No. 09-2353

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOME CONCRETE & SUPPLY, LLC; ROBERT L. PIERCE; STEPHEN R. CHANDLER; REBECCA R. CHANDLER; HOME OIL AND COAL COMPANY, INCORPORATED; SUZANNE D. PIERCE,
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

APPELLEE'S PETITION FOR REHEARING EN BANC

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STATEMENT PURSUANT TO RULE 35(b)(1) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

The panel's holding conflicts with two other circuit court decisions and presents a question of exceptional importance to the proper administration of Federal tax laws: whether an understatement of income resulting from an overstated basis of sold property can qualify as an omission from gross income for purposes of the extended, six-year assessment period, I.R.C. § 6501(e)(1)(A). The panel's holding that a basis overstatement cannot trigger the longer assessment period, though consistent with *Burks v. United States*, 2011 WL 438640 (5th Cir. Feb. 9, 2011),[1] and *Bakersfield Energy Partners, LP v. Commissioner*, 568 F.3d 767, 778 (9th Cir. 2009), is in direct conflict with the decisions of the Seventh and Federal Circuits in *Beard v. Commissioner*, 2011 WL 222249 (7th Cir. Jan. 26, 2011), *petition for hearing pending*, and *Grapevine Imports, Ltd. v. United States*, 2011 WL 832915 (Fed. Cir. Mar. 11, 2011).

The issue presented also has substantial administrative importance, as it is raised in about 30 docketed cases, which involve about $1 billion in taxes, interest, and penalties. Since basis overstatement is frequently used as a means of tax avoidance in complex tax shelter schemes that may not be identified during the general three-year period for tax assessment, the panel's adverse holding significantly impairs the IRS's ability to pursue those schemes and results in the

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[1] The Acting Solicitor General of the United States has authorized the filing of a petition for rehearing *en banc* in *Burks*.

disparate treatment of similarly situated taxpayers. Under the panel's holding, taxpayers who engaged in abusive tax shelters that are not discovered by the IRS within the general three-year assessment period and whose cases are heard in the Fourth Circuit (and Fifth and Ninth Circuits) will escape taxation, while similarly situated taxpayers whose cases are heard in the Seventh and Federal Circuits will not.

STATEMENT OF THE CASE AND FACTS

In 1999, Robert Pierce, his grantor trusts, and Stephen Chandler ("taxpayers") owned Home Oil & Coal Co., which they planned to sell. (JA20, 199, 205-219.) To reduce their tax liability from this sale, taxpayers formed Home Concrete, which is taxed as a partnership (JA21), and engaged in transactions intended to create an artificially high basis in an asset contributed to it. Taxpayers sold U.S. Treasury Notes short, then transferred the sale proceeds, together with the offsetting obligations to close the short sales, to Home Concrete as capital contributions. Taxpayers then increased their bases in their partnership interests by the amount of the short-sale proceeds, without reduction for the offsetting obligation to close the short sales. By inflating the bases in their partnership interests, taxpayers sheltered capital gains of over $6 million.

On September 7, 2006, the IRS issued a Notice of Final Partnership Administrative Adjustment ("FPAA") to Home Concrete for 1999 in which it reduced the partners' bases in their partnership interests to zero, reasoning that

Home Concrete was a sham and lacked economic substance. It also determined that Home Concrete had improperly adjusted its basis in its assets pursuant to its election under I.R.C. § 754. (JA154, 161, 163.) Plaintiffs commenced this action and alleged that the adjustments in the FPAA were barred by the general, three-year assessment period. (JA26.) *See* I.R.C. § 6501(a). When, however, a taxpayer has omitted 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). Section 6229 has similar time periods for assessing taxes attributable to partnership items. The Government alleged that the six-year assessment period applied.[2] (JA71.)

The case was decided on cross-motions for summary judgment. (JA324.) Plaintiffs 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), which so held in the context of § 275(c) of the Internal Revenue Code of 1939. (JA329-330.) Plaintiffs also contended that they qualified for the safe harbor for adequate disclosure (I.R.C. § 6501(e)(1)(A)(ii)), which protects

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[2] Although the FPAA was issued on September 7, 2006, more than six years after the April 17, 2000 filing of taxpayers' returns, the assessment period was suspended between December 20, 2003, and May 17, 2004, due to a third-party recordkeeper's tardy compliance with IRS summonses pertaining to plaintiffs' tax liabilities. *See* I.R.C. § 7609(e)(2). Due to this tolling, the FPAA was timely if the six-year assessment period applied. (JA326 & n.5.)

taxpayers from the six-year period if they adequately disclosed on their return any omitted amount. (JA337.)

The district court rejected these arguments and upheld the applicability of the extended assessment period, reasoning that amendments to the Code in 1954 rendered *Colony* inapplicable. (JA332-334.) The court added that "the relevant statutory definitions provided by the IRC . . . further undermine the overly broad reading of *Colony* urged by plaintiffs." (JA335.) It explained:

> "Gross income" is, broadly construed, "all income from whatever source derived, including . . . (3) gains derived from dealings in property." 26 U.S.C. § 61(a). Section 1001(a) fleshes out the meaning of "gains derived from dealings in property," defining gains from dealings in property as "the excess of the amount realized therefrom over the adjusted basis." 26 U.S.C. § 1001(a). Thus, "gross income" as related to dealings in property is defined with reference to the property's adjusted basis. Any overstatement in basis will necessarily decrease the amount of gross income that a taxpayer states on his return. In other words, by overstating basis in the gross income calculation, the taxpayer "leave[s] out" or fails to "include" "an amount properly includible therein."

Id. (footnote omitted). The court also held that the safe harbor for adequate disclosure was unavailable because the tax returns "contain[ed] misleading statements and information that obscured the substance of the disputed underlying transactions." (JA350.)

On September 24, 2009, after entry of partial summary judgment for the Government, 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 the final regulations.

The panel (Judges Wilkinson, Gregory, and Wynn) reversed. It relied on *Colony*, which interpreted the 1939 Code and which held that an overstated basis could not trigger the extended assessment period. Notwithstanding significant statutory changes when the Internal Revenue Code was revised in 1954, the panel ruled that, since "there has been . . . no change at all to the most pertinent language," it was "not free to construe an omission from gross income as

something other than a failure to report some income receipt or accrual." (Slip Op. 10; internal quotation marks omitted).

The panel further held that the regulations were inapplicable because even if the six-year assessment period applied pursuant to the regulations, the "period for assessing tax would have expired on September 14, 2006," over three years before the regulations' effective date. (*Id.* at 12.) The panel added that the regulations were not entitled to deference because *Colony*'s "reference to 'the *unambiguous* language of section 6501(e)(1)(A)' cannot be ignored." (*Id.* at 14; emphasis in original.) Thus, the panel concluded that the three-year assessment period, I.R.C. § 6501(a), applied, making the FPAA untimely. (*Id.* at 15.)

Concurring Judge Wilkinson recognized that "it is sometimes difficult to determine whether pre-*Chevron* decisions are based upon '*Chevron* step one' . . . or '*Chevron* step two'" and that "there is some language in *Colony* suggesting that the Court looked at legislative history or thought that § 275(c) was ambiguous." (Slip Op. 16.) But since *Colony* characterized § 6501(e)(1)(A), the successor to § 275(c), as "unambiguous," Judge Wilkinson concluded that *Colony* was a *Chevron* step-one case. (*Id.* at 16-17.)

ARGUMENT

1. The panel's holding that I.R.C. § 6501(e)(1)(A) is "unambiguous" and compelled the conclusion that an overstated basis could not trigger the extended assessment period (Slip Op. 10-11) is in direct conflict with the Seventh Circuit's

holding that the meaning of § 6501(e)(1)(A) is "clear" and compelled the opposite conclusion (*Beard*, 2011 WL 222249 at *7). The panel's holding is based (Slip Op. 8) on the Supreme Court's description (*see* 357 U.S. at 37) in *Colony* of § 6501(e)(1)(A) of the 1954 Code as "unambiguous," and on the notion that *Colony* controlled because "there has been no material change between former § 275(c) [of the 1939 Code] and current §6501(e)(1)(A)." (Slip Op. 10.)

The panel is wrong on both counts. Not only did the panel fail to take into account *Colony*'s description of the phrase "omits from gross income"—contained in both § 275(c) of the 1939 Code and in § 6501(e)(1)(A) of the 1954 Code —as *ambiguous* (357 U.S. at 33), but it also failed to take into account the addition in 1954 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)) to the extended assessment period. Section 6501(e)(1)(A)(i) defined the term "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.

As the Seventh Circuit explained in *Beard*, § 6501(e)(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 "subsection (ii) is on all

fours with *Colony*'s suggestion that Congress's 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 Seventh Circuit concluded that the Court in *Colony* was "referring to . . . [*Colony*'s] synchronicity with subsections (i) and (ii) when it concluded that its interpretation of legislative history gave the 'ambiguous' Section 275(c) [of the 1939 Code] a meaning harmonious with that of 'unambiguous' Section 6501(e)(1)(A)" of the 1954 Code. *Id*. The Seventh Circuit thus correctly held that "the facts of *Colony* and the changes from the 1939 to the 1954 Code must distinguish our case from *Colony*. . . ." *Id*. at *5. The panel erred in concluding otherwise.

As the Seventh Circuit correctly determined, § 6501(e)(1)(A), with its two subsections, "should be read as a gestalt." *Beard*, 2011 WL 222249 at *5. When so read, "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" assessment period. *Id.* at *7. That is because "gross income" is a "key phrase in the statutory language," and "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.* at *5. Further support for this interpretation of "gross income" is derived from § 6501(e)(1)(A)(i) (*id.* at *6):

> If the omissions from gross income contemplated by Section 6501(e)(1)(A) were only specific items such as

> receipts and accruals, then the specific 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.

The panel erred in failing to follow the Seventh Circuit's well-reasoned analysis.

2. The panel compounded its error by concluding (Slip Op. 14) that the final Treasury regulations, which provide that a basis overstatement can give rise to an omission from gross income, were not entitled to *Chevron* deference.[3] Indeed, the panel's reasoning, which was based on the supposedly "*unambiguous* language of section 6501(e)(1)(A)" (*id.*, quoting *Colony*, 357 U.S. at 37; emphasis by the panel), conflicts not only with the Federal Circuit, but with the reasoning of the Ninth Circuit as well.

Unlike the panel, the Federal Circuit found "the relevant text of § 6229 and § 6501 . . . ambiguous as to Congress's intent concerning treatment of a taxpayer's overstated basis." *Grapevine*, 2011 WL 832915 at *8. Because the Court in *Colony* stated that "it cannot be said that the language ['omits from gross income'] is unambiguous" (357 U.S. at 33), the Federal Circuit concluded that "*Colony* [was] no bar to our finding that the text of the relevant statutes, standing alone, is ambiguous as to the disposition of this issue." *Id.* (footnote omitted). The Federal Circuit added, "Even incorporating the legislative history into our analysis of the

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[3] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

statutory text, we do not think Congress's intent was so clear that no reasonable interpretation could differ." *Id.* at *9. Similarly, the Ninth Circuit in *Bakersfield* (a pre-regulation case) held the relevant statutory language to be ambiguous, and refused to rely on *Colony*'s characterization of § 6501(e)(1)(A) as unambiguous because "[t]he Court expressly avoided construing the 1954 Code. . . ."[4] *Bakersfield*, 568 F.3d at 778. Thus, the panel erred in relying on *Colony*'s statement that § 6501(e)(1)(A) is "unambiguous," and that erroneous premise led to the panel's equally erroneous conclusion that the Treasury Regulations providing that a basis overstatement can constitute an omission of gross income is invalid.

Since the critical statutory language—"omits from gross income"—was (and still is) ambiguous, Treasury could validly interpret that language differently from the Supreme Court. *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 v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996). Thus, "the agency may, consistent with the court's

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[4] This ambiguity occasioned the Ninth Circuit's observation that "[t]he IRS may have the authority to promulgate a reasonable reinterpretation of an ambiguous provision of the tax code, even if its interpretation runs contrary to the Supreme Court's opinion as to the best reading of the provision." *Bakersfield*, 568 F.3d at 778 (internal quotation marks omitted).

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." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). The issuance of regulations in response to litigation is no impediment to giving them *Chevron* deference. *Mayo Foundation v. United States*, 131 S. Ct. 704, 712-713 (2011); *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); *Grapevine*, 2011 WL 832915 at *13. Thus, the final regulations are entitled to *Chevron* deference. *Grapevine*, 2011 WL 832915 at *11. *See also Beard*, 2011 WL 222249 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").

The regulatory definition of "gross income" is a permissible construction of the statutory language because it 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)). Because gain is determined mathematically, by subtracting "basis" from the "amount realized," an "omi[ssion] from gross income" within the meaning of § 6501(e)(1)(A) can occur either from an understatement of the amount realized (the minuend) or from an overstatement of basis (the subtrahend). The regulatory definition is also supported by the addition to the Code in 1954 of

§ 6501(e)(1)(A)(i), which demonstrated Congress's intent to treat trade-or-business income and non-trade-or-business income according to different rules. *See* T.D. 9466, 74 Fed. Reg. at 49,321-49,322; *Grapevine*, 2011 WL 832915 at *10. Thus, the regulations are valid. *Grapevine*, 2011 WL 832915 at *10 ("the Treasury regulations . . . are reasonable, even though they depart from the judicial interpretation of *Colony* and *Salman Ranch*").[5]

3. a. The panel's further holding that the regulations, even if valid, are inapplicable to this particular case is likewise erroneous and conflicts with *Grapevine*. 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. §§ 301.6229(c)(2)-1(b), 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. The principles of § 7481(a) apply in determining the date on which a district court judgment becomes final. *See* I.R.C. § 6230(g).

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[5] *Salman Ranch Ltd. v. United States*, 573 F.3d 1362 (Fed. Cir. 2009).

It is undisputed that the FPAA was issued within six years of the filing of the relevant returns, as extended by the operation of § 7609(e)(2). *See supra* note 2. Since the challenged judgment is obviously not final within the meaning of § 7481, the assessment period is still open, and the regulations apply to the 1999 tax year. As the Federal Circuit explained (*Grapevine*, 2011 WL 832915 at *13),

> [T]he limitations period for Grapevine's 1999 tax return remains open until this case reaches unappealable termination. It is open today, and it was open on September 24, 2009. As a result, by their plain terms the new Treasury regulations apply to Grapevine's 1999 return.

The panel mistakenly believed that "[e]ven assuming *arguendo* that the six-year statute of limitations applied," the assessment period "would have expired" in 2006, *i.e.*, six years after the returns were filed, and well before the 2009 effective date of the regulations. (Slip Op. 12.) But the timely issuance of an FPAA "suspend[s] the running of any open period of limitations applicable to petitioner on the date the FPAA was issued. . . ." *Rhone-Poulenc Surfactants and Specialties, L.P. v. Commissioner*, 114 T.C. 533, 554 (2000), *appeal dism.*, 249 F.3d 175 (3rd Cir. 2001). *Accord Epsolon Ltd. ex rel. Sligo (2000) Co. v. United States*, 78 Fed. Cl. 738, 761-762 (2007). As the Tax Court stated, it is "highly unlikely that Congress intended to create a preassessment procedure for partners to contest partnership determinations, during which the Government is prohibited from making related assessments, while at the same time allowing the applicable period of limitations to expire during the time those preassessment

procedures are being utilized." *Rhone-Poulenc*, 114 T.C. at 554. *See also* I.R.C. § 6225(a) (prohibition on assessment during pendency of TEFRA partnership proceeding); § 6229(d) (suspension of assessment period during pendency of partnership proceeding); § 6230(g) (application of principles of 7481(a) to district court judgment); § 6503 (tolling of assessment period). Thus, the fundamental premise of the panel's inapplicability holding is faulty.

b. Finally, the panel erred in concluding (Slip Op. 14) that the regulations would have an impermissible retroactive effect if applied to this case. When, as here, a tax year is open because a decision is not final, the regulations are not retroactive. But even if the regulations can be characterized as "retroactive" in common parlance, that "retroactivity" is specifically authorized by statute, general Supreme Court principles, and the regulations themselves. The Supreme Court has authorized retroactive rulemaking when there is an "express statutory grant." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 209 (1988). The applicable version of I.R.C. § 7805(b)—I.R.C. § 7805(b) (1994 ed.)—contains such an express grant; it establishes a presumption that regulations apply retroactively unless otherwise specified. *See, e.g.*, *Snap-Drape, Inc. v. Commissioner*, 98 F.3d 194, 202 (5th Cir. 1996); *Likins-Foster Honolulu Corp. v. Commissioner*, 840 F.2d 642, 647 (9th Cir. 1988); *Gehl Co. v. Commissioner*, 795 F.2d 1324, 1331 (7th Cir. 1986). Treasury relied on § 7805(b) in promulgating the regulations:

> Although these regulations are not retroactive, a retroactive regulation interpreting sections 6229(c)(2)

> and 6501(e)(1) is expressly permitted by the applicable version of section 7805(b). . . .

T.D. 9511, 75 Fed. Reg. at 78898. Thus, even if the regulations are considered to be "retroactive," such retroactivity is permissible, as the Federal Circuit correctly concluded. *Grapevine*, 2011 WL832915 at *11-*12.

CONCLUSION

This petition for rehearing en banc should be granted. On rehearing this Court should vacate the panel's determination and affirm the district court judgment.

Respectfully submitted,

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ADDENDUM

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

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).

. . . . .

(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 turn, 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 which is in excess of 25 percent of the amount of gross income stated in its return, subsection (a) shall be applied by substituting “6 years” for “3 years”.

. . . . .

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

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

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

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

other basis of the property. Consequently, except as provided in paragraph (a)(1)(ii) of this section, an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income for purposes of section 6229(c)(2).

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

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

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.

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(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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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