SCHEDULED FOR ORAL ARGUMENT: APRIL 5, 2011

No. 10-1204

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERMOUNTAIN INSURANCE SERVICES OF VAIL, LLC and THOMAS A. DAVIES, TAX MATTERS PARTNER,

Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES TAX COURT

BRIEF FOR APPELLEES

Steven R. Anderson
(*counsel of record*)
Anderson & Jahde, P.C.
2100 W. Littleton Blvd., Suite 300
Littleton, CO 80120
(303) 782-0001
steven@andersonjahde.com

Brian F. Huebsch
Anderson & Jahde, P.C.
2100 W. Littleton Blvd., Suite 300
Littleton, CO 80120
(303) 782-0038
brian@andersonjahde.com

Certificate As To Parties, Rulings, And Related Cases.

(A) Parties/Amici.

All parties and amici appearing before this Court and the United States Tax Court, below, are listed in the Brief For The Appellant.

(B) Rulings Under Review.

The rulings at issue are also provided, with the date and citation information required by Circuit Rule 8(a) (ii), in the Brief For The Appellant.

(C) Related Cases.

This case has not previously been before this Court, or any other Court of Appeals. There are no "related cases", as defined in Circuit Rule 28(a)(1)(c), because Intermountain is not a party to any other litigation, however, issues similar to those at issue herein are being litigated in the following cases pending as noted:

UTAM, Ltd. v. Comm'r, No. 10-1262, currently pending before this Court; *Wilmington Partners, L.P. v. Comm'r*, 2d Cir., No. 10-4183 (Commissioner's brief due 3/8/11; *Home Concrete & Supply, LLC v. United States*, 4th Cir., No. 09-2353 (argued 10/27/10, case submitted); *Burks v. United States*, 5th Cir., No. 09-11061 (argued 11/1/10,[1] case submitted); *Comm'r v. MITA*, 5th Cir., No. 09-

[1] A recording of the oral arguments is available at http://www.ca5.uscourts.gov/OralArgRecordings/09/09-11061_11-1-2010.wma (last visited 12/22/10).

60827 (argued 11/1/10,[2] case submitted); *Comm'r v. Equipment Holding Co.*, 5th Cir., No. 09-60866 (proceedings stayed pending decision in *Burks* and *MITA*); *DSDBL, Ltd. v. Comm'r*, 5th Cir., No. 10-60706 (proceedings stayed pending decision in *Burks* and *MITA*); *R and J Partners v. Comm'r*, 5th Cir., No. 10-60685 (proceedings stayed pending decision in *Burks* and *MITA*); *Beard v. Comm'r*, 7th Cir., No. 09-3741 (argued 9/27/10,[3] case submitted); *Reynolds Properties, L.P. v. Comm'r*, 9th Cir., No. 10-72406 (Commissioner's brief due 2/14/11); *Logan Farms II, LLC v. Comm'r*, 9th Cir., No. 10-73208 (appeal docketed, no briefing schedule); *Applied Technologies, LLC v. Comm'r*, 9th Cir., No. 10-73299 (appeal docketed, no briefing schedule); *Salman Ranch Ltd. v. United States*, 10th Cir., No. 09-9015 (argued 9/22/10, case submitted); *Grapevine Imports, Ltd. v. United States*, Fed. Cir. No. 2008-5009 (fully briefed, oral arguments scheduled for 1/12/11).

/s/ Steven R. Anderson
Steven R. Anderson

---

[2] A recording of the oral arguments is available at http://www.ca5.uscourts.gov/OralArgRecordings/09/09-11061_11-1-2010.wma (last visited 12/22/10).

[3] A recording of the oral arguments is available at http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=09-3741_001.mp3 (last visited 12/22/10).

Corporate Disclosure Statement

Pursuant to Rule 26.1, Fed. R. App. P., Appellees Intermountain Insurance Services of Vail, LLC, and Thomas A. Davies state that Intermountain Insurance Services, Inc. owns a majority interest in Intermountain Insurance Services of Vail, LLC; and no publicly held corporation owns ten percent or more of the stock of Intermountain Insurance Services of Vail, LLC.

Table of Contents

Table of Authorities[4]

Cases: **Page(s)**

[4] Authorities upon which Intermountain chiefly relies are marked with asterisks.

Statutes:

Administrative Procedures Act (5 U.S.C.):

Internal Revenue Code of 1939 (26 U.S.C. 1952 Ed.):

Internal Revenue Code of 1954 (26 U.S.C. 1954 Ed):

Internal Revenue Code of 1986 (26 U.S.C.):

Miscellaneous:

Glossary

APA	Administrative Procedures Act, 5 U.S.C. §551, *et seq.*
Commissioner	Commissioner of Internal Revenue, Appellant herein.
FPAA	*Final Partnership Administrative Adjustment*, dated September 14, 2006, issued by the Commissioner to Intermountain Insurance Services of Vail, LLC (A11-23).[5]
Intermountain	Intermountain Insurance Services of Vail, LLC, and Thomas A. Davies, its Tax Matters Partner, Appellees herein.
IRC or **Code**	Internal Revenue Code of 1986 (as amended), 26 U.S.C. §1, *et seq.*
TEFRA	Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.
Temporary Regulations	Temporary Treas. Reg. §§ 301.6229(c)(2) – 1T(a)(1)(iii) and 301.6501(e)-1T(a)(1)(iii) (74 Fed. Reg. 49321 (Sept. 28, 2009)).
Treas. Reg.	Treasury Regulations, 26 C.F.R. §1, *et. seq.*

[5] "A" references are to the separately-bound record appendix filed by the Commissioner on December 6, 2010. "Doc." references are to documents, as numbered by the Tax Court Clerk, not included in the appendix.

Jurisdictional Statement

Intermountain does not dispute the Commissioner's statement of this Court's jurisdiction, but clarifies the Tax Court Petition at issue was timely filed by Intermountain's Tax Matters Partner, Thomas A. Davies, pursuant to §6226(a), not §6226(b)(1),[6] and the Notice of Appeal was filed on July 27, not August 27, 2010.

Statement of the Issues

1. Whether the Tax Court correctly granted summary judgment to Intermountain based on Supreme Court precedent establishing that an overstatement of basis in property does not constitute an omission "from gross income" within the intendment of §§6501(e)(1)(A) and 6229(c)(2); therefore, the extended six-year limitations periods contained in those Code sections were unavailable to the Commissioner and his FPAA was time-barred?

2. Whether the Tax Court abused its discretion in denying the Commissioner's motions to vacate and reconsider its summary judgment decision where the motions were based on Temporary Regulations issued after the fact to re-interpret the applicable statutory language contrary to the intent of Congress, as determined by the Supreme Court, and, by their own terms, did not become effective in time to impact this case?

[6] All "§ __" references are to the IRC, unless otherwise indicated.

3. Whether Intermountain provided adequate disclosure to provide the Commissioner with a sufficient clue of the claimed omission?

Statutes And Regulations

Except for the statutes and regulations contained in the addendum filed herewith, all applicable statutes and regulations are contained in the addendum to the Brief for Appellant.

Statement Of The Case

The Commissioner has appealed two decisions rendered by the United States Tax Court in favor of Intermountain. Under the first, the Tax Court granted Intermountain's Motion For Summary Judgment ("MSJ"). Under the second, it denied the Commissioner's Motion to Vacate and Motion to Reconsider its ruling granting summary judgment to Intermountain (the "Motions").

The Summary Judgment Motion

The Commissioner's FPAA attempted to adjust the tax due from Intermountain's 1999 taxable year. (A11-22.) The principal adjustment proposed in the FPAA (and the only one relevant in this appeal) was the disallowance of $2,061,808 of Intermountain's reported basis in assets sold. (A17.) The Commissioner did not assert that, in filing its 1999 tax return,

Intermountain omitted any income receipt or accrual in its computation of gross income.

Based on fifty-year old Supreme Court precedent, the Tax Court correctly granted Intermountain's MSJ on the basis that the applicable three-year limitations on assessments—§§6501(a) and 6229(a)—had expired prior to the date the FPAA was mailed, so the FPAA was time barred. (A65). *Colony, Inc. v. Comm'r*, 357 U.S. 28 (1958). Prior thereto, the continued applicability of *Colony's* holding to situations like Intermountain's had been reaffirmed by the Tax Court in *Bakersfield Energy Partners, L.P. v. Comm'r*, 128 T.C. 207 (2007), *aff'd*, 568 F.3d 767 (9th Cir. 2009).

In *Colony*, the Supreme Court determined that for the Commissioner to be entitled to the extended limitations period triggered by omissions from gross income, a taxpayer must actually omit, or leave out, "some income receipt or accrual in its computation of gross income." 357 U.S. at 33. *Colony* also clarified that Congress did not intend for an overstatement of basis to suffice for the omission "…from gross income" necessary for the Commissioner to open the extended limitations period. *Id.* at 33.

After Intermountain filed its MSJ asking the Tax Court to apply *Colony* and *Bakersfield*[7] to bar the FPAA (Docs. 24-25), the Tax Court held in abeyance its ruling on the MSJ for approximately twenty months, pending the Ninth Circuit's decision in *Bakersfield*. Once the Ninth Circuit affirmed in *Bakersfield*, the Tax Court issued a Memorandum Opinion (A59-66, the "September 2009 Opinion"), and a separate Order and Decision (A67), granting Intermountain's MSJ on the grounds that an overstatement of basis does not constitute the special circumstances necessary to open the six-year limitations periods of §§6501(e)(1)(A) and 6229(c)(2); therefore, the FPAA was time barred by the three-year limitations periods of §§6501(a) and 6229(c). (A59-66.)

The Motions To Vacate And Reconsider

After the Tax Court granted Intermountain's MSJ, the Commissioner attempted to bolster his litigation position by issuing the Temporary Regulations on September 28, 2009, which are directly contrary to congressional intent as set forth in *Colony*. According to the Commissioner's interpretation, an overstatement of basis does constitute an omission from gross income for purposes of justifying the extended, six-year limitations periods set forth in

[7] When Intermountain filed its MSJ, the Tax Court's decision in *Bakersfield* was pending on appeal to the Ninth Circuit.

§§6501(e)(1)(A) and 6229(c)(2). Treas. Reg. §§ 301.6229(c)(2)-1T(a)(1)(iii) and 301.6501(e)-1T(a)(1)(iii) (74 Fed. Reg. 49321 (Sept. 28, 2009)).

Once the Temporary Regulations were issued, the Commissioner declined to be bound by the plain language of the effective/applicability date of the Temporary Regulations, which state "[t]he rules of this section apply to taxable years with respect to which the applicable period for assessing tax did not expire before September 24, 2009." 74 Fed. Reg. 49321 (Sept. 28, 2009). He attempted to retroactively apply them to Intermountain by asking the Tax Court to reconsider its September 2009 Opinion granting Summary Judgment and apply the 2009 Temporary Regulations retroactively ten years to Intermountain's 1999 tax year. In effect, the Commissioner sought to use the Temporary Regulations to avoid the applicable three-year limitations period and reverse the decisions of the Tax Court, two Courts of Appeals, and, by implication, the Supreme Court, to reach his desired result. Arguing that the Temporary Regulations are entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Commissioner asserted that the Temporary Regulations required the Tax Court to vacate and reverse its prior decision. The Tax Court rejected all of the Commissioner's arguments and denied the Commissioner's Motions.

In one of the cases involving an issue similar to Intermountain, *Reynolds Properties v. Commissioner*, Doc. No. 22437-07 (Nov. 17, 2009) (appeal pending, 9th Cir., No. 10-72406**)**, Tax Court Judge Laro observed:[8]

> It would appear that the effective date provision if applied first without regard to the rest of the temporary regulations would not be met where, as here, the period of limitations did expire before September 24, 2009, on the basis of the Court's interpretation of the applicable law, but that the 6-year period of limitations could apply if the effective date provision was applied after application of the rest of the temporary regulations. [9]

Six days later, the same Associate Chief Counsel attorney who signed the Commissioner's briefs on the Temporary Regulations in Intermountain issued IRS Chief Counsel Notice CC-2010-001, which states:

> The temporary regulations apply to any docketed Tax Court case in which the period of limitations under sections 6229(c)(2) and 6501(e)(1)(A), ***as interpreted in the temporary regulations***, did not expire with respect to the tax year at issue, before September 24, 2009 . . ..

IRS CCN CC-2010-001, 2009 WL 4753220 (Nov. 23, 2009) (emphasis

[8] This Order is available at: http://www.ustaxcourt.gov/DocImages/528642217/1449910.pdf (last visited 12/31/10).

[9] In *Intermountain*, the Tax Court also suggested the parties address in their briefs "whether the effective date provisions of the temporary regulations make the regulations applicable in this case." (A70.)

added).[10] The Commissioner relies on this Chief Counsel Notice to defend and argue against any implication that the Temporary Regulations do not apply to cases such as this, where the three-year limitation period expired prior to the September 24, 2009, effective date of the Temporary Regulations. Like the Temporary Regulations themselves, CC-2010-001 is an unprecedented, after-the-fact attempt by the Commissioner to bolster his litigation position on an "it-is-because-I-say-it-is" basis.

In a reviewed (*en banc*) supplemental opinion, the Tax Court denied the Commissioner's motions to vacate and for reconsideration. (A72-134.) The seven-judge majority (authored by Judge Wherry) held: 1) the Temporary Regulations, by their own plain meaning, did not apply to Intermountain's 1999 taxable year (A86-87); and 2) even if the Temporary Regulations did apply, they are not entitled to *Chevron* deference (A95-96). The rationale of the Tax Court was that the interpretation set forth in the Temporary Regulations was expressly rejected in *Colony* as being contrary to the intent of Congress. *Colony*, 357 U.S. at 36; A95. After thoroughly analyzing the legislative history, *Colony* concluded that the intent of Congress was clear in enacting the critical language

[10] Shortly after the Tax Court's supplemental opinion in this case, the same attorney told the ABA Tax Section that the IRS will continue to litigate this issue until it gets "the right answer" that the extended limitations period applies. Coder, "IRS Undeterred After Tax Court's *Intermountain* Decision," 127 Tax Notes 729 (May 17, 2010).

"omits from gross income an amount properly includible therein…." And Congress did not intend for an overstatement of basis to suffice as an omission "… from gross income." *Colony*, 357 U.S. at 33. For these reasons and others, the Tax Court denied the Motions. (A97).

In her concurring opinion (joined by three other judges), Judge Cohen stated that she "would reach the same result, however, on narrower grounds relating to motions to vacate and reconsider or untimely motions to amend pleadings…." (A99). "I would defer discussion of the difficult and divisive issues regarding retroactive regulations, temporary regulations promulgated without notice and an opportunity for comment, and the degree of deference to which these regulations and Treasury regulations generally are entitled." *Id.*

Judge Halpern (writing for himself and Judge Holmes) would have held that the Temporary Regulations were invalid as legislative regulations promulgated without notice and comment in violation of Section 553(b) and (c) of the APA.

The Commissioner's Actions Post-Tax Court

More recently, the Commissioner once again has attempted to right his previous wrongs through the regulatory process. On December 14, 2010, barely a week after filing his principal brief in this appeal, the Commissioner issued final regulations under §§6501 and 6229. T.D. 9511. The preamble to the final

regulations summarizes the effective/applicability date provisions of the Temporary Regulations by recasting them as follows: ". . . 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."

Intermountain anticipates that, in his reply brief, the Commissioner may attempt to rely upon the issuance of the final regulations. Any such reliance should be rejected. The Commissioner did not raise the existence of the final regulations in his principal brief, and it is axiomatic that a party may not raise a new argument for the first time in reply. *McBride v. Merrell Dow & Pharms.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986). Although the final regulations were not issued until after the Commissioner had filed his principal brief, it is inconceivable that he was not aware that the final regulations would be issued barely a week later. Indeed, he controlled the fact and timing of the issuance of the final regulations. Yet he made no mention in his principal brief that the final regulations were about to be issued, nor has he sought leave to amend or supplement his brief in the interim.

Statement of Facts

On August 1, 1999, Intermountain sold business assets for a total purchase price of $1,918,844. (A41; C.I.R. Br. at 6.).[11] On September 15, 2000, Intermountain timely filed its *U.S. Partnership Return of Income* (IRS Form 1065) for taxable year 1999 (A58) and fully and properly reported on Form 4797 ("Sales of Business Property") the gross sales price of $1,918,844.00, depreciation in the amount of $131,544.00, and tax basis in the amount of $2,061,808.00.

The Commissioner issued his FPAA on September 14, 2006. The sole basis of the FPAA is the Commissioner's assertion that Intermountain overstated the $2,061,808 in basis reported its tax return. (A11-23; A22; *see also* C.I.R. Br. at 7.) The Commissioner has never asserted that Intermountain **omitted** any receipt or accrual of income from its 1999 tax return; nor has he disputed that the nature of the transaction was correctly characterized as a sale of business assets. *Id.*

While the facts relevant to the issues on appeal are few and not in dispute, the Commissioner devotes four pages of his principal brief to characterizing the underlying transaction entered into by Intermountain as an "abusive tax shelter," apparently in an effort to prejudice this Court in its review of the Tax Court's

[11] References to "C.I.R. Br. ___" are to the Commissioner's Principal Brief.

rulings that the FPAA was untimely because it was issued outside the applicable three-year limitations period, notwithstanding the Temporary Regulations. [12] But, as the Tax Court noted, "the details of the transactions are largely irrelevant to the issues we face today" (A74). "Statutes of limitation . . . are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable or unavoidable delay." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

Summary of Argument

1. The Tax Court's Decision granting Intermountain's MSJ in this case, the Federal Circuit's Opinion in *Salman Ranch*, and the Ninth Circuit's Opinion in *Bakersfield* are all correct. *First*, the Supreme Court held in *Colony* that the identical phrase at issue here—"omits from gross income an amount properly includible therein . . ."—does not include, as the Commissioner argues, an overstatement of basis.

The Fifth Circuit in *Phinney* did not modify or expand the rule of *Colony* as argued by the Commissioner. *Phinney v. Chambers*, 392 F.2d 680, 685 (5th

[12] The Commissioner also argues that the complexity of the transaction placed him in a more disadvantaged position than did the Taxpayer in *Colony*. (C.I.R. Br. at 7 n.6.) This is simply untrue. In *Colony*, as here, the Taxpayer's return reported no more than the aggregate sales price, the aggregate cost/basis, and the profit on that sale. *See Colony, Inc. v. Comm'r*, 26 T.C. 30, 38-39 (1956). Thus, the nature of the information reported on the return at issue in each case is virtually indistinguishable.

Cir. 1968) (". . . the court's opinion in *Colony* should control here.") *Phinney* held that, where a taxpayer so blatantly misrepresents the "nature" of receipts from an installment note as proceeds from the sale of stock, and then reports the misrepresented stock sale transaction on the wrong schedule to the tax return, the taxpayer does, in fact, "omit" an item of income. *Id.* The controlling facts in *Phinney* do not exist here. And the holding of *Phinney* simply cannot be extended to provide any meaningful guidance in ruling on these particular facts.

2. For several reasons, the Tax Court did not abuse its discretion in denying the Commissioner's *post hoc* Motions to apply Temporary Regulations issued by the Commissioner only after losing this case in the Tax Court and two similar cases in two different Circuit Courts.

A. The Tax Court correctly held that the plain language of the effective-date provisions of the Commissioner's Temporary Regulations—"[t]he rules of this section apply to taxable years with respect to which the applicable period for assessing tax did not expire before September 24, 2009." 74 Fed. Reg. 49321 (Sept. 28, 2009)—means that the Temporary Regulations do not apply to Intermountain's 1999 tax year.

B. The *Colony* Court thoroughly reviewed the legislative history and held that Congress had spoken on the precise issue that the Commissioner raises in this appeal. *Colony* determined that in using the language "omits from

gross income," Congress did not intend for an overstatement of basis to open the extended limitations period. Under the first prong of the *Chevron* analysis, Congress left no "gap" for the Commissioner to fill. *Chevron*, 467 U.S. at 842-43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Hence, the Tax Court did not abuse its discretion by denying the Commissioner's Motions.

C. The Temporary Regulations are not a permissible construction of the statute under step two of *Chevron*. In *Colony*, the Supreme Court stated the Commissioner's construction, which is the same he advances in this appeal, would "not only read [the language] more broadly than is justified by the evident reason for its enactment, but also to create a patent incongruity in the tax law." *Colony*, 357 U.S. at 37-38.

D. The Temporary Regulations were invalid as legislative regulations promulgated without notice and comment in violation of Section 553(b) and (c) of the APA.

E. Even if this Court were to disagree with the Tax Court's interpretations noted in sub-paragraphs *A* through *D*, of this paragraph, this Court may still find that any one or all provide sufficient grounds for the Tax

Court to refuse to disturb the finality of the September, 2009 Order granting summary judgment and, therefore, the Tax Court did not abuse its discretion in denying the Commissioner's *post hoc* Motions. *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006).

3. Alternatively, this Court can affirm both Orders under the adequate disclosure provisions of §6501(e)(1)(A)(ii). *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979) (an appellee is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by" the lower court).

Argument

1. THE TAX COURT DID NOT ERR IN GRANTING INTERMOUNTAIN'S MOTION FOR SUMMARY JUDGMENT.

A. *Standard of Review.*

Intermountain agrees that this Court should review the Tax Court's September 2009 Opinion *de novo*. *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 422-23 (D.C. Cir. 2005).

B. *The Tax Court Correctly Applied The Supreme Court's Holding In Colony.*

The precise issue presented in this case—whether an overstatement of basis could constitute an omission from gross income—was conclusively

rejected by the Supreme Court in *Colony*, where the Court held that Congress intended this language to serve a much narrower purpose:

> We find in [the legislative] history persuasive evidence that Congress was addressing itself to the specific situation where a taxpayer ***actually omitted some income receipt or accrual in his computation of gross income, and not more generally to errors in that computation arising from other causes***.

357 U.S. at 33 (emphasis added).

Analyzing the legislative history, the *Colony* Court specifically noted that:

> We have been unable to find ***any*** solid support for the Government's theory [that an overstatement of basis can constitute an "omission from gross income" availing the Commissioner of the six-year limitations period] in the legislative history. Instead, as the excerpts set out above illustrate, this history shows to our satisfaction that the Congress intended an exception to the usual three-year statute of limitations ***only*** in the restricted type of situation already described.

Id. at 36 (emphasis added).

Although the *Colony* Court interpreted the statute-of-limitations provisions from the Internal Revenue Code of 1939 (the "39 Code"), *Colony* was decided four years after the then new Internal Revenue Code of 1954 (the "54 Code") was signed into law. At new §6501(e)(1)(A) of the 54 Code, Congress adopted the exact same language that the Supreme Court addressed in *Colony*. Importantly, the *Colony* Court noted at the end of its Opinion that ". . .

the conclusion we reach is in harmony with the ***unambiguous language of §6501(e)(1)(A).*** *Id.* at 37 (emphasis added).

During the years following *Colony*, between 1958 and the date of the FPAA, Congress amended the limitations period for tax assessments a total of thirty-nine times without modifying, clarifying or rewriting the statutory language the Supreme Court construed in *Colony*. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-02 (1983) (construing congressional inaction as acquiescence where the interpretation of statutory language generated controversy, and Congress did not amend the statute); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Salman Ranch*, 573 F.3d at 1373-74. As the Supreme Court has held:

> Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change [internal citations omitted]. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard, 434 U.S. at 580-581.

Citing Justice Scalia's *concurring* opinion in *United States v. Estate of Romani*, 523 U.S. 517, 535-36 (1998), the Commissioner argues that Congress's repeated amendment of §6501 "lacks persuasive significance." (C.I.R. Br. at 26.) In doing so, he ignores both the Supreme Court's longstanding holding in

Lorillard and the Federal Circuit's specific holding in *Salman Ranch* (573 F.3d at 1373-74) that Congress's decision not to alter its use of the term "omits" in the many times it has amended §6501 indicates that it was aware of, and accepted, the Supreme Court's interpretation of §6501(e)(1)(A) and similar statutory language in *Colony*. *See also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) ("*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.' Additionally, Congress has long acquiesced in the interpretation we have given.") (internal citations omitted); *Shepard v. United States*, 544 U.S. 13, 23 (2005) ("In this instance, time has enhanced even the usual precedential force, nearly 15 years having passed since *Taylor* came down, without any action by Congress to modify the statute as subject to our understanding that it allowed only a restricted look beyond the record of conviction under a nongeneric statute.")

Nevertheless, Congress enacted §6229 (one of the two provisions at issue herein) in 1982, twenty-four years after the Supreme Court's decision in *Colony*. Yet, §6229 contains the same language—"omits from gross income an amount properly includible therein"—without further defining either the word "omits" or "gross income." In this instance, Congress's acquiescence to the construction

in *Colony* is demonstrated by its actions, not its failure to act, as the Commissioner incorrectly claims.

Hence, the application of *Colony*'s holding to cases such as this has been clear. The first court to address the issue in a similar situation was the Tax Court in *Bakersfield*, which rejected the Commissioner's position that the holding of *Colony* does not apply to interpretations of §6501:

> Although the numbering of the sections as part of recodifications of the Internal Revenue Code has changed, we see little change in the rationale of the applicable statute. Thus, the Supreme Court holding would apply equally to [the taxpayer's] return.

Bakersfield, 128 T.C. at 214. Both Circuit Courts that have addressed the issue have agreed. *Salman Ranch*, 573 F.3d at 1377 ("In sum, we conclude that the Supreme Court's interpretation of the language 'omits from gross income an amount properly includible therein' in I.R.C. § 275(c) controls the interpretation of the identical language in I.R.C. §6501(e)(1)(A)"); *Bakersfield*, 568 F.3d at 778 ("[The Supreme Court's holding in *Colony*] controls our interpretation of . . . §6501(e)(1)(A)").

The Commissioner cites three trial court cases that have sided with him. (C.I.R. Br. at 17.) The Commissioner's reliance on these cases, however, is misplaced. The Eastern District of North Carolina's decision in *Home Concrete & Supply, LLC v. United States*, 599 F. Supp. 2d 678 (E.D.N.C. 2009), *appeal*

docketed No. 09-2353 (4th Cir. Dec. 9, 2009), was based almost entirely on the Court of Claims decision in *Salman Ranch*, which has since been reversed by the Federal Circuit. *Salman Ranch*, 573 F.3d 1362. The other two, *Burks v. United States*, No. 3:06-CV-1747-N, 2009 WL 2600358 (N.D. Tex. June 13, 2008), *appeal docketed* No. 09-11061 (5th Cir. Oct. 26, 2009) and *Brandon Ridge Partners v. United States*, 100 A.F.T.R.2d (RIA) 5347 (M.D. Fla. 2007), are both unpublished opinions based on those Courts' beliefs that they were bound by an erroneous construction of the Fifth's Circuit opinion in *Phinney v. Chambers*, 392 F.2d 680 (5th Cir. 1968), discussed *infra.*

In arguing that *Bakersfield* and *Salman Ranch* were incorrectly decided, the Commissioner merely rehashes a number of his previously rejected arguments. First, the Commissioner argues that the "general definition of 'gross income' in [§61] establishes that an omission of gross income can result from an overstated basis." (C.I.R. Br.at 15-16.) In support thereof, the Commissioner relies exclusively on cases from the Tax Court. The Tax Court, however, obviously does not interpret its own precedent in the same manner as the Commissioner, as evidenced by its rejection of this argument in this case.

Nevertheless, the Commissioner made this same argument in *Colony*,[13] and the Supreme Court explicitly rejected it:

> To accept the Commissioner's interpretation and to impose a five-year limitation [later changed to six] when such errors affect "gross income," but a three-year limitation when they do not, not only would be to read §275(c) more broadly than is justified by the evident reason for its enactment, but also to create a patent incongruity in the tax law.

Id. at 37-38.

The Commissioner's bold suggestion that this Court has the authority to overrule the Supreme Court's holding in *Colony* is contrary to the hierarchical structure of our appellate courts, and directly contradicted by the Supreme Court's own mandates:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

The Commissioner criticizes the Tax Court for its reliance on *Rodriguez* because it pre-dated *National Cable & Telecomms. Ass'n v. Brand X Internet*

[13] *See Colony*, 357 U.S. at 32 ("[The Commissioner's] view is somewhat reinforced if, in reading the above-quoted phrase, one touches lightly on the word 'omits' and bears down hard on the words 'gross income,' … .").

Servs., 545 U.S. 967 (2005). (C.I.R. Br. at 41.) The Commissioner, however, misrepresents the context in which the citation and quote occurs. The Tax Court did not, as the Commissioner implies, rely upon the holding in *Rodriguez* as support for denying deference to the Temporary Regulations. (A90.) Instead the Court cited *Rodriguez* in rebuke of the Commissioner's attempt to re-argue his original position that, notwithstanding the issuance of the Temporary Regulations, *Colony* is not controlling. ("We rejected respondent's arguments in the process, and rehashing them now even in this context is not necessary.") (A66, n.5; A89, n.14). The Tax Court's adherence to the mandate of *Rodriguez* in granting summary judgment was correct.

Courts have also rejected the Commissioner's argument that the enactment of §6501(e)(1)(A)(i) limits the Supreme Court's holding in *Colony* to cases involving a "trade or business." *Salman Ranch*, 573 F.3d at 1373; *Bakersfield*, 568 F.3d at 775-76. The Federal Circuit in *Salman Ranch* addressed the issue as follows:

> In our view, however, the [trial court's] approach incorrectly reads into *Colony* what is not stated. After analyzing the language of §275(c) and the pertinent legislative history, the Court in *Colony* held that "omits from gross income an amount properly includible therein" does not include an overstatement of basis, as was alleged in the case of the taxpayer before it, and the Court did not say that its holding was limited to sales of goods or services by a trade or business. We are not prepared to conclude--based simply upon the Court's

> reference to ambiguity in §275(c) and the lack thereof in §6501(e)(1)(A)--that the Court's facially unqualified holding nevertheless carries with it a qualification.

Salman Ranch, 573 F.3d at 1373.

The Federal and Ninth Circuits similarly rejected the Commissioner's argument that applying *Colony* would render §6501(e)(1)(A)(i) superfluous. The Ninth Circuit explained:

> Section 6501(e)(1)(A) requires a comparison of two numbers: (1) the "gross income" omitted with (2) the "gross income" stated in the return. If the first number divided by the second number is greater than 25%, then the six-year limitations period applies. Because §6501(e)(1)(A)(i) changes the definition of "gross income" for taxpayers in a trade or business, it potentially affects both the numerator (the omission from gross income) and the denominator (the total gross income stated in the return). *Colony*'s holding, however, affects only the numerator, by defining what constitutes an omission from gross income.
>
> When there is no dispute about the amount of gross income omitted, the denominator, the total amount of gross income stated in the return, determines whether the omission meets the 25% threshold that triggers the six-year limitations period. For taxpayers not in a trade or business, the denominator is the amount of gross income (gross receipts minus basis); for taxpayers in a trade or business, the denominator is the total amount of money received without any reduction for basis (gross receipts). Thus, in a case where there is no dispute regarding the amount of gross income omitted, whether a taxpayer's omissions constitute more than 25% of the gross income stated in the return may depend on whether subparagraph (i)'s definition of "gross income" applies. In such cases,

> subparagraph (i) may be dispositive, whether or not we accept the IRS's interpretation of *Colony*.

Bakersfield, 568 F.3d at 776-777; *see also Salman Ranch*, 573 F.3d at 1375 (concurring with the Ninth Circuit's decision in *Bakersfield*).

Finally, the Commissioner argues that this Court should reject the Federal and Ninth Circuit decisions applying *Colony*, and, instead, follow what he characterizes as the Fifth Circuit's conflicting decision in *Phinney v. Chambers*, 392 F.2d 680 (5th Cir. 1968). The Commissioner's position on appeal that *Salman Ranch* and *Bakersfield* are in conflict with *Phinney*, however, is contrary to his position below: "During the period within which to request rehearing or Supreme Court review in Bakersfield, there was (and still is) no intra- or inter-circuit conflict to support rehearing or a petition for a writ of certiorari." (Doc. 47 at 22 n.6.) The Commissioner had it right the first time. *Phinney* does not conflict with *Salman Ranch* and *Bakersfield*.

According to the Commissioner, *Phinney* rejected *Colony*'s plain-meaning holding and §6501(e)(1)(A)'s requirement that there be an omission from gross income *before* the extended limitations period can apply, and

replaced it with a two-pronged test in which failure to *either* include an amount in gross income *or* adequately disclose an item means such period applies.[14]

Phinney in fact stands for the simple proposition that "either a complete omission of an item of income of the requisite amount or misstating of the nature of an item of income" can give rise to the six-year limitations period. *Id.* at 685. In *Phinney*, a husband and wife sold jointly held stock in 1954 in an installment sale. The husband died in 1956, and, in 1958, his estate properly reported 84% of its share of the final installment payment as capital gain on Schedule D to its return. Rather than report the wife's share of that payment consistently, the same accountant reported her receipt as proceeds from a 1958 stock sale offset by a stepped-up basis due to her husband's death in 1956, yielding zero gain. The purported 1958 stock sale was listed on a separate schedule under a different heading using an incorrect designation. The Fifth Circuit held that the income was "left out" of (*i.e.*, "omitted" from) Schedule D, even though the item was listed on a separate schedule to the return. Because

[14] The Commissioner states that "a mere misdescription of an income item is insufficient" to invoke the six-year limitation period of § 6501(e)(1)(A). (C.I.R. Br. at 24.) Yet that is exactly what the Fifth Circuit held. *Phinney*, 392 F.2d at 685 (". . . the six year statute is intended to apply where there is either a complete omission of an item of income of the requisite amount ***or misstating the nature of an item of income*** which places the Commissioner . . . at a special disadvantage.") (emphasis added).

the wife's return grossly misrepresented the nature of the income item, and the 25% threshold was satisfied, the six-year limitations period applied.

The Fifth Circuit's decision was premised on the following:

> This, it seems to us, is to say that if an item of income is shown on the face of the return or an attached statement that is *not* shown in a manner sufficient to enable the secretary by reasonable inspection of the return to detect the errors then it *is* the omission of "an amount" properly includable in the return.

Id. at 685.

The *Phinney* Court never said *Colony* did not apply. In fact, it stated: "[w]e think the following language of the court's opinion in *Colony* should ***control*** here." *Id.* (emphasis added) (quoting Supreme Court's statement of Congress's intent).

Simply put, the Fifth Circuit in *Phinney* did not, as the Commissioner suggests, apply a limitation to the Supreme Court's holding in *Colony*. It applied *Colony* to the particular facts of the case and determined that the taxpayer's gross mischaracterization of the *nature* of income constituted the "omission" envisioned by the Supreme Court in *Colony*. No such facts exist in this appeal. The Commissioner has never asserted that Intermountain "misstate[ed] the nature of an item of income." On its 1999 tax return, Intermountain correctly characterized the income at issue as a sale of its assets. The sole issue is whether it correctly reported its basis. This falls directly under

the Supreme Court's holding in *Colony* and not within the special circumstances addressed in *Phinney*.[15]

2. THE TAX COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE COMMISSIONER'S MOTIONS TO VACATE AND RECONSIDER THE SEPTEMBER 2009 ORDER GRANTING SUMMARY JUDGMENT.

A. *Standard Of Review.*

The Commissioner fails to acknowledge that the Tax Court's May 2010 opinion should be reviewed for an abuse of discretion. *La Bow v. Commissioner*, 763 F.2d 125, 129 (2d Cir. 1985) ("We are well aware that rulings on motions for reconsideration are committed to the discretion of the Tax Court, subject to reversal only if 'extraordinary circumstances' clearly show that that discretion was abused.") citing *Wilson v. Commissioner*, 500 F.2d 645, 648 (2d Cir. 1974), and *Louisville & Nashville Railroad Co. v. Commissioner*, 641 F.2d 435, 443 (6th Cir. 1981).

In the context of reviewing a trial court's disposition of a motion for reconsideration under Fed. R. Civ. P. 60,[16] this Court's function "is not to

---

[15] At oral argument in the consolidated cases *MITA* and *Burks*, the Fifth Circuit panel expressed extreme skepticism of the Commissioner's arguments under *Phinney* (a recording of which is available through the Fifth Circuit's website at http://www.ca5.uscourts.gov/OralArgRecordings/09/09-11061_11-1-2010.wma (last visited 12/19/2010)).

[16] Decisions interpreting Rules 59 and 60 of the Federal Rules of Civil Procedure apply to motions for reconsideration under Rule 161 of the Tax Court Rules of Practice and Procedure. *Estate of Kraus v. Comm'r*, 875 F.2d 597, 602 (7th Cir. 1989) (citing *Wheeler v. Comm'r*, 46 T.C.M. (CCH) 642 (1983)).

determine the substantive correctness of the judgment." *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006). Rather, the Court "is limited to deciding whether the district court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown." *Id.*

Under this deferential standard of review, as set forth below, several factors compel the conclusion that the Tax Court acted well within its discretion when it denied the Commissioner's Motions.

The Tax Court's denial of the Commissioner's Motions was unanimous—thirteen of the fifteen Tax Court judges participated in considering the Motions, and not a single judge dissented from the ruling that the Motions should be denied. While some judges advanced alternative grounds for reaching their conclusions, they all agreed that the finality of the September 2009 Order should not be disturbed. Furthermore, the Tax Court's Order comprises sixty-one pages of detailed analysis of the legal issues presented in the Motions. Each of the various grounds for dismissal advanced in the Tax Court's opinions relies heavily on precedent from this Court.

Each of the opinions contained in the May 2010 Order[17] amply support the Tax Court's refusal to exercise its discretion and not disturb the finality of the September 2009 Order. Therefore, the May 2010 Order should be affirmed.

B. *The Tax Court Did Not Abuse Its Discretion In Ruling That, By Their Own Terms, The Temporary Regulations Do Not Apply To Intermountain's 1999 Taxable Year.*

The majority opinion of the Tax Court, authored by Judge Wherry and joined by six other judges, ruled that the Temporary Regulations do not apply to render the FPAA in this case timely. The effective date/applicability provisions of the Temporary Regulations state: "[t]he rules of this section apply to taxable years with respect to which the applicable period for assessing tax did not expire before September 24, 2009." 74 Fed. Reg. 49321 (Sept. 28, 2009). Neither the Temporary Regulations nor their preamble contains any statement indicating that the Temporary Regulations are intended to be applied retroactively. T.D. 9466, 74 Fed. Reg. 49321-23. To the contrary, the Commissioner concedes that the Temporary Regulations were never intended to be retroactive. (C.I.R. Br. at 63.)

Under the Supreme Court's holding in *Colony*, and the Tax Court's September 2009 Order, the "applicable period for assessing tax" in this case

[17] This Court is free to affirm the Tax Court's Order denying the Commissioner's Motions on any ground supported by the record. *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1362 (D.C. Cir. 1982); *citing Paskaly v. Seale*, 506 F.2d 1209, 1211 n.4 (9th Cir. 1974).

closed on September 15, 2003, *i.e.*, three years after Intermountain's return for the 1999 taxable year was filed (on September 15, 2000). As of September 24, 2009, the effective date of the Temporary Regulations, the Tax Court had already correctly determined that §6501(a)'s limitation period had long expired. Thus, under then-existing law, adjustments to Intermountain's 1999 return were time-barred years before the Temporary Regulations were issued. The Temporary Regulations do not and cannot change the law as it existed prior to their publication on September 24, 2009. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983-984 (2005) (an agency's subsequent interpretation of a statute does not reverse a judicial decision applying a different interpretation and does not say that the court's holding was legally wrong). Therefore, as the seven-judge majority of the Tax Court correctly ruled, by their own terms, the Temporary Regulations do not apply in this case.

Not liking this result, the Commissioner argues that, despite the clear language of the applicability date provision, the Temporary Regulations "apply to petitioner's 1999 tax year, because the period of limitations under sections 6229(c)(2) and 6501(e)(1)(A), ***as interpreted in the regulations***, remains open

with respect to that year." (Doc. 42 at 19; A85-86; C.I.R. Br. at 60 (emphasis added).)[18]

The Tax Court, however, did not agree:

> Respondent's interpretation of the temporary regulations' effective/applicability date provisions is erroneous and inconsistent with the regulations. Specifically, we find the interpretation to be irreparably marred by circular, result-driven logic and the wishful notion that the temporary regulations should apply to this case because Intermountain was involved in what he believes was an abusive tax transaction.

(A86.)

Based on the plain and unambiguous language of the effective/applicability date provision, the seven-member majority of the Tax Court did not abuse its discretion in reaching this conclusion.

The Commissioner, however, continues his "I win because I say I win" posture by arguing that his interpretation of the applicability provisions (inserting the phrase "as interpreted in the regulations," which does not exist in the provision itself) is entitled to deference. (C.I.R. Br. at 61 n.15.) But deference to an agency's interpretation of its own regulations is not absolute. As the Commissioner acknowledges, his interpretation of the regulation is not

[18] Despite the fact that this issue formed the principal ground for the majority opinion below, the Commissioner does not even mention it until page 60 of his brief.

entitled to deference where it is "plainly erroneous and inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

As the majority below found, the Commissioner's interpretation is "irreparably marred by circular, result-driven logic," that finds no basis whatsoever in the plain language of the Temporary Regulations. (A15.)

Furthermore, no deference is afforded to an agency's interpretation of its own regulations where it is a ". . . 'post hoc rationalization' advanced by an agency seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462; citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

Here, the Chief Counsel advice memorandum espousing the Commissioner's interpretation was issued ***after*** Judge Laro (in a case involving the same limitations period question) raised the issue. Clearly, the Chief Counsel Memorandum was issued for the sole purpose of justifying and defending the Commissioner's attempt to apply regulations in this case that, by their own terms, do not apply, as the Tax Court correctly ruled.

The Commissioner's interpretation of the applicability/effective date provisions is also invalid because it contravenes the rule that once a limitations period expires, it is permanently closed. *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950 (1997) ("extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund

cause of action."); *see also Chenault v. U.S. Postal Serv.*, 37 F.3d 535 (9th Cir. 1994) ("a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would "alter the substantive rights" of a party and "increased a party's liability.")

The Commissioner's argument is contrary to the universal practice of the federal courts. In analyzing the 1999 Congressional amendment to Code §6502—which extended the statute of limitations on collection from six to ten years—courts universally applied the effective date provision first to determine whether the six-year or ten-year statute of limitation applied, and then proceeded to determine whether the IRS's collection actions were timely.[19] Where, as here, the limitations period expired prior to the effective date of the extended statute, the courts held the IRS's actions were time-barred. *U.S. v. Simons*, 864 F. Supp. 171 (D.C. Utah 1994); *U.S. v. Wright*, 868 F. Supp. 1070 (S.D. Ind. 1994); *Hillyer v. Comm.*, 817 F.Supp. 532 (M.D. Penn. 1993); *Babich*, 73 AFTR 2d 94-848.

The Commissioner's position is further belied by the fact that the sole issue in this case is whether the FPAA was timely issued. Importantly, the

[19] *Foutz v. U.S.*, 72 F.3d 902 (10th Cir. 1995); *Wright*, 868 F. Supp. 1070; *Kaggen v. IRS*, 73 AFTR 2d 94-2234 (E.D. N.Y. 1994); *Hillyer*, 817 F. Supp. 532; *In re Babich*, 73 AFTR 2d 94-848 (Bankr. Ct. N.D. Ohio 1993).

timeliness of the FPAA is determined on the date the IRS mails it, which, by necessary implication, means that the law in effect on that date is controlling. *Frieling v. Comm'r*, 81 T.C. 42 (1983). The Temporary Regulations did not exist at the time the FPAA was mailed. But Supreme Court authority that had been in existence for nearly fifty years established that the limitations period had expired nearly three years before the FPAA was mailed. Holding the Commissioner to his word below that the "temporary Treasury regulations do not apply in a manner that would have the effect of reopening any tax year that is otherwise closed" (Doc. 37 at 20 n.6), this Court should affirm the Tax Court's determination that the Temporary Regulations do not apply to this case.

C. *The Temporary Regulations Are Not Entitled To Chevron Deference.*

The Commissioner's argument under the Temporary Regulations relies entirely upon the proposition that the Temporary Regulations are entitled to *Chevron* deference. This proposition is without merit.

i. The Temporary Regulations Were Not Issued Under Circumstances That Qualify For *Chevron* Deference.

The touchstone of eligibility for *Chevron* deference is participation in notice-and-comment rulemaking or formal adjudication. *United States v. Mead*, 533 U.S. 218, 230 (2001). The abbreviated process by which the Temporary Regulations were promulgated did not include such formalities.

In both the preamble to the Temporary Regulations and in his principal brief, the Commissioner asserts that the Temporary Regulations are interpretive, and, therefore, exempt from notice-and-comment rulemaking. As explained in the Tax Court's concurring opinion below, however, the Temporary Regulations bear the indicia of legislative (not interpretive) rules under this Court's holding in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993). The Commissioner claims that the Temporary Regulations are binding and carry the force of law; he repeatedly characterizes them as "controlling" and acknowledges that they unequivocally provide that "an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis *constitutes* an omission from gross income ... ."[20] But if, as the Commissioner claims, the Temporary Rules are interpretive, they ". . . enjoy no *Chevron* status as a class." *Mead*, 533 U.S. at 232.

Citing *Mead*,[21] however, the Commissioner argues that *Chevron* deference nonetheless applies. *Mead* does not help the Commissioner's cause. While the Supreme Court left open the possibility that administrative

[20] Temp. Reg. §§ 301.6229(c)(2)-1T(a)(1)(iii) and 301.6501(e)-1T(a)(1)(iii); *see also* T.D. 9466 ("any basis overstatement that leads to an understatement of gross income under section 61(a) *constitutes* an omission from gross income for purposes of sections 6501(e)(1)(A) and 6229(c)(2)"). (Emphases added).

[21] The Commissioner also cites *Barnhart v. Walton*, 535 U.S. 212 (2002), but that case is inapposite, because the regulations at issue there had been subject to notice-and-comment rulemaking. *Id.* at 217, citing 65 Fed. Reg. 42772 (July 17, 2000).

pronouncements not subject to notice-and-comment rulemaking *might* be entitled to such deference, it limited this possibility to circumstances where it was apparent that Congress intended such deference be given:

> There are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment rulemaking, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.

Id. at 231.

One such case is where:

> . . . Congress . . . provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.

Id. at 230.

The Commissioner also argues that §7805(e) is a separate and specific exemption for regulations issued under the Commissioner's general rulemaking authority. (C.I.R. Br. at 49-52.) If true, however, that would preclude a determination, under *Mead*, that Congress intended Temporary Regulations to carry the force of law that would entitle them to *Chevron* deference because it did not ". . . provide[] for a relatively formal administrative procedure tending to foster the fairness and deliberation . . ." *Mead*, 533 U.S. at 230.

Furthermore, the Commissioner does not, and cannot, point to a single provision where Congress expressly, or impliedly, granted him the authority to issue regulations concerning the limitations periods at issue herein, let alone to do so with the force of law. *Id.* at 231 (". . . the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."). The general grant of authority in §7805(a) relied upon by the Commissioner grants only the authority to ". . . prescribe all needful rules and regulations ***for the enforcement of this title*** [emphasis added]." Importantly, however, §§6501 and 6229 are by their very nature a Congressional decision to place a ***limitation*** on the Commissioner's ability to enforce the provisions of the Internal Revenue Code. To construe §7805(a) as authorizing the Commissioner to issue regulations (with the force of law) to unilaterally expand those limits is nonsensical. Importantly, none of the cases cited by the Commissioner for the premise that a general grant of regulatory authority prompts *Chevron* deference, involves a regulation concerning a statute of limitation, or other Congressionally imposed limitation on the agency. The limitations placed upon the Commissioner to assess tax is

the exclusive province of Congress,[22] and a fair reading of §7805(a) cannot lead to an implied grant of authority to the Commissioner to expand those limits.

Finally, the Commissioner's reactive issuance of the Temporary Regulations immediately following the rejection of his identical litigating position by two Courts of Appeals and the Tax Court does not ". . . foster the fairness and deliberation that should underlie a pronouncement" meriting *Chevron* deference. *Id.* at 230 (citing *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996)). Indeed, the Supreme Court has held that the deliberateness and authoritativeness of a regulation is suspect where it is merely an agency's attempt to repackage its failed litigating position. *Smiley*, 517 U.S. at 741 ("Of course we deny deference 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. [citation omitted]. The deliberateness of such positions, if not indeed their authoritativeness, is suspect."); *see also Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). Such agency action merits no more than "near indifference" from courts. *Mead*, 533 U.S. at 228.

For each of these reasons, the Temporary Regulations are not entitled to *Chevron* deference.

---

[22] *Toussie v. United States*, 397 U.S. 112, 121 (1970) (". . . questions of limitations are fundamentally matters of legislative not administrative decision.").

ii. The Temporary Regulations Do Not Pass *Chevron's* Test.

Even if this Court were to review the Temporary Regulations under *Chevron's* framework, they still would not be entitled to deference. Before the Temporary Regulations can receive the deference afforded under *Chevron,* they must satisfy both parts of a two-step analysis. In step one, this Court must determine whether Congressional intent is clear, and, if so, give effect to that intent over any contrary interpretation of the agency. The rule in this Circuit is that the meaning of words in their statutory context and the legislative history of the statute ***must be*** considered in this first step. *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008).

If, however, Congress has not spoken directly to the precise question, courts move to step two to determine whether the rule or regulation is a permissible construction of the statute.

The Temporary Regulations fail at both of these steps.

a. *Congress's Intent Is Clear.*

Under *Chevron* step one, the Court must give effect to the clear intent of Congress. *Chevron*, 467 U.S. at 841-43. If congressional intent is clear, the court and governmental agency must give effect to that intent. *Id.*

As a result of *Colony*, the law has been unambiguous for over fifty years. An overstatement of basis does not (as argued by the Commissioner herein)

constitute an "omission from gross income" for purposes of §§6501(e)(1)(A) and 6229(c)(2). Equally important, the Court's analysis of the legislative history in *Colony* provided a clear and unambiguous picture of Congressional intent in enacting this language and it is contrary to the Commissioner's interpretation. In effect, the Supreme Court in *Colony* determined that Congress has spoken, leaving no "gap" under the first prong of the *Chevron* analysis for the Commissioner to fill with his own regulatory interpretation. *Chevron*, 467 U.S. at 842-43. ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

Although the *Colony* court interpreted the statute of limitations provisions from the 39 Code, at the time the then new 54 Code had been signed into law. At new §6501(e)(1)(A) Congress adopted the exact same language the Supreme Court interpreted in *Colony*. Importantly, the *Colony* Court noted at the end of its Opinion that ". . . the conclusion we reach is in harmony with the ***unambiguous language of §6501(e)(1)(A)*** [emphasis added]." 357 U.S. at 37.

The Commissioner cites the Supreme Court's statement in *Colony* that "it cannot be said that the language is unambiguous." This, however, appears ***before*** the Court's plain meaning and legislative history analysis. The Supreme

Court reached its conclusion after (1) looking to the ordinary meaning of the word "omit;"[23] and (2) an in-depth analysis of the legislative history of Section 275(c). Nevertheless, even "some ambiguity" or "the presence of some uncertainty does not expand *Chevron* deference to cover" an agency construction previously rejected based on traditional tools of statutory construction, including "evidence from the time of the statute's enactment, a long line of [Supreme Court cases], and normal principles of construction." *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S.Ct. 2710, 2715 (2009).

The Commissioner criticizes the Tax Court's reliance on *Colony's* legislative history analysis to reach its conclusion that congressional intent was clear. C.I.R. Br. at 42. But, under the law of this Circuit, such considerations are not only appropriate, but required:

> "Although Chevron step one analysis begins with the statute's text," the court must examine the meaning of certain words or phrases in context and also "exhaust the traditional tools of statutory construction, including examining the statute's legislative history to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear."

[23] *See also Salman Ranch*, 573 F.3d at 1374 ("The meaning of 'omits' in today's parlance appears to be no different than its meaning at the time of the *Colony* decision.")

Sierra Club v. EPA, 551 F.3d 1019, 1027 (D.C. Cir. 2008);[24] *citing Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 267 (D.C. Cir. 2001); *see also Catawba County v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) ("To be sure, a statute may foreclose an agency's preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque.")

In its step-one analysis, this Court need look no further than the Supreme Court's decision in *Colony*. Where a court has previously ruled that the statutory terms are unambiguous and leave no room for agency discretion, an agency interpretation that might otherwise be entitled to judicial deference is precluded. *Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).[25] Since the Supreme Court is the final authority on issues of statutory construction (*Chevron*, 467 U.S. at 841-43 (1984)), its decision in *Colony* precludes this Court from granting any deference to the Commissioner's contrary regulatory pronouncement.

---

[24] Despite the fact that Judge Halpern cites it in his concurring opinion, the Commissioner fails to even cite (let alone address) *Sierra Club* in his principal brief.

[25] A court need use no "magic words" to indicate that its holding is the only permissible construction of the statute. *Fernandez v. Keisler*, 502 F.3d 337, 347-48 (4th Cir. 2007) ("In many instances, courts were operating without the guidance of *Brand X*, and yet the exercise of statutory interpretation makes clear the court's view that the plain language of the statute was controlling and that there existed no room for contrary agency interpretation.").

This conclusion is further bolstered by the fact that in the more than fifty years since *Colony*, Congress has amended §6501 forty-two times without changing the pertinent language "omits from gross income an amount properly includible therein." *See Bob Jones Univ.*, 461 U.S. at 600-02 (construing congressional inaction as acquiescence where the interpretation of statutory language generated controversy and Congress did not amend the statute); *Lorillard*, 434 U.S. at 580; *Salman Ranch*, 573 F.3d at 1373-74.

Importantly, when Congress enacted §6229 (one of the two provisions at issue in this case) in 1982, twenty-four years after *Colony*,[26] it employed exactly the same language—"omits from gross income an amount properly includible therein"—interpreted by the Supreme Court, without further defining either "omits" or "gross income." As the Supreme Court has held:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. … So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard, 434 U.S. at 580-581 (internal citations omitted).

[26] In this instance, Congress's acquiescence to the construction in *Colony* is demonstrated by its actions, not its failure to act, as the Commissioner wrongly claims. (C.I.R. Br. at 26-27.)

Hence, it cannot be said that Congress's intent has changed over time. Since Congressional intent (both before and after *Colony*) is clear, that intent, as determined in *Colony*, must be given effect. The Temporary Regulations are contrary to that intent. Consequently, they are not entitled to *Chevron* deference.

b. *The Temporary Regulations Are Not A Permissible Construction of the Statutes.*

Even if this Court determines that §§6501(e)(1)(A) and 6229(c)(2) are silent or ambiguous on the issue, "the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. 842-843. The Temporary Regulations fail *Chevron* step two, as well.

In *Colony*, the Commissioner argued the same statutory construction as set forth in the Temporary Regulations, and was flatly rejected by the Supreme Court. Significantly, the Supreme Court did not present its holding as the "best" of several possible interpretations of the statute; rather, the Court explained that its holding was, in fact, the only permissible interpretation:

> We have been unable to find ***any*** solid support for the Government's theory [that an overstatement of basis can constitute an "omission from gross income" availing the Commissioner of the six-year limitations period] in the legislative history. Instead, as the excerpts set out above illustrate, this history shows to our satisfaction that the Congress intended an exception to the usual three-year statute of limitations ***only*** in the restricted type of situation already described.

Id. at 36 (emphasis added).

The Court then went on to note:

> To accept the Commissioner's interpretation and to impose a five-year limitation when such errors affect "gross income," but a three-year limitation when they do not, ***not only would be to read §275(c) more broadly than is justified by the evident reason for its enactment, but also to create a patent incongruity in the tax law*** [emphasis added]**.**

Id. at 36-37.

The Commissioner's position (as set forth in the Temporary Regulations) simply cannot be harmonized with the statutory language, its origin, or its purpose. Therefore, the Commissioner's position is not entitled to *Chevron* deference.

D. *The Commissioner Cannot Overrule The Supreme Court.*

In any event, the Temporary Regulations cannot overrule the Supreme Court. *Brand X*, which the Commissioner cites as authority for overruling *Colony* by regulation, does not apply. Courts have readily distinguished *Brand X* on the ground that it did not involve an agency that was an unsuccessful party to the prior litigation. *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1114 (9th Cir. 2009); *Swallows Holdings Ltd. v. Comm'r*, 126 T.C. 96, 144 (2006). The trio of cases—*Smiley*, *Long Island Care*, and *Morton*—the Commissioner relies on for the proposition that he can overrule court decisions

during the pendency of a litigation are inapposite. None of these cases involved an agency currently engaged in litigation or promulgating rules that embodied its previously rejected litigating position. The Commissioner can cite to no case where, during ongoing litigation in which his position had been repeatedly rejected, a court sanctioned the use of agency power to overrule a lower court in the same litigation. Undersigned counsel is likewise aware of no such case. As the Supreme Court held in *Bowen*, "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." 488 U.S. at 213. What the Commissioner is asking this Court to do is unprecedented.

Further, *Brand X* did not involve a prior Supreme Court decision; the Court's holding was directed only at agency action related to an existing Court of Appeals' decision. Justice Stevens, joining the majority opinion "in full," emphasized this point in his concurring opinion by explaining that *Brand X* would not necessarily apply to a Supreme Court decision that removed any pre-existing ambiguity.[27] This comports with *Chevron*'s holding that Congress's

[27] *Brand X*, 545 U.S. at 1003 (Stevens, J, concurring); *Intermountain*, slip op. at 20 n.15 (Justice Stevens' position has "sparked debate over the applicability of *Brand X*"); *see also Brand X* at 1016 n.11 (Scalia, J., dissenting); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (it is the Supreme Court's prerogative to overrule its own decisions). Justice Stevens wrote the majority opinion in *Chevron*.

intent, as ascertained by a court using traditional tools of statutory construction, "is the law." *Chevron*, 467 U.S. at 843 n.11.

Finally, the Supreme Court recently limited the reach of *Brand X*, holding that an agency's construction of an ambiguous statute was invalid because it was contrary to the teaching of the Supreme Court's jurisprudence. *Cuomo*, 129 S.Ct. at 2715-17. This is consistent with the Court's statement, on at least three occasions, that: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and ***we assess an agency's later interpretation of the statute against that settled law*** [emphasis added]." *Neal v. U.S.*, 516 U.S. 284, 295 (1996); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). In *Brand X*, the Supreme Court held that an agency cannot reverse a prior court ruling applying a different interpretation or say that the ruling was wrong—the prior ruling "remains binding law." *Brand X*, 545 U.S. at 983-84. Ultimately, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[28] and "[t]he *Chevron* doctrine, properly understood, does

[28] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

not change this basic application of Separation of Powers doctrine."[29]

E. *Alternatively, This Court May Affirm The Tax Court's Ruling On The Ground That The Regulations Are Invalid Because The Commissioner Did Not Comply With The Notice-And-Comment Requirements Of The APA.*

After a thorough review of binding precedent from this Circuit, Judge Halpern's concurring opinion concluded that the Temporary Regulations were invalid because the Commissioner had failed to comply with the notice-and-comment requirements of APA §553(b) and (c). (A133.) Unless specifically exempted, Section 553 of the APA applies to all agency rulemaking and requires an administrative agency to comply with certain procedures ***before*** a regulation may take effect. APA §553.

The APA identifies only two exemptions to its notice-and-comment requirements:

> 1) interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice (APA §553(b)(A)); and

[29] *Bankers Trust N.Y. Corp. v. U.S.*, 225 F.3d 1368, 1376 (Fed. Cir. 2000); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

> 2) when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (APA §553(b)(B)).[30]

Here, there is no dispute that the Commissioner issued the Temporary Regulations (which were immediately effective) without pre-promulgation notice or an opportunity for public comment. The Commissioner attempts to excuse his lack of compliance with the APA on two separate grounds. First, contrary to a wealth of case law from both this Circuit and the Supreme Court, and his own pronouncement that the Temporary Regulations "bind all persons [including the courts] who are subject to the tax laws" (C.I.R. Br. at 32), the Commissioner argues that the Temporary Regulations are merely "interpretive." Next, the Commissioner argues that §7805(e) provides a specific statutory exception to the APA for purposes of issuing not only the Temporary Regulations, but all temporary regulations issued by the Commissioner. Both arguments lack merit.

i. The Temporary Regulations Are "Legislative."

As set forth in Judge Halpern's concurrence, the determination of whether a regulation is "interpretive" or "legislative" is guided by this Court's opinion in *American Mining Congress*, 995 F.2d 1106. The defining characteristic of

[30] The Commissioner has never asserted that the good-cause exception applies to the Temporary Regulations, nor do the Temporary Regulations meet the requirement that the good-cause basis be set forth in the regulation. APA §553(b)(B).

"legislative" regulations is that they have the "force and effect of law," *id.* at 1109, while interpretive rules merely inform the public of what the agency believes the statute means. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-302 (1979).

The Commissioner clearly seeks to have the Temporary Regulations have the "force and effect of law." Throughout his Brief, the Commissioner repeatedly asserts to this Court that the Temporary Regulations carry such weight. For instance, in arguing that the Temporary Regulations are entitled to *Chevron* deference, the Commissioner quotes the Supreme Court's statement in *Mead* that such deference applies whenever ". . . Congress delegated authority to the agency generally to make rules carrying the force of law." (C.I.R. Br. at 31.)[31] The Commissioner then goes on to assert that "[i]t is readily apparent that Congress intended that rules and regulations issued under the authority granted by I.R.C. §7805(a) to enforce the Internal Revenue Code would bind all persons who are subject to the federal tax laws." (C.I.R. Br. at 32.)

Furthermore, the Temporary Regulations were not issued to "merely inform the public of the agency's construction of the statutes and rules which it administers." *Id.* That construction was well known through the Commissioner's briefs in any number of similar cases, starting in *Bakersfield*.

[31] The Commissioner's attempts to pigeonhole "legislative" rules to only those issued under "expressly delegated authority" is erroneous. *See* p. 52, *infra*.

The Commissioner's problem, however, was that his construction was almost universally rejected by the courts, going back to the Supreme Court's decision in *Colony*. Hence, the only remaining avenue he had was to issue the Temporary Regulations and argue, as he does here, that the Temporary Regulations are not only informative of the Commissioner's position, but are dispositive of the issue.

The Commissioner simply cannot have it both ways. The Temporary Regulations are either "interpretive," and, therefore, not binding and cannot overrule the Supreme Court, or, conversely, are legislative, and therefore invalid under the APA.

In *American Mining Congress*, this Court held that the determination of whether a regulation is "legislative" or interpretive is based upon an analysis of the following four factors:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Am. Mining Cong., 995 F.2d at 1112.

Importantly, "[i]f the answer to ***any*** of these questions is affirmative, we have a legislative, not an interpretive rule [emphasis added]." *Id.*

The Temporary Regulations meet at least two of the *American Mining Congress* factors.[32]

First, "in the absence of the [Temporary Regulations] there would not be an adequate legislative basis" for the Commissioner's attempts to apply the six-year statute of limitations to overstated-basis cases such as this. The Supreme Court's plain-meaning and legislative-history analysis of the term "omits from gross income" and Congress's subsequent amendments to §6501 and enactment of §6229 using identical language categorically precludes the Commissioner from doing so. Two Courts of Appeals and the Tax Court so held, and the express purpose of the Temporary Regulations was to overrule the Federal and Ninth Circuit's opinions in *Salman Ranch* and *Bakersfield*, respectively. T.D. 9466, 74 FR 49321 ("The reasonable interpretation of the provisions of sections 6501(e)(1)(A) and 6229(c)(2) provided in these temporary regulations, . . . is entitled to deference even if the agency's interpretation may run contrary to the opinions in *Bakersfield* and *Salman Ranch*."). Indeed, in his Petition for Rehearing in *Salman Ranch*, the Commissioner argued that reversal of the Federal Circuit's panel decision was required on the ground that the Temporary Regulations "***compel*** the conclusion that the partnership's overstatement of basis

[32] In addition to the two factors discussed below, the Temporary Regulations were also published in the Code of Federal Regulations. While this factor may be given less weight, its existence, with the other two, is important.

on the sale of its ranch resulted in an omission of gross income . . . ."[33] Intermountain respectfully asks this Court to take judicial notice of the Commissioner's Petition for Rehearing in *Salman Ranch*. *See Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("Courts may take judicial notice of official court records").

The Commissioner continues these attempts throughout his briefs. If, as the Commissioner asserts, "Congress intended that rules and regulations issued under the authority granted by I.R.C. §7805(a) [such as the Temporary Regulations] . . . would bind all persons . . ." (C.I.R. Br. at 32), the Temporary Regulations are, by definition, legislative. *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 216 (D.C. Cir. 2007) ("the question of whether the guidance document is a legislative rule that is subject to notice and comment . . . turns on "whether the agency action binds private parties or the agency itself with the 'force of law.'").

The Commissioner is incorrect in asserting that all regulations issued under the agency's general authority (*i.e.,* §7805(a)) are interpretive, while only those issued under specifical authority are legislative. Regulations that make binding law are legislative whether they are promulgated under specific

[33] Appellee's Petition for Panel Rehearing, *Salman Ranch Ltd. v. United States*, No. 2008-5053, 2009 WL 3611615, *13 (Fed. Cir. Oct. 14, 2009) (emphasis added).

authority or general authority. *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973). The Commissioner says as much in arguing that *Chevron* deference should apply. (C.I.R. Br. at 32.) Again, the Commissioner cannot have it both ways.[34]

The Temporary Regulations also satisfy the third *American Mining Congress* factor: In issuing the Temporary Regulations, the Treasury "invoked its general legislative authority" under §7805(a). The Commissioner once again asserts that §7805 is only a general grant of authority, but "the general consensus now is that a general rulemaking power confers delegated power [on agencies] to adopt binding legislative rules." Michael Asimow, "Public Participation in the Adoption of Temporary Tax Regulations," 44 *Tax Law*. 343, 354 (1991) (citing "emphatic holdings" in several nontax cases.)

The Commissioner cites a number of cases for the premise that regulations that merely "clarify" the existing law are interpretive.[35] (C.I.R. Br. at 35-37.) He then cites himself to suggest that the Temporary Regulations

[34] Notably, while the commentator cited by the Commissioner advocates for preservation of the general authority-interpretive regulations/specific authority-legislative regulation distinction for tax law purposes, he does so in the context of acknowledging that an interpretive rule is not binding on the courts. Michael Asimow, Public Participation in the Adoption of Temporary Tax Regulations," 44 *Tax Law*. 343, 351 (1991).

[35] Of course, the fact that a rule defines statutory language does not necessarily make it interpretive. *Bratterton v. Francis*, 432 U.S. 416, 425 (1977) (regulation defining term "unemployment" held to be legislative).

merely clarify the language of the statute. (C.I.R. Br. at 55.) But the longstanding rule in this Circuit is that an agency's characterization of its rule as interpretative is not dispositive. *Chamber of Commerce v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980). Here again, the Commissioner's intent in issuing the Temporary Regulations (to overrule *Salman Ranch*, *Bakersfield*, and, by implication, *Colony*) cuts against his self-serving description. As this Court recognized in *Chamber of Commerce*:

> After this court's ruling in *Leone* that the Act, its legislative history, and its policies do not mandate walkaround pay, an Administration issuance of a differing view solely as a matter of its own interpretation would be inconceivable. Such a rule would be a mere phasm of agency action, "full of sound and fury,/ Signifying nothing," W. Shakespeare, Macbeth, act V, sc. v, lines 27-28.

636 F.2d at 469.

Under this Court's rules for distinguishing between interpretive and legislative regulations, the Temporary Regulations are clearly legislative. Hence, the Commissioner's failure to follow the APA's notice-and-comment requirements renders them invalid.

ii. Section 7805(e) Does Not Displace The APA's Requirements.

The Commissioner further attempts to avoid the clear requirements of the APA by asserting that §7805(e) is a specific exemption from the APA's notice–

and-comment requirements for temporary regulations. This assertion is also unpersuasive.

The APA precludes a subsequent statute from displacing its requirements ". . . ***except to the extent that*** [the subsequent statute] ***does so expressly***." 5 U.S.C. § 559 (emphasis added). As this Court has held, exceptions under §559 must be "narrowly construed and only reluctantly countenanced" in order to assure that "an agency's decisions will be informed and responsive." *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

The Commissioner acknowledges that §7805(e) was not added to the Internal Revenue Code until 1988 (22 years after APA §559). (C.I.R. Br. at 50.) Yet, he can point to nothing in the statute or legislative history where Congress ***expressly*** excepted temporary regulations from the APA. The Commissioner's citation to the legislative history of §7805(e) is unavailing. (C.I.R. Br. at 51.) It does not, on any level, discuss compliance with the APA. It merely stands for the proposition that a temporary regulation that is not put in final form before the three-year period expires is still effective during that three-year period.

The Commissioner's argument that an exception should be *implied* is misplaced. This Court's decision in *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1997) is clearly distinguishable. First, the regulation in *Asiana* was issued under a ***specific*** statutory grant of authority to the FAA, with a specific and

immediate goal in mind. Under the specific grant of authority (49 U.S.C. §45301(b)(2)), the FAA was required to issue an interim rule before seeking public comment and ultimately finalizing the rule. In addition to the specified procedure, this Court found important that "the legislative history of the Act also demonstrates that Congress sought rapid action from the agency to begin recovering costs of services provided to overflights through FAA-controlled airspace which heretofore had been 'free riders.'" *Id.* at 398. It was only as a result of these two special circumstances that this Court concluded that Congress "purposely and expressly created an exception to the otherwise-applicable APA notice and comment procedures." *Id.* Notably, this Court went on to state: "It is probably the case that once the FAA issued the [regulation], the APA once again became controlling for all subsequent proceedings . . ." *Id.*

Here, however, the Temporary Regulations were not issued under authority granted by Congress in the specific statutes at issue (§§6501 and 6229). And nothing cited by the Commissioner indicates that in enacting §7805(e), Congress specifically sought to grant the Treasury exigent authority in nearly every regulation that it issues. Notably, the Temporary Regulations were issued more than twenty years after §7805(e). Furthermore, the Commissioner's longstanding position (as advanced here) is that regulations issued under §7805 are interpretive and therefore exempt from the APA's notice and comment

requirements. In this respect, §7805(e) places additional (not fewer) requirements and limitations on temporary regulations. Where, for instance, another agency would not be required to provide notice or a meaningful opportunity for public comment for a truly interpretive regulation, the Treasury must still do so. Furthermore, §7805 places a three-year time restriction on temporary regulations, that would not apply to other interpretive regulations.

Hence, the better interpretation of the import of §7805(e) is that Congress intended to impose additional post-promulgation notice and comment requirements on the Treasury for otherwise interpretive regulations (exempt under the APA), but that truly legislative regulations (like the Temporary Regulations) still must comply with the APA. Such an interpretation would be in line with the Supreme Court's mandate that "exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in [§559] that modifications must be express." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

3. ALTERNATIVELY, THIS COURT CAN AFFIRM ON THE GROUND THAT INTERMOUNTAIN ADEQUATELY DISCLOSED THE BASIS ON ITS TAX RETURN.

Intermountain moved for summary judgment on the independently sufficient ground that it had adequately disclosed to the IRS the basis amount it applied in connection with the transaction at issue. (Doc. 25, at 7-9; C.I.R. Br.

at 8.) Specifically, Intermountain filed a Form 4797 with the IRS titled "Sales of Business Property" disclosing that Intermountain claimed a basis of $2,061,808 for a sale of business property with a gross sales price of $1,918,844. (A41.) Congress has mandated that adequately disclosed figures such as this do not count towards an omission from gross income:

> 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.

Section 6501(e)(1)(A)(ii). This is consistent with the Supreme Court's determination in *Colony* that Congressional purpose in enacting the extended limitations period was to provide the Commissioner additional time to assess tax where ". . . because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors." *Colony*, 357 U.S. at 36. Thus, the relevant standard, as enunciated by the Supreme Court (and consistently followed by lower courts) is whether the return provides a "clue to the existence of the omitted item." *Id.*[36]

[36] *See White v. Comm'r*, 991 F.2d 657, 661-62 (10th Cir.1993); *Benderoff v. United States*, 398 F.2d 132, 137 (8th Cir. 1968); *Quaker State Oil Refining Corp. v. United States*, 24 Cl. Ct. 64 (1991); *Myers v. United States*, 30 AFTR.2d 5332 (S.D. Cal. 1992); *Bishop v. United States*, 338 F. Supp. 1336, 1352 (N.D. Miss. 1970); *Russell F. Davis, Inc. v. United States*, 170 F. Supp. 185, 186 (N.D. Ind. 1959).

Here, the Commissioner suffered no such special disadvantage. He was fully notified that Intermountain claimed a basis of over $2 million on a sale of business property whose gross sales prices was less than $2 million. Given these circumstances, under §6501(e)(1)(A)(ii), any alleged overstatement of basis by Intermountain could not constitute "an omission from gross income" because it was adequately disclosed on Form 4797. Thus, even if as a general matter, a basis overstatement *could* be construed as an omission from gross income—which Intermountain disputes—there was no such omission here, due to adequate disclosure by Intermountain.

Although the Tax Court did not rule on this ground in either the September 2009 or May 2010 Order, more than sufficient evidence exists in the record for this Court to affirm the Tax Court's grant of summary judgment on this alternative ground. *Hoffa*, 673 F.2d at 1361-62 ("[T]here is ample precedent in support of the prerogative, if not the duty, of an appellate court to affirm a summary judgment on a ground other than that employed in the district court where there exists no material controversy regarding matters of fact or law."). And as a general matter, it is well settled that without taking a cross-appeal, an appellee "is free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered

by" the lower court. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979).[37]

CONCLUSION

For all the reasons stated herein, this Court should affirm the Tax Court's rulings granting summary judgment to Intermountain and denying the Commissioner's motions to vacate and reconsider.

Respectfully submitted this 5th day of January, 2011.

/s/ Steven R. Anderson
Anderson & Jahde, P.C.
2100 W. Littleton Blvd., Suite 300
Littleton, CO 80120
(303) 782-0001

/s/ Brian F. Huebsch
Anderson & Jahde, P.C.
2100 W. Littleton Blvd., Suite 300
Littleton, CO 80120
(303) 782-0038

Attorneys

[37] *See also Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Union Pacific R.R. Co. v. Brotherhood of Locomotive Engineers & Trainmen Gen'l Comm. Of Adjustment, Cent. Region*, 130 S. Ct. 584, 595 (2009).

Certificate of Compliance With Rule 32(a)(7)(B)

In accordance with Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B), and that this brief, including the included items listed in Fed. R. App. P. 32(a)(7)(B)(iii), but excluding the excluded items listed in Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), contains 13,357 words.

Dated: January 5, 2011

/s/ *Steven R. Anderson*
Steven R. Anderson

Certificate of Service

I hereby certify that on January 5, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

/s/ *Steven R. Anderson*
Steven R. Anderson
Attorney for Appellees

ADDENDUM

TABLE OF CONTENTS

ADDENDUM

Administrative Procedures Act (5 U.S.C.):

Sec. 553. **Rule making.**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and

public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Sec. 559. **Effect on other laws; effect of subsequent statute.**

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372,

or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

Sec. 275. **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.

* * * * *

(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.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C. 1954 ed.):

Sec. 6501. **Limitations on assessment and collection.**

(a) **General rule.** Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(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.

* * * * *

Internal Revenue Code of 1986 (26 U.S.C.):

Sec. 61. **Gross income defined.**

(a) **General definition.** Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

(b) **Cross references.** For items specifically included in gross income, see part II (sec. 71 and following). For items

specifically excluded from gross income, see part III (sec. 101 and following).

Sec. 6226. **Judicial review of final partnership administrative adjustments.**

(a) **Petition by tax matters partner.** Within 90 days after the day on which a notice of a final partnership administrative adjustment is mailed to the tax matters partner, the tax matters partner may file a petition for a readjustment of the partnership items for such taxable year with--

(1) the Tax Court,

(2) the district court of the United States for the district in which the partnership's principal place of business is located, or

(3) the Claims Court.

(b) **Petition by partner other than tax matters partner.**

(1) **In general.** If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, any notice partner (and any 5-percent group) may, within 60 days after the close of the 90-day period set forth in subsection (a), file a petition for a readjustment of the partnership items for the taxable year involved with any of the courts described in subsection (a).

* * * * *

Sec. 6229. **Period of limitations for making assessments.**

(a) **General rule.** Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of--

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

(b) **Extension by agreement.**

(1) **In general.** The period described in subsection (a) (including an extension period under this subsection) may be extended--

(A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement), before the expiration of such period.

(2) **Special rule with respect to debtors in title 11 cases.** Notwithstanding any other law or rule of law, if an agreement is entered into under paragraph (1)(B) and the agreement is signed by a person who would be the tax matters partner but for the fact that, at the time that the agreement is executed, the person is a debtor in a bankruptcy proceeding under title 11 of the United States Code, such agreement shall be binding on all partners in the partnership unless the Secretary has been notified of the bankruptcy proceeding in accordance with regulations prescribed by the Secretary.

(3) **Coordination with section 6501(c)(4).** Any agreement under section 6501(c)(4) shall apply with respect to the period described in subsection (a) only if the agreement expressly provides that such agreement applies to tax attributable to partnership items.

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

(1) **False return.** If any partner has, with the intent to evade tax, signed or participated directly or indirectly in the preparation of a partnership return which includes a false or fraudulent item--

(A) in the case of partners so signing or participating in the preparation of the return, any tax imposed by subtitle A which is attributable to any partnership item (or affected item) for the partnership taxable year to which the return relates may be assessed at any time, and

(B) in the case of all other partners, subsection (a) shall be applied with respect to such return by substituting "6 years" for "3 years".

(2) **Substantial omission of income.** If any partnership omits from gross income an amount properly includible therein and such amount is described in clause (i) or (ii) of section 6501(e)(1)(A), subsection (a) shall be applied by substituting "6 years" for "3 years".

(3) **No return.** In the case of a failure by a partnership to file a return for any taxable year, any tax attributable to a partnership item (or affected item) arising in such year may be assessed at any time.

(4) **Return filed by Secretary.** For purposes of this section, a return executed by the Secretary under subsection (b) of section 6020 on behalf of the partnership shall not be treated as a return of the partnership.

(d) **Suspension when Secretary makes administrative adjustment.** If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended--

(1) for the period during which an action may be brought under section 6226 (and, if a petition is filed under section 6226 with respect to such administrative adjustment, until the decision of the court becomes final), and

(2) for 1 year thereafter.

(e) **Unidentified partner.** If--

(1) the name, address, and taxpayer identification number of a partner are not furnished on the partnership return for a partnership taxable year, and

(2) (A) the Secretary, before the expiration of the period otherwise provided under this section with respect to such partner, mails to the tax matters partner the notice specified in paragraph (2) of section 6223(a) with respect to such taxable year, or

(B) the partner has failed to comply with subsection (b) of section 6222 (relating to notification of inconsistent treatment) with respect to any partnership item for such taxable year,

the period for assessing any tax imposed by subtitle A which is attributable to any partnership item (or affected item) for such taxable year shall not expire with respect to such partner before the date which is 1 year after the date on which the name, address, and taxpayer identification number of such partner are furnished to the Secretary.

(f) **Special rules.**

(1) **Items becoming nonpartnership items.** If before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for the partnership taxable year, such items become nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, the period for assessing any tax imposed by subtitle A which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date on which the items become nonpartnership items. The period described in the preceding sentence (including any extension period under this sentence) may be extended with respect to any partner by agreement entered into by the Secretary and such partner.

(2) **Special rule for partial settlement agreements.** If a partner enters into a settlement agreement with the Secretary or the Attorney General (or his delegate) with respect to the treatment of some of the partnership items in dispute for a partnership taxable year but other partnership items for such year remain in dispute, the period of limitations for assessing any tax attributable to the settled items shall be determined as if such agreement had not been entered into.

(g) **Period of limitations for penalties.** The provisions of this section shall apply also in the case of any addition to tax or an additional amount imposed under subchapter A of chapter 68 which arises with respect to any tax imposed under subtitle A in the same manner as if such addition or additional amount were a tax imposed by subtitle A.

(h) **Suspension during pendency of bankruptcy proceeding.** If a petition is filed naming a partner as a debtor in a bankruptcy proceeding under title 11 of the United States Code, the running of the period of limitations provided in this section with respect to such partner shall be suspended--

(1) for the period during which the Secretary is prohibited by reason of such bankruptcy proceeding from making an assessment, and

(2) for 60 days thereafter.

Sec. 6501. **Limitations on assessment and collection.**

(a) **General rule.** Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

(b) **Time return deemed filed.**

(1) **Early return.** For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 4, 21, or 24, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.

(2) **Return of certain employment and witholding taxes.** For purposes of this section, if a return of tax imposed by chapter 3, 4, 21, or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

(3) **Return executed by Secretary.** Notwithstanding the provisions of paragraph (2) of section 6020(b), the execution of a return by the Secretary pursuant to the authority conferred by such section shall not start the running of the period of limitations on assessment and collection.

(4) **Return of excise taxes.** For purposes of this section, the filing of a return for a specified period on which an entry has been made with respect to a tax imposed under a provision of subtitle D (including a return on which an entry has been made showing no liability for such tax for such period) shall constitute the filing of a return of all amounts of such tax which, if properly paid, would be required to be reported on such return for such period.

(c) **Exceptions.**

(1) **False return.** In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) **Willful attempt to evade tax.** In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) **No return.** In the case of failure to file a 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.

(4) **Extension by agreement.**

(A) **In general.** Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(B) **Notice to taxpayer of right to refuse or limit extension.** The Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent.

(5) **Tax resulting from changes in certain incometax or estate tax credits.** For special rules applicable in cases where the adjustment of certain taxes allowed as a credit against income taxes or estate taxes results in additional tax, see section 905(c) (relating to the foreign tax credit for income tax purposes) and section 2016 (relating to taxes of foreign countries, States, etc., claimed as credit against estate taxes).

(6) **Termination of private foundation status.** In the case of a tax on termination of private foundation status under section 507, such tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(7) **Special rule for certain amended returns.** Where, within the 60-day period ending on the day on which the time prescribed in this section for the assessment of any tax imposed by subtitle A for any taxable year would otherwise expire, the Secretary receives a written document signed by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable year, the period for the assessment of such additional amount shall not expire before the day 60 days after the day on which the Secretary receives such document.

(8) **Failure to notify Secretary of certain foreign transfers.**

(A) **In general.** In the case of any information which is required to be reported to the Secretary pursuant to an election under section 1295(b) or under

section 1298(f), 6038, 6038A, 6038B, 6038D, 6046, 6046A, or 6048, the time for assessment of any tax imposed by this title with respect to any tax return, event, or period to which such information relates shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.

(B) **Application to failures due to reasonable cause.** If the failure to furnish the information referred to in subparagraph (A) is due to reasonable cause and not willful neglect, subparagraph (A) shall apply only to the item or items related to such failure.

(9) **Gift tax on certain gifts not shown on return.** If any gift of property the value of which (or any increase in taxable gifts required under section 2701(d) which) is required to be shown on a return of tax imposed by chapter 12 (without regard to section 2503(b)), and is not shown on such return, any tax imposed by chapter 12 on such gift may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. The preceding sentence shall not apply to any item which is disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(10) **Listed transactions.** If a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction (as defined in section 6707A(c)(2)) which is required under section 6011 to be included with such return or statement, the time for assessment of any tax imposed by this title with respect to such transaction shall not expire before the date which is 1 year after the earlier of--

(A) the date on which the Secretary is furnished the information so required, or

(B) the date that a material advisor meets the requirements of section 6112 with respect to a request by the Secretary under section 6112(b) relating to such transaction with respect to such taxpayer.

(11) **Certain orders of criminal restitution.** In the case of any amount described in section 6201(a)(4), such amount may be assessed, or a proceeding in court for the collection of such amount may be begun without assessment, at any time.

(d) **Request for prompt assessment.** Except as otherwise provided in subsection (c), (e), or (f), in the case of any tax (other than the tax imposed by chapter 11 of subtitle B, relating to estate taxes) for which return is required in the case 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 18 months after written request therefor (filed after the return is made and filed in such manner and such form as may be prescribed by regulations of the Secretary) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of 3 years after the return was filed. This subsection shall not apply in the case of a corporation unless--

(1) (A) such written request notifies the Secretary that the corporation contemplates dissolution at or before the expiration of such 18-month period, (B) the dissolution is in good faith begun before the expiration of such 18-month period, and (C) the dissolution is completed;

(2) (A) such written request notifies the Secretary that a dissolution has in good faith been begun, and (B) the dissolution is completed; or

(3) a dissolution has been completed at the time such written request is made.

(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 and--

(i) such amount is in excess of 25 percent of the amount of gross income stated in the return, or

(ii) such amount--

(I) is attributable to one or more assets with respect to which information is required to be reported under section 6038D (or would be so required if such section were applied without regard to the dollar threshold specified in subsection (a) thereof and without regard to any exceptions provided pursuant to subsection (h)(1) thereof), and

(II) is in excess of $ 5,000,

the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(B) **Determination of gross income.** For purposes of subparagraph (A)--

(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.

(C) **Constructive dividends.** If the taxpayer omits from gross income an amount properly includible therein under section 951(a), the tax may be assessed, or a proceeding in court for the collection of such tax may be done without assessing, at any time within 6 years after the return was filed.

(2) **Estate and gift taxes.** In the case of a return of estate tax under chapter 11 or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the period for which the return was filed items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts 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. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item 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.

(3) **Excise taxes.** In the case of a return of a tax imposed under a provision of subtitle D, if the return omits an amount of such tax properly includible thereon which exceeds 25 percent of the amount of such tax reported thereon, 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 is filed. In determining the amount of tax omitted on a return, there shall not be taken into account any amount of tax imposed by chapter 41, 42, 43, or 44 which is omitted from the return if the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the existence and nature of such item.

(f) **Personal holding company tax.** If a corporation which is a personal holding company for any taxable year fails to file with its return under chapter 1 for such year a schedule setting forth--

> (1) the items of gross income and adjusted ordinary gross income, described in section 543, received by the corporation during such year, and
>
> (2) the names and addresses of the individuals who owned, within the meaning of section 544 (relating to rules for determining stock ownership), at any time during the last half of such year more than 50 percent in value of the outstanding capital stock of the corporation,

the personal holding company tax for such year 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 for such year was filed.

(g) **Certain income tax returns of corporations.**

> (1) **Trusts or partnerships.** If a taxpayer determines in good faith that it is a trust or partnership and files a return as such under subtitle A, and if such taxpayer is thereafter held to be a corporation for the taxable year for which the return is filed, such return shall be deemed the return of the corporation for purposes of this section.
>
> (2) **Exempt organizations.** If a taxpayer determines in good faith that it is an exempt organization and files a return as such under section 6033, and if such taxpayer is thereafter held to be a taxable organization for the taxable year for

which the return is filed, such return shall be deemed the return of the organization for purposes of this section.

(3) **DISC.** If a corporation determines in good faith that it is a DISC (as defined in section 992(a)) and files a return as such under section 6011(c)(2) and if such corporation is thereafter held to be a corporation which is not a DISC for the taxable year for which the return is filed, such return shall be deemed the return of a corporation which is not a DISC for purposes of this section.

(h) **Net operating loss carryback or capital loss carrybacks.** In the case of a deficiency attributable to the application to the taxpayer of a net operating loss carryback or a capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss or net capital loss which results in such carryback may be assessed.

(i) **Foreign tax carrybacks.** In the case of a deficiency attributable to the application to the taxpayer of a carryback under section 904(c) (relating to carryback and carryover of excess foreign taxes) or under section 907(f) (relating to carryback and carryover of disallowed foreign oil and gas taxes), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year of the excess taxes described in section 904(c) or 907(f) which result in such carryback.

(j) **Certain credit carrybacks.**

(1) **In general.** In the case of a deficiency attributable to the application to the taxpayer of a credit carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the unused credit which results in such carryback may be assessed, or

with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, at any time before the expiration of the period within which a deficiency for such subsequent taxable year may be assessed.

(2) **Credit carryback defined.** For purposes of this subsection, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(k) **Tentative carryback adjustment assessment period.** In a case where an amount has been applied, credited, or refunded under section 6411 (relating to tentative carryback and refund adjustments) by reason of a net operating loss carryback, a capital loss carryback, or a credit carryback (as defined in Section 6511(d)(4)(C)) to a prior taxable year, the period described in subsection (a) of this section for assessing a deficiency for such prior taxable year shall be extended to include the period described in subsection (h) or (j), whichever is applicable; except that the amount which may be assessed solely by reason of this subsection shall not exceed the amount so applied, credited, or refunded under section 6411, reduced by any amount which may be assessed solely by reason of subsection (h) or (j), as the case may be.

(l) **Special rule for chapter 42 and similar taxes.**

(1) **In general.** For purposes of any tax imposed by section 4912, by chapter 42 (other than section 4940), or by section 4975, the return referred to in this section shall be the return filed by the private foundation, plan, trust, or other organization (as the case may be) for the year in which the act (or failure to act) giving rise to liability for such tax occurred. For purposes of section 4940, such return is the return filed by the private foundation for the taxable year for which the tax is imposed.

(2) **Certain contributions to section 501(c)(3) organizations.** In the case of a deficiency of tax of a private foundation making a contribution in the manner provided in

section 4942(g)(3) (relating to certain contributions to section 501(c)(3) organizations) attributable to the failure of a section 501(c)(3) organization to make the distribution prescribed by section 4942(g)(3), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year with respect to which the contribution was made.

(3) **Certain set-asides described in section 4942(g)(2).** In the case of a deficiency attributable to the failure of an amount set aside by a private foundation for a specific project to be treated as a qualifying distribution under the provisions of section 4942(g)(2)(B)(ii), such deficiency may be assessed at any time before the expiration of 2 years after the expiration of the period within which a deficiency may be assessed for the taxable year to which the amount set aside relates.

(m) **Deficiencies attributable to election of certain credits.** The period for assessing a deficiency attributable to any election under section 30(e)(6), 30B(h)(9), 30C(e)(5), 30D(e)(4), 40(f), 43, 45B, 45C(d)(4), 45H(g), or 51(j) (or any revocation thereof) shall not expire before the date 1 year after the date on which the Secretary is notified of such election (or revocation).

(n) **Cross references.**

(1) For period of limitations for assessment and collection in the case of a joint income return filed after separate returns have been filed, see section 6013(b)(3) and (4).

(2) For extension of period in the case of partnership items (as defined in section 6231(a)(3)), see section 6229.

(3) For declaratory judgment relating to treatment of items other than partnership items with respect to an oversheltered return, see section 6234.

Sec. 7805. **Rules and regulations.**

(a) **Authorization.** Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

* * * * *

(e) **Temporary regulations.**

(1) **Issuance.** Any temporary regulation issued by the Secretary shall also be issued as a proposed regulation.

(2) **3-Year duration.** Any temporary regulation shall expire within 3 years after the date of issuance of such regulation.

* * * * *