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No. 09-3741

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DATE OF DECISION
JAN 26 2011

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant

v.

KENNETH H. BEARD and SUSAN W. BEARD,
Petitioners-Appellees

ON APPEAL FROM THE ORDER AND DECISION OF THE
UNITED STATES TAX COURT

RESPONSE TO APPELLEES' PETITION FOR REHEARING EN BANC

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STATEMENT

Kenneth Beard, who planned to sell his interest in two companies, MMCD, Inc., and MMSD, Inc., used an abusive tax shelter to increase his basis in them and reduce his gain upon the sale. In 1999, he executed a short sale of United States Treasury Notes ("T-Notes"), which generated cash proceeds of $12,160,000.[1] He used these proceeds to buy more T-Notes, which he transferred to MMCD and MMSD, along with the obligation to close the short sales. MMCD and MMSD sold these T-Notes and closed the short sales for $7,500,000 and $8,500,000. Beard then sold his interests in MMCD and MMSD. *Beard v. Commissioner*, 2011 WL 222249 at *1-*2 (7th Cir. Jan. 26, 2011).

On their 1999 tax return, the Beards ("taxpayers") claimed high bases in the MMCD and MMSD stock, which significantly reduced the reported long-term capital gains. The high bases resulted from the asymmetric treatment of the short-sale transactions. Beard had increased his bases in the stock by the amount of the short-sale proceeds contributed to each company, without reduction for the offsetting obligation to close the short sales. 2011 WL 222249 at *2.

[1] A short sale is a sale of a security that the investor does not own. Typically this is done by borrowing shares from a broker. The short seller is obligated to buy an equivalent number of shares in order to return the borrowed shares, and he generally makes this covering purchase using the funds he received from selling the borrowed stock. *Zlotnick v. TIE Communications*, 836 F.2d 818, 820 (3d Cir. 1988).

In 2006, almost six years after taxpayers filed their 1999 tax return, the IRS issued a notice of deficiency, reducing the basis in MMCD and MMSD by the amount of the transferred T-Notes and consequently increasing taxpayers' capital gains by $12,160,000. Taxpayers commenced this action and moved for summary judgment. They urged that the adjustments are barred by the general three-year assessment period, I.R.C. § 6501. 2011 WL 222249 at *2. When, however, "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 assessment period is six years. I.R.C. § 6501(e)(1)(A). Taxpayers urged that a basis overstatement cannot give rise to an omission of gross income under § 6501(e)(1)(A). They relied on *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), *rev'g* 26 T.C. 30 (1956), which so held in the context of § 275(c) of the Internal Revenue Code of 1939 (26 U.S.C.). The Tax Court agreed and granted summary judgment.

On September 24, 2009, after entry of the Tax Court decision, the Department of Treasury issued temporary regulations which "clarif[ied] that, outside of the trade or business context, gross income for purposes of sections 6501(e)(1)(A) and 6229(c)(2) has the same meaning as gross income as defined in section 61(a)." T.D. 9466, 74 Fed. Reg. 49321, 49321 (2009). Since, in the case of the sale of property, "gross income" under § 61 means the excess of the amount realized over the adjusted basis of the property, under the temporary regulations "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)." *Id.* Treasury published a notice of proposed rulemaking contemporaneously with the temporary regulations. *See* Definition of Omission from Gross Income, 74 Fed. Reg. 49354 (proposed Sept. 28, 2009.) After notice and comment, final regulations adopting the interpretation of "gross income" contained in the temporary and proposed regulations became effective December 14, 2010, and the temporary regulations were withdrawn. T.D. 9511, 75 Fed. Reg. 78897 (2010). On appeal, the Government relied, in part, on these regulations in urging reversal.

The panel (Judges Rovner, Evans, and Williams) reversed. It concluded that "the facts of *Colony* and the changes from the 1939 to the 1954 Code must distinguish our case from *Colony*. . . ." *Beard*, 2011 WL 222249 at *4. These statutory changes are the additions to the extended assessment period of the gross-receipts provision, I.R.C. § 6501(e)(1)(A)(i), and the adequate-disclosure provision, I.R.C. § 6501(e)(1)(A)(ii).[2]

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[2] Section 6501(e)(1)(A)(i) defined "gross income" in the context of the sale of goods or services by a trade or business, so that in that context, "gross income" means gross receipts, undiminished by basis. In § 6501(e)(1)(A)(ii), Congress created a "safe harbor" for adequate disclosure by excluding from the 25% omission computation any amount adequately disclosed on the return (or a statement attached thereto).

Since *Colony* did not control, the panel analyzed the statutory language to determine the applicable assessment period. 2011 WL 222249 at *5. It concluded that § 6501(e)(1)(A), with its two subsections, "should be read as a gestalt." 2011 WL 222249 at *5. "[A]pplying standard rules of statutory construction to give equal weight to each term and avoid rendering parts of the language superfluous," the panel held "that a plain reading of Section 6501(e)(1)(A) would include an inflation of basis as an omission of gross income in non-trade or business situations." *Id.* It reasoned that "gross income" was a "key phrase in the statutory language," and that "for situations not involving trade or business, . . . it makes logical sense to use the Code's general gross income definition when reading Section 6501(e)(1)(A)." *Id.* The court derived further support for its reading from § 6501(e)(1)(A)(i):

> If the omissions from gross income contemplated by Section 6501(e)(1)(A) were only specific items such as receipts and accruals, then the special definition in subsection (i) would be, if not superfluous, certainly diminished. The addition of this subsection suggests that the definition of gross income for the purposes of Section 6501(e)(1)(A) is meant to encompass more than the types of specific items contemplated by the *Colony* holding.

2011 WL 222249 at *6. The panel added that it would have applied the extended assessment period based on the new regulations, had it been necessary to reach the issue. *See id.* at *7 ("we would have been inclined to grant the temporary regulation *Chevron* deference, just as we would be inclined to grant such deference to T.D. 9511").

ARGUMENT

The panel's holding that, under the clear statutory language, an overstated basis can trigger the six-year assessment period is consistent with *Colony*, where the applicability of the general three-year assessment period turned on different statutory language. The panel's decision is also consistent with *Grapevine Imports, Ltd. v. United States*, 2011 WL 832915 (Fed. Cir. Mar. 11, 2011), where the Federal Circuit relied on Treasury's new regulations to hold that an overstated basis can trigger the extended assessment period.[3] These regulations were intervening authority that relieved the Federal Circuit of its obligation to follow *Salman Ranch Ltd v. United States*, 573 F.3d 1362 (Fed. Cir. 2009). *Grapevine*, 2011 WL 832915 at *6-*11.

In upholding the applicability of the six-year assessment period, the panel carefully considered and correctly rejected the contrary opinions of the Ninth and Federal Circuits in *Bakersfield Energy Partners, LP v. Commissioner*, 568 F.3d 767 (9th Cir. 2009), and *Salman Ranch* (which is no longer followed in the Federal Circuit due to *Grapevine*). Now that the Federal Circuit (in *Grapevine*) has reached the same result as this Court, the contrary decisions reached by the

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[3] Taxpayers' contention (Pet. 2) that the panel's decision is "an outlier" is thus incorrect.

Fourth and Fifth Circuits after the panel's decision was issued here (*Home Concrete & Supply, LLC v. United States*, 2011 WL 361495 (4th Cir. Feb. 7, 2011), and *Burks v. United States*, 2011 WL 438640 (5th Cir. Feb. 9, 2011)), furnish no reason for this Court to reconsider the matter *en banc*. Indeed, the Federal Circuit in *Grapevine* correctly rejected the Fourth and Fifth Circuits' contrary holdings that an overstated basis cannot trigger the extended assessment period. This Court cannot by itself resolve this conflict. [4]

1. The panel's decision is consistent with *Colony*'s holding that a basis overstatement could not trigger the extended assessment period, because I.R.C. § 6501(e)(1)(A), at issue here, differs significantly from § 275(c) of the 1939 Code, at issue in *Colony*. As the panel observed, the gross receipts provision, § 6501(1)(1)(A)(i), "addresses the situation faced by the Court in *Colony* where there is an omission of an actual receipt or accrual in a trade or business situation," while § 6501(e)(1)(A)(ii) "is on all fours with *Colony*'s suggestion that Congress' intention in enacting the longer time period was to give the IRS a fighting chance in situations where the taxpayer's return doesn't provide a clue to the omission." 2011 WL 222249 at *4. The panel concluded that the Court in *Colony* was "referring to this synchronicity with subsections (i) and (ii) when it concluded that its interpretation of legislative history gave the 'ambiguous' Section 275(c) a

[4] The Acting Solicitor General of the United States has authorized the Government to file petitions for rehearing *en banc* in both *Home Concrete* and *Burks*.

meaning harmonious with that of 'unambiguous' Section 6501(e)(1)(A)." *Id.* The panel thus correctly held that "the facts of *Colony* and the changes from the 1939 to the 1954 Code must distinguish our case from *Colony*."[5] *Id.* at *5.

2. The panel acknowledged that "[t]he question [in this case] has been addressed by multiple federal courts, with differing results." 2011 WL 222249 at *3. It carefully considered and rejected (correctly, we think) the reasoning of the conflicting decisions predating its opinion—*Bakersfield* and *Salman Ranch*. It rejected the Ninth Circuit's conclusion that the addition of § 6501(e)(1)(A)(i) and (ii) to the Code in 1954 did not alter the interpretation of the statutory phrase "omits from gross income" (*id.* at *6):

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[5] The panel correctly concluded that *Colony* involved the sale of goods and services, to which § 6501(e)(1)(a)(i) now applies, rather than the sale of improved real property, as taxpayers erroneously assert (Pet. 5). Colony treated its lot sales as the sale of property sold in the ordinary course of its trade or business:

> In said tax returns, petitioner subtracted the reported cost of the lots sold from the gross sales proceeds to compute the gross profit on lot sales (Resp. Ex. D, Sch. A; R. 32 and Resp. Ex. E, Sch. A; R. 38). The resulting gross profit was then combined with petitioner's other income, and the total carried forward and shown on page 1 of each tax return at line 15, labeled "Total income". . . .

Brief for the Petitioner, *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), 1958 WL 91875 at *3-*4. "Inventory" and "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" are not capital assets. I.R.C. of 1939, § 117(a)(1) (26 U.S.C. 1952 ed.). *See also Grapevine*, 2011 WL832915 at *8 ("in *Colony* the taxpayer was in the business of land sales, so § 6501(e)(1)(A)(i)'s test for income 'in the case of a trade or business' expressly applied").

> We agree with our colleagues to the west that the additions to the 1954 Code could indeed be seen as clarifications, rather than a rewriting. However, we must quickly part ways, as we don't believe a full rewriting was necessary in order to cast the language of Section 6501(e)(1)(A) in a different light, nor do we believe that Congress needed to redefine "omits" in order to clarify the existing law. . . . . [C]ongress, when revising the Code, was responding . . . to the confusion throughout the circuits. We do not find it hard to believe that Congress added subsections (i) and (ii) to Section 6501(e)(1)(A) with the belief that this would clarify a plain reading of the statute and quell the confusion. Indeed, . . . the additions did just that.

The panel also considered and rejected the Ninth and Federal Circuits' conclusion that § 6501(e)(1)(A)(i) was added to the Code to clarify the 25% omission calculation. After observing that "[t]he Federal Circuit arrives at this conclusion via a deep-dive into legislative history, while the Ninth Circuit wades through a convoluted discussion of numerators and denominators to reach the same place" (2011 WL 222249 at *6), the panel correctly concluded that "the clear dry line from the language to the plain meaning of Section 6501(e)(1)(A) is preferable" (*id.* at *7). The panel elaborated (*id.*):

> Certainly, we should be mindful of the applicability of subsection (i) when calculating the 25%, and we should be equally mindful of this subsection and its interplay with the rest of Section 6501(e)(1)(A) and the entirety of the Code when determining what counts as an omission from gross income. Reading Section 6501(e)(1)(A) as a gestalt, the meaning is clear, and an inflation of basis should be considered an omission from gross income such that it triggers the extended six-year statute of limitations.

The Fourth and Fifth Circuits' poorly-reasoned, post-*Beard* holdings that an overstated basis cannot trigger the extended assessment period do not cast doubt on the validity of the panel's opinion, as neither case contains extensive discussion of that opinion. *See Burks*, 2011 WL 438640 at *6-*7; *Home Concrete*, 2011 WL 361495 at *4. In *Home Concrete*, the Fourth Circuit concluded that "[b]ecause there has been no material change between former § 275(c) [of the 1939 Code] and current §6501(e)(1)(A)," a basis understatement could not give rise to an omission from gross income sufficient to trigger the extended assessment period. 2011 WL 361495 at *5. But this reasoning ignores the significant changes—the insertion of a special "gross income" definition for trades and businesses, and an adequate-disclosure safe harbor—that Congress made in the 1954 Code for the specific purpose of settling the controversies that had arisen under the 1939 Code. As the panel's decision shows, those changes can hardly be described as not "material," as *Home Concrete* would have it. Likewise, the Fifth Circuit's conclusion that "*Colony*'s holding with respect to the definition of 'omits gross income' remains applicable in light of the revisions to the Code" (*Burks*, 2011 WL 438640 at *6) fails to give sufficient effect to the statutory changes in 1954. It, like *Home Concrete*, is wrongly decided.

3. Taxpayers (Pet. 7) urge that the panel's reliance on *Phinney v. Chambers*, 392 F.2d 680 (5th Cir. 1968), was misplaced since the Fifth Circuit recently observed that "the Seventh Circuit failed to note the distinct factual

pattern presented in *Phinney*, where the taxpayers had missstated the very nature of the item so that the IRS would not have had any reasonable way of detecting the error on the tax return."[6] *Burks*, 2011 WL 438640 at *13 n.5. But the Fifth Circuit's interpretation of its own 43-year-old precedent merits no more deference than does the panel's interpretation.

The panel correctly cited *Phinney* for the principle that an overstated basis can trigger the extended assessment period. 2011 WL 222249 at *3. In *Phinney*, the taxpayer's share of note proceeds ($375,736.06) was correctly reported (but mislabeled), and the omitted gross income resulted from a basis step-up from zero to $375,736.06 upon the death of taxpayer's husband. The Fifth Circuit identified the taxpayer's failure to disclose the basis step-up as the critical error justifying application of the six-year assessment period:

> It simply defies belief that the Internal Revenue Service, while contesting the right of Bath to claim a stepped-up basis in connection with a community property interest of less than $50,000 would have complacently permitted the similar claim for stepped-up basis in the Chambers estate to go unchallenged had the return filed on behalf of Mrs. Chambers disclosed what was really at issue, that is, as claimed by taxpayer, the amount received was in payment of an installment note, which, by virtue of the provisions of Section 1014(b)(6) of the Internal Revenue Code acquired a stepped-up basis upon the death of her husband.

[6] In any case, the panel's reliance on *Phinney* was limited. Although it cited *Phinney* in distinguishing *Colony*, it relied primarily on its own analysis, as well as on the *Salman Ranch* dissent. *See* 2011 WL 222249 at *4-*7.

392 F.2d at 685. Since a mere misdescription of gross income does not trigger the six-year assessment period (*see* I.R.C. § 6501(e)(1)(A)), *Phinney* could not have applied that period without concluding that an overstated basis rendered it applicable.

4. The panel's decision has the salutary effect of treating taxpayers who overstate their bases in sold property the same—for purposes of the applicable assessment period—as those who understate their gross receipts. It also has the salutary effect of treating taxpayers' tax liabilities the same as those in *Grapevine*, *Phinney*, and *Brandon Ridge Partners v. United States*, 100 A.F.T.R.2d (RIA) 5347 (M.D. Fla. 2007), where the six-year assessment period applied.

Taxpayers, however, provide (Pet. 10-12) a parade of horribles to demonstrate the supposedly deleterious effects of the panel's holding. They include in this parade the sale of inventory, which supposedly will be treated differently in this circuit due to the panel's decision. They are wrong. I.R.C. § 6501(e)(1)(A)(i) establishes that "gross income" in the case of inventory means "gross receipts." Thus, for purposes of the applicable assessment period, basis, *i.e.*, the cost of goods sold, is not taken into account in determining gross income from inventory in this or any other circuit.

Taxpayers' argument (Pet. 12) that the panel's decision discriminates against taxpayers who overstate basis *vis-a-vis* those who overstate deductions also reflects their misunderstanding of tax law. The six-year assessment period only applies to substantial omissions of "gross income." A deduction is a *subtraction* from gross income and is used to determine "taxable income." *See* I.R.C. § 63(a) (defining "taxable income" as "gross income minus the deductions allowed by this chapter (other than the standard deduction)." Basis, on the other hand, is an integral part of the gross income calculation, since gross income is derived mathematically in the case of a property sale, by subtracting basis from the amount realized on the sale. Taxpayers' argument that gross income should be treated the same as deductions for purposes of the applicable assessment period is thus nothing more than wishful thinking.

There is also no merit to taxpayers' further contention (Pet. 13-14) that taxpayers residing in the Seventh Circuit with the resources to pay an asserted deficiency in full and commence a refund action in the Court of Federal Claims will be treated differently from taxpayers who cannot. In the Federal Circuit, as here, taxpayers are subject to the six-year assessment period if their overstated bases give rise to a substantial omission of gross income under § 6501(e)(1)(A). *Grapevine, supra.*

Taxpayers' reliance (Pet. 11) on pre-*Colony* decisions—*Davis v. Hightower*, 230 F.2d 549 (5th Cir. 1956), and *Slaff v. Commissioner*, 220 F.2d 65 (9th Cir. 1955)—to demonstrate the supposedly "extraordinary effects of the instant decision" defies credulity. Both cases turned on § 275(c) of the 1939 Code, which, as discussed above, differs significantly from the 1986 Code. Moreover, in both cases, the transactions giving rise to the omitted income were fully disclosed on the returns. *See Davis*, 230 F.2d at 553; *Slaff*, 220 F.2d at 66. Under I.R.C. § 6501(e)(1)(A)(ii), the extended assessment period is inapplicable when amounts omitted from gross income are adequately disclosed on the return. The panel's opinion is not to the contrary.

5. Even if the panel erred in relying on "the plain meaning of the Code" to uphold the applicability of the extended assessment period (2011 WL 222249 at *3) (and we do not think it did), its ruling that the six-year assessment period applied is still correct due to the new regulations. *See Grapevine*, 2011 WL 832915 at *6-*11 (new regulations are valid and apply to partnership's 1999 tax year). Final Treasury regulations are entitled to *Chevron* deference. *Mayo Foundation v. United States*, 131 S. Ct. 704, 713 (2011); *Kikalos v. Commissioner*, 190 F.3d 791, 795 (7th Cir. 1999); *Bankers Life and Cas. Co. v. United States*, 142 F.3d 973, 979-984 (7th Cir. 1998). That the regulations were issued in response to litigation is no impediment to giving them *Chevron* deference. *Mayo*, 131 S. Ct. at 712-713; *Barnhart v. Walton*, 535 U.S. 212, 221 (2002); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996); *United States v. Morton*, 467 U.S. 822, 836 n.21 (1984).

Under *Chevron* step two, the courts "may not disturb an agency rule unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo*, 131 S. Ct. at 711. The final regulations, Addendum, *infra*, satisfy step two as the regulatory definition of "gross income" is consistent with the Code's general definition of "gross income" to include gain on the sale of property (I.R.C. § 61(a)), and is also consistent with the statutory method of computing such gain (I.R.C. § 1001(a)). *See Grapevine*, 2011 WL 832915 at *11 ("Because the Treasury regulations are a reasonable interpretation of § 6501(e)(1)(A), they must receive our deference").

Colony's construction of "omits from gross income" does not diminish the deference due Treasury's different construction. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley,* 517 U.S. at 740-741. Thus, the "the agency may, consistent with the court's holding, choose a different construction [from that of the court], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

The regulations "appl[y] to taxable years with respect to which the period for assessing tax was open on or after September 24, 2009." Treas. Reg. § 301.6501(e)-1(e). The phrase "period for assessing tax" includes all assessment periods that Congress has provided, including the six-year period. Tax years are "open" if, *inter alia*, they "are the subject of any case pending before any court of competent jurisdiction . . . in which a decision had not become final (within the meaning of section 7481). . . ." T.D. 9511, 75 Fed. Reg. at 78898. Under § 7481, a Tax Court decision is not final until any appeal has been determined and the time for seeking Supreme Court review has expired, or, if Supreme Court review is granted, until the Supreme Court has decided the case. Here, it is undisputed that the FPAA was issued within six years of the filing of the relevant returns. Since the challenged Tax Court decision is obviously not final within the meaning of § 7481, the assessment period is still open, and the regulations apply to taxpayers' 1999 tax year.

The panel's decision is correct. Further review is not warranted.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that thirty copies of this response to petition for rehearing en banc in paper form were sent by FEDEX to the Clerk on March 22, 2011, and that service of it has been made on counsel for the appellees by sending two paper copies thereof on March 22, 2011, by FEDEX, properly addressed to him as follows:

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ADDENDUM

Internal Revenue Code of 1986 (26 U.S.C. 2000 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. 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).

. . . . .

(e) **Substantial Omission of Items.–Except as otherwise provided in subsection (c)--**

(1) **Income Taxes.**–In the case of any tax imposed by subtitle A–

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

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

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

. . . . .

Treas. Reg. § 301.6501(e)-1 **Omission from return**

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

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

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

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

. . . .

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

. . . .