No. 11-139

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

HOME CONCRETE & SUPPLY, LLC, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF DANIEL S. BURKS AND REYNOLDS PROPERTIES, L.P. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Amici curiae Daniel S. Burks and Reynolds Properties, L.P. are parties to pending litigation involving the same issue present in this case, and therefore, they are interested in the outcome of this litigation.[1] *See United States v. Burks*, *petition for cert. filed*, No. 11-178 (U.S. Aug. 11, 2011); *Reynolds Properties, L.P. v. Comm'r*, Nos. 10-72406 and 10-73376 (9th Cir.).

INTRODUCTION AND STATEMENT OF ISSUE

Much ink has been spilled in the federal courts across the United States regarding this Court's decision in *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), and the level of deference to be afforded Treasury Regulation § 301.6501(e)-1 (the "Regulation"), which flagrantly seeks to trump *Colony* and congressional intent. This brief does not add to such body of work, but rather addresses a much simpler issue present in *United States v. Home Concrete & Supply, LLC* and the many other cases standing behind it. That is, assuming this Court

[1] This amicus brief is filed with the consent of the parties. *See* SUP. CT. R. 37.3(a). Petitioner filed a letter consenting to the filing of amicus briefs on November 23, 2011. Respondent filed a letter consenting to the filing of amicus briefs on November 22, 2011. Further, pursuant to Rule 37.6, the amici curiae submitting this brief and their counsel hereby represent that neither party to this case nor their counsel authored any part of this brief, and that no person other than amici curiae made a monetary contribution toward the preparation or submission of this brief.

reaches the issue of the Regulation,[2] does the Regulation apply to a tax year if the limitations period for that year was closed on September 24, 2009? The effective-date provision of the Regulation definitively answers this question: "No."

SUMMARY OF ARGUMENT

The Regulation is clear. It applies only to tax years for which the limitations period was open on or after September 24, 2009. The limitations period for the tax year at issue was closed on that date because the IRS did not timely mail the Notice of Final Partnership Administrative Adjustment ("FPAA"). On the FPAA mailing date, the 3-year limitations period had expired, the Regulation did not exist, and under this Court's precedent in *Colony*, the 6-year limitations period did not apply. Because the FPAA was not timely, it could not and did not suspend the limitations period, and thus, the limitations period was not further suspended by the district court litigation. The Government's argument for applying the Regulation based on a lack of final decision in this case is wholly without merit.

While the Government urges that, if necessary, this Court may apply the Regulation retroactively, there is no legal basis for doing so. The Government issued the Regulation with a contemporaneous effective date, and has publicly declared that the Regulation is not

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[2] This brief assumes the Court holds that *Colony* applies to the 1954 version of the Internal Revenue Code, under which a basis overstatement does not give rise to an "omission" from gross income triggering the 6-year limitations period under I.R.C. § 6501(e).

retroactive. Also, applying the Regulation retroactively has the legally-impermissible effect of reopening a closed tax year and stripping the taxpayer of its substantive rights against an untimely tax assessment. It places taxpayers in a "Heads the Government Wins, Tails the Taxpayer Loses" situation, wherein the taxpayers either voluntarily, or by virtue of challenging the IRS, forfeit their statute-of-limitations defenses. For these reasons, the Regulation cannot and should not apply.

ARGUMENT

1. THE REGULATION DOES NOT APPLY BECAUSE THE IRS DID NOT TIMELY MAIL THE FPAA.

The IRS's untimely mailing of the FPAA cannot operate to reopen a limitations period that has already expired. The tax year at issue was closed when the IRS issued the FPAA and therefore was also closed on September 24, 2009 when the Regulation took effect. For this reason, the Regulation does not apply.

The Regulation states that it 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(e)(1). The only manner in which the limitations period for the tax year at issue could be considered open on September 24, 2009 is if the district court litigation somehow reopened the period under I.R.C. § 6503(a).[3] This provision, and its

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[3] *See* I.R.C. § 6503(a)(1) ("The running of the period of limitations provided in section 6501 or 6502 (or section 6229[]) . . . in respect of any deficiency as defined in section 6211 . . . shall (after the

partnership counterpart,[4] operate to suspend the limitations period upon the IRS's timely mailing of a notice of deficiency or FPAA – not reopen a closed period.[5] The Third Circuit highlighted this timeliness requirement and the interplay of §§ 6501 and 6503 in *Commissioner v. S. Frieder & Sons Co.*:

> [T]he combined effect of Section 275 and Section 277 [predecessors to §§ 6501 and 6503, respectively] is to cause the three year statute of limitations on excess profits tax deficiency assessments to run until it shall be suspended by the Commissioner's issuance of such a deficiency notice as is a statutory prerequisite to assessment. But if the statutory period has

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mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.").

[4] I.R.C. § 6229(d) ("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—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 for 1 year thereafter.").

[5] *See St. Joseph Lease Capital Corp. v. Comm'r*, 235 F.3d 886, 888-90 (4th Cir. 2000) (timely mailing of the notice of deficiency is the crucial act suspending the limitations period); *Reddock v. Comm'r*, 72 T.C. 21, 27-28 (1979).

> fully run before the giving of such notice, the bar is not removed by that untimely notice.

247 F.2d 834, 837 (3d Cir. 1957).[6]

It is a well-settled rule that the timeliness of an IRS notice of deficiency or FPAA is determined on the mailing date of the notice applying the law in effect at that time. *See, e.g., Frieling v. Comm'r*, 81 T.C. 42, 54 (1983) ("We have held that the date the notice of deficiency is mailed . . . determines whether that notice is timely."); *see also Clodfelter v. Comm'r*, 527 F.2d 754, 757 (9th Cir. 1975) (timeliness of a notice of deficiency determined based on the mailing date); *Reddock v. Comm'r*, 72 T.C. 21, 27-28 (1979). On the mailing date of the FPAA in this case, the 3-year limitations period for the tax year at issue had expired and the Regulation did not exist. The FPAA was therefore untimely.

Because the IRS did not timely mail the FPAA, the FPAA could not operate to suspend the limitations period. As the Tax Court keenly noted decades ago, "[t]here can be no suspension of the running after the

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[6] These decisions, addressing the suspension of the limitations period with respect to timely issued notices of deficiency, apply with equal force to FPAAs. *See Sealy Power, Ltd v. Comm'r*, 46 F.3d 382, 385-86 (5th Cir. 1995) ("[A]n FPAA is the functional equivalent of a notice of deficiency. Both the FPAA and the notice of deficiency serve to notify affected taxpayers that the Commissioner has made a final administrative determination of their liability for particular tax years. We therefore analyze the FPAA here the same way that we would analyze a notice of deficiency.").

period has completely run." *Greve v. Comm'r*, 42 B.T.A. 142, 142 (1940).

The Tax Court affirmed this truism years later in *Reddock v. Commissioner*, 72 T.C. 21 (1979). In that case, the IRS initially mailed a notice of deficiency to the taxpayer at the wrong address. The IRS thereafter mailed a second notice of deficiency to the correct address, but after the limitations period had expired. The Tax Court dismissed the first notice as invalid. Regarding the second notice, the Tax Court found that the limitations period had expired when the IRS mailed it; and consequently, the untimely notice did not suspend the limitations period under § 6503(a). This is true because after the limitations period expires, "[t]he Secretary no longer possessed the power to make a valid assessment or to issue a notice of deficiency which, under section 6503(a), would suspend the running of the statute of limitations." *Reddock*, 72 T.C. at 26.

Because the untimely FPAA did not suspend the limitations period, it was impossible for the limitations period to be further suspended by the district court litigation. *See Greve*, 42 B.T.A. at 144 ("the running of the period could not be suspended by anything which happened [after issuance of notice]."). The mere fact that the taxpayers exercised their right of judicial review of the FPAA's adjustments had no effect on the limitations period or their statute-of-limitations defenses. *See Reddock*, 72 T.C. at 27 ("By filing their petition in this Court, petitioners waived nothing.").

At the end of the day, the limitations period was closed when the IRS mailed the FPAA in this case. It remained closed when the taxpayers petitioned for

judicial review and throughout the district court litigation. And the limitations period was closed on September 24, 2009 when the Regulation took effect. The Regulation therefore does not apply by its own terms.

2. THE LACK OF A FINAL DECISION IN THE LITIGATION DOES NOT MAKE THE REGULATION APPLICABLE.

The Government attempts to avoid this literal result by arguing that the Regulation applies because there was not yet a final decision in the litigation. Although the Regulation states that it only applies to tax years open on September 24, 2009, the Government argues that this language somehow includes tax years "that are the subject of any case pending before any court of competent jurisdiction (including the United States Tax Court and Court of Federal Claims) in which a decision had not become final (within the meaning of section 7481)." T.D. 9511, 75 Fed. Reg. 78897-01, 78898 (2010).

The Government raises a specious and ultimately unsupportable argument. The lack of a final decision does not answer the question posed by the Regulation's effective date provision – is the limitations period for the tax year open on September 24, 2009? The weakness in the Government's position is that it assumes the litigation suspended the limitations period. Such assumption is false. The limitations period was closed when the IRS issued the FPAA and it cannot be reopened by the filing of a lawsuit.

The Government ignores the infirmity of its assumption and instead seeks deference for its "interpretation" of the effective date provision of the

Regulation. The Government seeks that to which it is not entitled. This Court declared long ago that an agency's interpretation of its promulgated rules is not entitled to deference if the interpretation is either plainly erroneous or inconsistent with the regulation. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).[7] The Government's "interpretation" of the effective date of the Regulation is both.

The Government's "interpretation" is plainly erroneous because it is based on a faulty legal premise: that the litigation somehow held open the limitations period. This did not occur here because the IRS failed to timely mail the FPAA. There can be no suspension of a limitations period that has already expired. *S. Frieder & Sons*, 247 F.2d at 837; *Reddock*, 72 T.C. at 26-27; *Greve*, 42 B.T.A. at 142, 144. Thus to apply the Regulation here – where the limitations period was not open on the Regulation's effective date – is plainly erroneous.

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[7] In *Bowles*, a crushed-stone company challenged the Government's interpretation of a regulation promulgated by the Office of Price Administration. The regulation imposed a maximum price at which building materials could be delivered. Maximum price was defined as the "highest price charged" during a specific period of time. The Government interpreted "highest price charged" as including the price at which goods were delivered during the relevant period, even though the goods were sold under an order pre-dating the relevant period. In deciding that case, this Court set the framework for evaluating agency interpretations of their own regulations, holding that the interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The Government's "interpretation" is also plainly erroneous because it requires this Court to give effect to the Regulation in applying the effective date provision of the Regulation. Such argument demeans the generally-accepted definition of "effective date." Black's Law Dictionary (9th ed.) defines effective date as "[t]he date on which a statute, contract, insurance policy, or other such instrument becomes enforceable . . ." BLACK'S LAW DICTIONARY 592 (9th ed. 2009). Applying this definition, the Regulation became enforceable on September 24, 2009. The Government would have this Court apply the unenforceable provisions of the Regulation in order to make the Regulation enforceable. This circular method of construing an effective date provision nullifies the whole point of having an effective date, and, as the Tax Court perceptively noted, is "irreparably marred by circular, result-driven logic" which has no place in the tax laws. *Intermountain Ins. Svc. of Vail v. Comm'r*, 134 T.C. 211, 219 (2010), *rev'd*, 650 F.3d 691 (D.C. Cir. 2011), *petition for cert. filed*, No. 11-663 (U.S. Nov. 16, 2011); *Carpenter Family Invs., LLC, v. Comm'r*, 136 T.C. 373, 379-80 (2011) (same ruling); *see also Burks v. United States*, 633 F.3d 347, 360 (5th Cir. 2011), *petition for cert. filed*, No. 11-178 (U.S. Aug. 11, 2011) (rejecting the Government's "circular argument that the Regulations apply to the taxpayers because the statute of limitations remains open under the language of the newly promulgated Regulations").

The Government's "interpretation" should also be rejected because it is inconsistent with the Regulation and the Treasury's issuing statements. Giving proper consideration to I.R.C. §§ 6501 and 6503, the only conceivable manner for the Regulation to apply to the tax year at issue is for this Court to place the

Regulation in effect at the time the IRS mailed the FPAA. In other words, this Court must give the Regulation retroactive effect. This would be wholly inconsistent with the Regulation's contemporaneous effective date and the Treasury's public pronouncements, in the Preamble to the Regulation and in numerous court filings across the United States, that "these regulations are not retroactive," and that the Treasury and IRS "disagree with the characterization of the regulations as retroactive." T.D. 9511, 75 Fed. Reg. at 78898; *see also* Gov't Br. 29.

The decisions by the Tenth Circuit, D.C. Circuit, and Federal Circuit — applying the Regulation in similar circumstances notwithstanding the plain language of the effective date — were wrongly decided and should not be followed.[8] The Appeals Court in each case made the same fatal misstep. Each court failed to test the assumption upon which the Government's "interpretation" of the effective date is based — that the litigation had the legal effect of suspending the limitations period.[9] This assumption is false where, as here, the IRS did not timely issue the FPAA, which is a prerequisite to triggering the suspension rules.

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[8] *See Intermountain Ins. Svc. of Vail v. Comm'r*, 650 F.3d 691 (D.C. Cir. Jun. 21, 2011), *petition for cert. filed*, No. 11-663 (U.S. Nov. 16, 2011); *Salman Ranch, Ltd. v. Comm'r*, 647 F.3d 929 (10th Cir. May 31, 2011), *petition for cert. filed*, No. 11-582 (U.S. Nov. 7, 2011); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368 (Fed. Cir. Mar. 11, 2011), *petition for cert. filed*, No. 11-163 (U.S. Aug. 5, 2011).

[9] *See Intermountain*, 650 F.3d at 707-09; *Salman Ranch*, 647 F.3d at 941-42; *Grapevine Imports*, 636 F.3d at 1382-83.

3. THE REGULATION IS NOT RETROACTIVE AND CANNOT BE APPLIED RETROACTIVELY.

The Government urges this Court that the Regulation could apply retroactively. Gov't Br. 42-43. The obvious flaw with this argument is that the Regulation is not retroactive. The Treasury issued the Regulation with a contemporaneous effective date, and stated unequivocally in the Preamble that "these regulations are not retroactive." The Preamble further stated that Treasury and the IRS "disagree with the characterization of the regulations as retroactive." T.D. 9511, 75 Fed. Reg. at 78898. The Government has maintained this position in dozens of cases, including the case before this Court. Gov't Br. 29.

While I.R.C. § 7805(b) states that regulations are presumed retroactive unless otherwise proscribed, the Government has "otherwise proscribed" in the Regulation. I.R.C. § 7805 does not authorize the Treasury "to add retroactive effect that a Regulation would otherwise not have." *See Agway, Inc. v. United States*, 524 F.2d 1194, 1199 (Ct. Cl. 1975) (rejecting the Government's attempt to retroactively apply a rule that specified its own prospective application).

Further, once Treasury promulgates a regulation, its provisions — including effective date — are binding on the Government and taxpayers equally. The Ninth Circuit's decision in *Pacific National Bank v. Commissioner*, 91 F.2d 103 (9th Cir. 1937), is instructive on this point. At issue in that case was a Treasury regulation that raised a presumption of deductibility for bad debts "charged off" in accordance with instructions from federal and state regulatory agencies. The taxpayer deducted the exact amount of

a charge-off made pursuant to the orders of a national bank examiner. The IRS disallowed the deduction, which the Board of Tax Appeals sustained.

The Ninth Circuit reversed on appeal. The court found uncontroverted evidence of the taxpayer's compliance with the regulation, raising the presumption of deductibility that the IRS made no effort to rebut. The Ninth Circuit chastised the Government for its failure to abide by its own regulations:

> The suggestion that Treasury Regulations . . . are binding on taxpayers, but not on the Commissioner or on the Board of Tax Appeals, cannot be entertained. Tax officials and taxpayers alike are under the law, not above it.

Pacific Nat'l Bank, 91 F.2d at 105.

The Government follows a comparable "do as I say, not as I do" approach in its enforcement of the Regulation. Although the Treasury promulgated the Regulation with a contemporaneous effective date, the Government seeks to apply the Regulation retroactively in a manner that re-writes the effective date provision. Under *Pacific National Bank*, for better or worse, the Government is bound by the terms of the Regulation it promulgated. The Regulation therefore cannot apply retroactively.

An additional fatal flaw is that retroactive application of the Regulation produces a legally impermissible result. The Ninth Circuit's decision in *Chenault v. U.S. Postal Service*, 37 F.3d 535 (9th Cir. 1994), illustrates this point and is instructive. The

plaintiff in that case brought discrimination claims against the U.S. Postal Service. The district court dismissed one of the claims as time-barred because it was not brought within the required 30-day period. A few months later, Congress passed legislation that extended the period to 90 days. The plaintiff moved to reinstate its claim, which under the 90-day period, would be timely. Applying this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the Ninth Circuit held that to apply the new statute of limitations retroactively would "alter the substantive rights" of a party and "increase a party's liability," as the party would be "forced to defend an action that was previously time-barred." *Chenault*, 37 F.3d at 539. In holding that the new statute of limitations could not be applied retroactively, the court stated "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme." *Id.*

This Court expressed its approval of *Chenault*'s holding in a case involving the retroactive application of an amendment to the False Claims Act ("FCA"). *See Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950-52 (1997). The FCA permits suits by private parties against anyone who submits a false claim to the government. The provision at issue permitted *qui tam* actions to proceed based on information already in the government's possession. *Id.* at 945-46. The parties agreed that if the amendment did not apply, the plaintiff's claims were barred. *Id.* at 945. In comparing its case to *Chenault,* this Court stated "[t]he [newly-enacted] amendment would revive that action, subjecting [the defendants] to previously foreclosed . . . litigation, much like extending a statute of limitations

after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action." *Id.* at 950 (citing *Chenault*, 37 F.3d at 537, 539).

The Government fails to address *Chenault* and *Hughes Aircraft* and instead analyzes retroactive application of the Regulation based on an abuse-of-discretion standard. *See* Gov't Br. 42-43. This argument should be summarily rejected. Where retroactivity achieves a *legally-prohibited result*, retroactive application is a per se abuse of discretion.

4. APPLYING THE REGULATION CREATES A "HEADS THE GOVERNMENT WINS – TAILS THE TAXPAYER LOSES" SITUATION THAT FRUSTRATES THE PURPOSE BEHIND STATUTES OF LIMITATION.

Adopting the Government's "interpretation" places the taxpayers in *Home Concrete* and similar cases in an impossible, no-win situation at the time they receive the FPAA. Do they challenge the untimely FPAA by filing a court action, and by doing so, allow the Government the opportunity to promulgate regulations to make the FPAA timely and nullify their statute-of-limitations defense? Or do the taxpayers not challenge the FPAA, thereby waiving their statute-of-limitations defense?[10] By virtue of the Regulation, the Government has stripped the taxpayers of their

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[10] The issue of whether the IRS assessed tax attributable to partnership items within the statute of limitations (i.e., a "statute of limitations defense") is a partnership item that must be raised at the partnership level. *See Weiner v. United States*, 389 F.3d 152, 157 (5th Cir. 2004); *Chimblo v. Comm'r*, 177 F.3d 119, 125 (2d Cir. 1999); *Kaplan v. United States*, 133 F.3d 469, 473 (7th Cir. 1998); *Crowell v. Comm'r*, 102 T.C. 683, 693 (1994).

statutory right to a timely assessment by the IRS and their right to judicial review of both the IRS's determinations and their statute-of-limitations defenses. By taking no action, the taxpayers lose. By challenging the IRS, the taxpayers lose. In every instance, the taxpayers lose. The law simply cannot allow the IRS to penalize taxpayers for exercising the rights expressly granted to them by Congress in the Internal Revenue Code.

To allow the Government's overreaching sets a dangerous precedent. Each time the Government lost in court, it could simply create an administrative fix, i.e., regulation, and apply the fix to ongoing litigation under the guise that the litigation is "not yet final." This would allow the Government to avoid any permanent defeat on a tax issue and seek to displace, at any time, the opinion of the judiciary with its own opinion. Circuit Court Judge Wilkinson warned of such dangers in his concurring opinion to the appeals court decision, characterizing the Government's "interpretation" of the Regulation as "something of an inversion of the universe and to pass the point where the beneficial application of agency expertise gives way to a lack of accountability and a risk of arbitrariness." Pet. App. 20a.

Further, no tax dispute would ever be stale. Should the tax dollars justify it, the Government could simply promulgate a new regulation to resurrect expired claims that are the subject of ongoing litigation. This would thwart the principles of justice and fairness upon which the rules of limitation were founded:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have

> an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

Rothensies v. Elec. Storage Battery Co., 329 U.S. 296, 301 (1946).

CONCLUSION

The simple truth is that an untimely FPAA does not suspend the limitations period. Once a limitations period has expired, neither the issuance of an FPAA nor subsequent filing of a lawsuit can reopen the period. Likewise, the lack of a final decision does not operate to hold open a limitations period which has already expired. When these simple truths are properly applied here, the result is unequivocally clear: the tax year at issue was closed when the Regulation took effect, and therefore the Regulation does not apply.

Nor can the Regulation apply retroactively. To do so would require this Court to improperly disregard the explicit terms of the Regulation's effective date provision. Further, applying the Regulation retroactively would reopen a closed tax year which impermissibly strips the taxpayer of its substantive rights against an untimely tax assessment. It places the taxpayers in a "Heads the Government Wins, Tails

the Taxpayer Loses" situation, wherein the taxpayers either voluntarily, or by virtue of challenging the IRS, forfeit their statute-of-limitations defenses. For these reasons, the Regulation cannot and should not apply.

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