (b), and (c), a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

(e) Corporation and shareholder. If a corporation makes no return of the tax imposed by this chapter, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

2. 26 U.S.C. 6229(c)(2) (2000) provides:

Period of limitations for making assessments

(c) Special rule in case of fraud, etc.

(2) Substantial omission of income

If any partnership omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in its return, subsection (a) shall be applied by substituting "6 years" for "3 years".

3. 26 U.S.C. 6501(e)(1)(A) (1954) provides:

Limitations on assessment and collection.

(e) Omission from gross income.

Except as otherwise provided in subsection (c)—

(1) Income taxes.

In the case of any tax imposed by subtitle A—

(A) General rule.

If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph—

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item.

4. 26 U.S.C. 6501(e)(1)(A) (2000) provides:

Limitations on assessment and collection

(e) Substantial omission of items

Except as otherwise provided in subsection (c)—

(1) Income taxes

In the case of any tax imposed by subtitle A—

(A) General rule

If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph—

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

5. 26 C.F.R. 301.6229(c)(2)-1 provides:

Substantial omission of income.

(a) *Partnership return*—(1) *General rule.* (i) If any partnership omits from the gross income stated in its return an amount properly includible therein and that amount is described in clause (i) of section 6501(e)(1)(A), subsection (a) of section 6229 shall be applied by substituting "6 years" for "3 years."

(ii) For purposes of paragraph (a)(1)(i) of this section, the term *gross income*, as it relates to a trade or business, means the total of the amounts received or accrued from the sale of goods or services, to the extent required to be shown on the return, without reduction for the cost of those goods or services.

(iii) For purposes of paragraph (a)(1)(i) of this section, the term *gross income*, as it relates to any income other than from the sale of goods or services in a trade or business, has the same meaning as provided under section 61(a), and includes the total of the amounts received or accrued, to the extent required to be shown on the return. In the case of amounts received or accrued that relate to the disposition of property, and except as provided in paragraph (a)(1)(ii) of this section, gross income means the excess of the amount realized from the disposition of the property over the unrecovered cost or other basis of the property. Consequently, except as provided in paragraph (a)(1)(ii) of this section, an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income for purposes of section 6229(c)(2).

(iv) An amount shall not be considered as omitted from gross income if information sufficient to apprise the Commissioner of the nature and amount of the item is disclosed in the return, including any schedule or statement attached to the return.

(b) *Effective/applicability date.* This section applies to taxable years with respect to which the period for assessing tax was open on or after September 24, 2009.

6. 26 C.F.R. 301.6501(e)-1 provides:

Omission from return.

(a) *Income taxes*—(1) *General rule.* (i) If a taxpayer omits from the gross income stated in the return of a tax imposed by subtitle A of the Internal Revenue Code an amount properly includible therein that is in excess of 25 percent of the gross income so stated, the tax may be assessed, or a proceeding in court for the collection of that tax may be begun without assessment, at any time within 6 years after the return was filed.

(ii) For purposes of paragraph (a)(1)(i) of this section, the term *gross income*, as it relates to a trade or business, means the total of the amounts received or accrued from the sale of goods or services, to the extent required to be shown on the return, without reduction for the cost of those goods or services.

(iii) For purposes of paragraph (a)(1)(i) of this section, the term *gross income*, as it relates to any income other than from the sale of goods or services in a trade or business, has the same meaning as provided under section 61(a), and includes the total of the amounts received or accrued, to the extent required to be shown on the return. In the case of amounts received or accrued that relate to the disposition of property, and except as provided in paragraph (a)(1)(ii) of this section, *gross income* means the excess of the amount realized from the disposition of the property over the unrecovered cost or other basis of the property. Consequently, except as provided in paragraph (a)(1)(ii) of this section, an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income for purposes of section 6501(e)(1)(A)(i).

(iv) An amount shall not be considered as omitted from gross income if information sufficient to apprise the Commissioner of the nature and amount of the item is disclosed in the return, including any schedule or statement attached to the return.

(2) [Reserved]

(b) *Estate and gift taxes*—(1) If the taxpayer omits from the gross estate as stated in the estate tax return, or from the total amount of the gifts made during the period for which the gift tax return was filed (see § 25.6019-1 of this chapter) as stated in the gift tax return, an item or items properly includible therein the amount of which is in excess of 25 percent of the gross estate as stated in the estate tax return, or 25 percent of the total amount of the gifts as stated in the gift tax return, the tax may be assessed, or a proceeding in court for the collection thereof may be begun without assessment, at any time within 6 years after the estate tax or gift tax return, as applicable, was filed.

(2) For purposes of this paragraph (b), an item disclosed in the return or in any schedule or statement attached to the return in a manner sufficient to apprise the Commissioner of the nature and amount thereof shall not be taken into account in determining items omitted from the gross estate or total gifts, as the case may be. Further, there shall not be taken into account in computing the 25 percent omission from the gross estate stated in the estate tax return or from the total gifts stated in the gift tax return, any increases in the valuation of assets disclosed on the return.

(c) *Excise taxes*—(1) *In general*. If the taxpayer omits from a return of a tax imposed under a provision of subtitle D an amount properly includible thereon, which amount is in excess of 25 percent of the amount of tax reported thereon, the tax may be assessed or a proceeding in court for the collection thereof may be begun without assessment, at any time within 6 years after the return was filed. For special rules relating to chapter 41, 42, 43 and 44 taxes, see paragraphs (c)(2), (3), (4), and (5) of this section.

(2) *Chapter 41 excise taxes*. If an organization discloses an expenditure in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the Commissioner of the existence and nature of the expenditure, the three-year limitation on assessment and collection described in section 6501(a) shall apply with respect to any tax under chapter 41 arising from the expenditure. If a taxpayer fails to so disclose an expenditure in its return (or in a schedule or statement attached thereto), the tax arising from the expenditure not so disclosed may be assessed, or a proceeding in court for the collection of the tax may be begun without

assessment, at any time within 6 years after the return was filed.

(3) *Chapter 42 excise taxes*. (i) If a private foundation omits from its annual return with respect to the tax imposed by section 4940 an amount of tax properly includible therein that is in excess of 25 percent of the amount of tax imposed by section 4940 that is reported on the return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed. If a private foundation discloses in its return (or in a schedule or statement attached thereto) the nature, source, and amount of any income giving rise to any omitted tax, the tax arising from the income shall be counted as reported on the return in computing whether the foundation has omitted more than 25 percent of the tax reported on its return.

(ii) If a private foundation, trust, or other organization (as the case may be) discloses an item in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the Commissioner of the existence and nature of the item, the three-year limitation on assessment and collection described in section 6501(a) shall apply with respect to any tax imposed under sections 4941(a), 4942(a), 4943(a), 4944(a), 4945(a), 4951(a), 4952(a), 4953 and 4958, arising from any transaction disclosed by the item. If a private foundation, trust, or other organization (as the case may be) fails to so disclose an item in its return (or in a schedule or statement attached thereto), the tax arising from any transaction not so disclosed may be assessed or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed.

(4) *Chapter 43 excise taxes*. If a taxpayer discloses an item in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the Commissioner of the existence and nature of the item, the three-year limitation on assessment and collection described in section 6501(a) shall apply with respect to any tax imposed under sections 4971(a), 4972, 4973, 4974 and 4975(a), arising from any transaction disclosed by the item. If a taxpayer fails to so disclose an item in its return (or in a schedule or statement attached thereto), the tax arising from any transaction not so disclosed may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed. The applicable return for the tax under sections 4971, 4972, 4973 and 4974, is the return designated by the Commissioner for reporting the respective tax. The applicable return for the tax under section 4975 is the return filed by the plan used to report the act giving rise to the tax.

(5) *Chapter 44 excise taxes*. If a real estate investment trust omits from its annual return with respect to the tax imposed by section 4981 an amount of tax properly includible therein that is in excess of 25 percent of the amount of tax imposed by section 4981 that is reported on the return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed. If a real estate investment trust discloses in its return (or in a schedule or statement attached thereto) the nature, source, and amount of any income giving rise to any omitted tax, the tax arising

from the income shall be counted as reported on the return in computing whether the trust has omitted more than 25 percent of the tax reported on its return.

(d) *Exception*. The provisions of this section do not limit the application of section 6501(c).

(e) *Effective/applicability date*—(1) *Income taxes*. Paragraph (a) of this section applies to taxable years with respect to which the period for assessing tax was open on or after September 24, 2009.

(2) *Estate, gift and excise taxes*. Paragraphs (b) through (d) of this section continue to apply as they did prior to being removed inadvertently on September 28, 2009. Specifically, paragraph (b) of this section applies to returns filed on or after May 2, 1956, except for the amendment to paragraph (b)(1) of this section that applies to returns filed on or after December 29, 1972. Paragraph (c) of this section applies to returns filed on or after October 7, 1982, except for the amendment to paragraph (c)(3)(ii) of this section that applies to returns filed on or after January 10, 2001. Paragraph (d) of this section applies to returns filed on or after May 2, 1956.

7. 75 Federal Register 78,897 provides:

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9511]

RIN 1545-BI44

Definition of Omission From Gross Income

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations defining an omission from gross income for purposes of the six-year minimum period for assessment of tax attributable to partnership items and the six-year period for assessing tax. The regulations resolve a continuing issue as to whether an overstatement of basis in a sold asset results in an omission from gross income. The regulations will affect any taxpayer who overstates basis in a sold asset creating an omission from gross income exceeding twenty-five percent of the income stated in the return. Additionally, provisions related to estate, gift and excise tax are reinstated from the prior final regulation.

DATES: *Effective Date*: These regulations are effective on December 14, 2010.

Applicability Date: The regulations relating to income taxes apply to taxable years with respect to which the period for assessing tax was open on or after September 24, 2009, which is the date that the proposed and temporary regulations to which these regulations relate were filed with the **Federal Register**. For dates of applicability regarding the regulations relating to estate, gift and excise taxes, see § 301.6501(e)-1(e)(2).

FOR FURTHER INFORMATION CONTACT: William A. Heard, III at (202) 622-4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Procedure and Administration Regulations (26 CFR part 301) under section 6229(c)(2) and section 6501(e) of the Internal Revenue Code. On September 28, 2009, temporary regulations (TD 9466) regarding the definition of an omission from gross income for purposes of the six-year period for assessment were published in the **Federal Register** (74 FR 49321). A notice of proposed rulemaking (REG-108045-08) cross-referencing the temporary regulations was published in the **Federal Register** for the same day (74 FR 49354). One written comment was received from the public in response to the notice of proposed rulemaking. No public hearing was requested or held. After consideration of the comment, the proposed regulations are adopted as amended by this Treasury decision, and the corresponding temporary regulations are removed.

Summary of Comments and Explanation of Revisions

These final regulations amend the Procedure and Administration Regulations (26 CFR part 301) relating to sections 6229(c)(2) and 6501(e). In addition to the revisions set forth in the proposed regulations cross-referencing the temporary regulations, the final regulations reflect structural amendments to sections

6229(c)(2) and 6501(e) in the Hiring Incentives To Restore Employment Act (Pub. L. 111-147, 124 Stat. 112) to accommodate an additional threshold triggering the six-year period of limitations for omissions from gross income attributable to assets subject to certain reporting requirements, which is not otherwise addressed in these final regulations. The final regulations also clarify the effective/applicability date provisions in the section 6229(c)(2) and section 6501(e) regulations to eliminate a perceived ambiguity in the temporary regulations, that was brought to light by the Tax Court in *Intermountain Insurance Service of Vail v. Commissioner*, 134 T.C. No. 11 (2010), appeal docketed, No. 10-1204 (DC Cir.).

As explained in the preamble to the temporary regulations, the United States Courts of Appeals for the Ninth Circuit and the Federal Circuit construed section 6501(e)(1) in cases outside the trade-or-business context contrary to the interpretation provided in these final regulations, holding that an overstatement of basis does not constitute an "omission." *Bakersfield Energy Partners v. Commissioner*, 568 F.3d 767 (9th Cir. 2009); *Salman Ranch Ltd v. United States*, 573 F.3d 1362 (Fed. Cir. 2009). Those courts relied on the Supreme Court's opinion in *Colony v. Commissioner*, 357 U.S. 28 (1958), which dealt with an omission from gross income in the context of a trade or business under the predecessor of section 6501(e). The Treasury Department and the Internal Revenue Service disagree with those courts that the Supreme Court's reading of the predecessor to section 6501(e) in *Colony* applies to sections 6501(e)(1) and 6229(c)(2), for the reasons set forth in the preamble to the temporary regulations.

After publication of the temporary regulations, the Tax Court declared the temporary regulations invalid, adhering to its prior opinion in *Bakersfield Energy Partners v. Commissioner*, 128 T.C. 207 (2007). *Intermountain Insurance Service of Vail v. Commissioner*, 134 T.C. No. 11 (2010), appeal docketed, No. 10-1204 (DC Cir.). In part, the Tax Court in *Intermountain* concluded that the Supreme Court's opinion in *Colony* was the only permissible interpretation of the statutory language in question ("omits from gross income"). The Treasury Department and the Internal Revenue Service disagree with *Intermountain*. The Supreme Court stated in *Colony* that the statutory phrase "omits from gross income" is ambiguous, meaning that it is susceptible to more than one reasonable interpretation. The interpretation adopted by the Supreme Court in *Colony* represented that court's interpretation of the phrase but not the only permissible interpretation of it. Under the authority of *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005), the Treasury Department and the Internal Revenue Service are permitted to adopt another reasonable interpretation of "omits from gross income," particularly as it is used in a new statutory setting. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008) (agencies are free to promulgate a reasonable construction of an ambiguous statute that contradicts any court's interpretation, even the Supreme Court's). The interpretation of the phrase "omits from gross income" as used in section 6501(e)(1) is currently pending before several United States Courts of Appeals.

Because these regulations are a clarification of the period of limitations provided in sections 6501(e)(1) and

6229(c)(2) and are consistent with the Secretary's application of those provisions both with respect to a trade or business (that is, gross income means gross receipts), as well as outside of the trade-or-business context (that is, the section 61 definition of gross income applies), they are applicable to all cases with respect to which the period for assessing tax was open on or after September 24, 2009, the date the temporary regulations were filed with the **Federal Register**.

1. Retroactivity

The sole written comment received in response to the notice of proposed rulemaking by cross-reference to the temporary regulations questioned the application of the regulations, characterizing them as retroactive, and recommended that they be applied only prospectively. The commentator stated that the temporary regulations apply with retroactive effect "in that taxable years which had closed are now reopened." The Treasury Department and the Internal Revenue Service disagree with the characterization of the regulations as retroactive. The final regulations have been clarified to emphasize that they only apply to open tax years, and do not reopen closed tax years as suggested by the commentator.

The commentator also relied on the 1996 amendments to section 7805(b) to argue that retroactively effective Treasury regulations are impermissible, with limited exceptions. The 1996 amendments to section 7805(b), however, do not apply to the regulations under sections 6229(c)(2) and 6501(e)(1). That is because those amendments are only effective for regulations that relate to statutory provisions enacted on or after July 30, 1996. Taxpayer Bill of Rights 2 (Pub. L. 104-168, section 1101(a), 110 Stat. 1469). Since section 6229(c)(2) was enacted in 1982 and section 6501(e)(1)(A) was enacted in 1954 (and redesignated as subparagraph (B) as part of the HIRE Act in 2010), the 1996 amendments to section 7805(b) are inapplicable to the regulations. Prior to the 1996 amendments, section 7805(b) provided, "The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." Although these regulations are not retroactive, a retroactive regulation interpreting sections 6229(c)(2) and 6501(e)(1) is expressly permitted by the applicable version of section 7805(b), which presumes regulations to apply retroactively unless otherwise provided.

2. Intermountain

The Tax Court's majority in *Intermountain* erroneously interpreted the applicability provisions of the temporary and proposed regulations, which provided that the regulations applied to taxable years with respect to which "the applicable period for assessing tax did not expire before September 24, 2009." The Internal Revenue Service will continue to adhere to the position that "the applicable period" of limitations is not the "general" three-year limitations period. The three-year limitations period is one of several limitations periods in the Internal Revenue Code, including the six-year limitations period under sections 6229(c)(2) and 6501(e)(1). The expiration of the three-year period does not "close" a taxable year if a longer period applies. Consistent with that position, the final regulations apply to taxable years with respect to which the six-year period for assessing tax under section 6229(c)(2) or 6501(e)(1) was open on or after September 24, 2009. This includes, but is not limited to, all taxable years (1) for which six years had not elapsed from the later of the date that a tax return was due or actually filed, (2) that are the subject of any case pending before any court of competent jurisdiction (including the United States Tax Court and Court of Federal Claims) in which a decision had not become final (within the meaning of section 7481) or (3) with respect to which the liability at issue had not become fixed pursuant to a closing agreement entered into under section 7121. The Internal Revenue Service's position is consistent with the effective/applicability date provisions of these final regulations.

3. Other Revisions

The final regulations are amended to reinstate estate, gift and excise tax provisions that were inadvertently removed by the temporary regulations.

Special Analyses

It has been determined that these regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the NPRM cross-referencing the temporary regulations preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is William A. Heard III of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and record-keeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 301.6229(c)(2)-1 is also issued under 26 U.S.C. 6230(k). * * *

■ **Par. 2**. Section 301.6229(c)(2)-1 is added to read as follows:

§ 301.6229(c)(2)-1 Substantial omission of income.

(a) *Partnership return*—(1) *General rule*. (i) If any partnership omits from the gross income stated in its return an amount properly includible therein and that amount is described in clause (i) of section 6501(e)(1)(A), subsection (a) of section 6229 shall be applied by substituting "6 years" for "3 years."

(ii) For purposes of paragraph (a)(1)(i) of this section, the term *gross income*, as it relates to a trade or business, means the total of the amounts received or accrued from the sale of goods or services, to the extent required to be shown on the return, without reduction for the cost of those goods or services.

(iii) For purposes of paragraph (a)(1)(i) of this section, the term *gross income*, as it relates to any income other than from the sale of goods or services in a trade or business, has the same meaning as provided under section 61(a), and includes the total of the amounts received or accrued, to the extent required to be shown on the return. In the case of amounts received or accrued that relate to the disposition of property, and except as provided in paragraph (a)(1)(ii) of this section, gross income means the excess of the amount realized from the disposition of the property over the unrecovered cost or other basis of the property. Consequently, except as provided in paragraph (a)(1)(ii) of this section, an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income for purposes of section 6229(c)(2).

(iv) An amount shall not be considered as omitted from gross income if information sufficient to apprise the Commissioner of the nature and amount of the item is disclosed in the return, including any schedule or statement attached to the return.

(b) *Effective/applicability date.* This section applies to taxable years with respect to which the period for assessing tax was open on or after September 24, 2009.

§ 301.6229(c)(2)-1T [Removed]

■ Par. 3. Section 6229(c)(2)-1T is removed.

■ Par. 4. Section 301.6501(e)-1 is added to read as follows:

§ 301.6501(e)-1 Omission from return.

(a) *Income taxes*—(1) *General rule*. (i) If a taxpayer omits from the gross income stated in the return of a tax imposed by subtitle A of the Internal Revenue Code an amount properly includible therein that is in excess of 25 percent of the gross income so stated, the tax may be assessed, or a proceeding in court for the collection of that tax may be begun without assessment, at any time within 6 years after the return was filed.

(ii) For purposes of paragraph (a)(1)(i) of this section, the term *gross income*, as it relates to a trade or business, means the total of the amounts received or accrued from the sale of goods or services, to the extent required to be shown on the return, without reduction for the cost of those goods or services.

(iii) For purposes of paragraph (a)(1)(i) of this section, the term *gross income*, as it relates to any income other than from the sale of goods or services in a trade or business, has the same meaning as provided under section 61(a), and includes the total of the amounts received or accrued, to the extent required to be shown on the return. In the case of amounts received or accrued that relate to the disposition of property, and except as provided in paragraph (a)(1)(ii) of this section, *gross income* means the excess of the amount realized from the disposition of the property over the unrecovered cost or other basis of the property. Consequently, except as provided in paragraph (a)(1)(ii) of this section, an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income for purposes of section 6501(e)(1)(A)(i).

(iv) An amount shall not be considered as omitted from gross income if information sufficient to apprise the Commissioner of the nature and amount of the item is disclosed in the return, including any schedule or statement attached to the return.

(2) [Reserved]

(b) *Estate and gift taxes*—(1) If the taxpayer omits from the gross estate as stated in the estate tax return, or from the total amount of the gifts made during the period for which the gift tax return was filed (see § 25.6019-1 of this chapter) as stated in the gift tax return, an item or items properly includible therein the amount of which is in excess of 25 percent of the gross estate as stated in the estate tax return, or 25 percent of the total amount of the gifts as stated in the gift tax return, the tax may be assessed, or a proceeding in court for the collection thereof may be begun without assessment, at any time within 6 years after the estate tax or gift tax return, as applicable, was filed.

(2) For purposes of this paragraph (b), an item disclosed in the return or in any schedule or statement attached to the return in a manner sufficient to apprise the Commissioner of the nature and amount thereof shall not be taken into account in determining items omitted from the gross estate or total gifts, as the case may be. Further, there shall not be taken into account in computing the 25 percent omission from the gross

estate stated in the estate tax return or from the total gifts stated in the gift tax return, any increases in the valuation of assets disclosed on the return.

(c) *Excise taxes*—(1) *In general*. If the taxpayer omits from a return of a tax imposed under a provision of subtitle D an amount properly includible thereon, which amount is in excess of 25 percent of the amount of tax reported thereon, the tax may be assessed or a proceeding in court for the collection thereof may be begun without assessment, at any time within 6 years after the return was filed. For special rules relating to chapter 41, 42, 43 and 44 taxes, see paragraphs (c)(2), (3), (4), and (5) of this section.

(2) *Chapter 41 excise taxes*. If an organization discloses an expenditure in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the Commissioner of the existence and nature of the expenditure, the three-year limitation on assessment and collection described in section 6501(a) shall apply with respect to any tax under chapter 41 arising from the expenditure. If a taxpayer fails to so disclose an expenditure in its return (or in a schedule or statement attached thereto), the tax arising from the expenditure not so disclosed may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed.

(3) *Chapter 42 excise taxes*. (i) If a private foundation omits from its annual return with respect to the tax imposed by section 4940 an amount of tax properly includible therein that is in excess of 25 percent of the amount of tax imposed by section 4940 that is reported

on the return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed. If a private foundation discloses in its return (or in a schedule or statement attached thereto) the nature, source, and amount of any income giving rise to any omitted tax, the tax arising from the income shall be counted as reported on the return in computing whether the foundation has omitted more than 25 percent of the tax reported on its return.

(ii) If a private foundation, trust, or other organization (as the case may be) discloses an item in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the Commissioner of the existence and nature of the item, the three-year limitation on assessment and collection described in section 6501(a) shall apply with respect to any tax imposed under sections 4941(a), 4942(a), 4943(a), 4944(a), 4945(a), 4951(a), 4952(a), 4953 and 4958, arising from any transaction disclosed by the item. If a private foundation, trust, or other organization (as the case may be) fails to so disclose an item in its return (or in a schedule or statement attached thereto), the tax arising from any transaction not so disclosed may be assessed or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed.

(4) *Chapter 43 excise taxes*. If a taxpayer discloses an item in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the Commissioner of the existence and nature of the item, the three-year limitation on assessment and collection described in section 6501(a) shall apply with respect to

any tax imposed under sections 4971(a), 4972, 4973, 4974 and 4975(a), arising from any transaction disclosed by the item. If a taxpayer fails to so disclose an item in its return (or in a schedule or statement attached thereto), the tax arising from any transaction not so disclosed may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed. The applicable return for the tax under sections 4971, 4972, 4973 and 4974, is the return designated by the Commissioner for reporting the respective tax. The applicable return for the tax under section 4975 is the return filed by the plan used to report the act giving rise to the tax.

(5) *Chapter 44 excise taxes*. If a real estate investment trust omits from its annual return with respect to the tax imposed by section 4981 an amount of tax properly includible therein that is in excess of 25 percent of the amount of tax imposed by section 4981 that is reported on the return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed. If a real estate investment trust discloses in its return (or in a schedule or statement attached thereto) the nature, source, and amount of any income giving rise to any omitted tax, the tax arising from the income shall be counted as reported on the return in computing whether the trust has omitted more than 25 percent of the tax reported on its return.

(d) *Exception*. The provisions of this section do not limit the application of section 6501(c).

(e) *Effective/applicability date*—(1) *Income taxes*. Paragraph (a) of this section applies to taxable years with respect to which the period for assessing tax was open on or after September 24, 2009.

(2) *Estate, gift and excise taxes*. Paragraphs (b) through (d) of this section continue to apply as they did prior to being removed inadvertently on September 28, 2009. Specifically, paragraph (b) of this section applies to returns filed on or after May 2, 1956, except for the amendment to paragraph (b)(1) of this section that applies to returns filed on or after December 29, 1972. Paragraph (c) of this section applies to returns filed on or after October 7, 1982, except for the amendment to paragraph (c)(3)(ii) of this section that applies to returns filed on or after January 10, 2001. Paragraph (d) of this section applies to returns filed on or after May 2, 1956.

§ 301.6501(e)-1T [Removed]

■ **Par. 5**. Section 301.6501(e)-1T is removed.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: December 13, 2010.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).