

Office of Chief Counsel
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to: Associate Area Counsel (Chicago, Group 1)
(Small Business/Self-Employed)
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from: Senior Technician Reviewer, Branch 2
(Procedure & Administration)

subject: Whether Section 6511(h) Can Extend the Period of Limitations in Section 6511(d)(2)

This Chief Counsel Advice responds to your request for assistance dated September 12, 2014. This advice may not be used or cited as precedent.

ISSUES

Does section 6511(h) extend the special period of limitations under section 6511(d)(2)?

CONCLUSIONS

No, the explicit language of section 6511(h) limits tolling in the case of a financially disabled taxpayer to periods of limitations specified in sections 6511(a), (b), & (c). Section 6511(h) does not apply to the special three-year period of limitation specified in section 6511(d)(2).

RELEVANT LEGAL AUTHORITIES

Section 6511(a): Period of limitation on filing claim.—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

Section 6511(c): Special rules applicable in case of extension of time by agreement.—If an agreement under the provisions of section 6501(c)(4) extending the period for assessment of a tax imposed by this title is made within the period prescribed in subsection (a) for the filing of a claim for credit or refund—(1) Time for filing claim.—The period for filing claim for credit or refund or for making credit or refund if no claim is filed, provided in subsections (a) and (b)(1), shall not expire prior to 6 months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof under section 6501(c)(4).

* * *

Section 6511(d)(2)(A): Special period of limitation with respect to net operating loss or capital loss carrybacks.—(A) Period of limitation.—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback or a capital loss carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss or net capital loss which results in such carryback, or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later. In the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in subsection (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to such carryback.

Section 6511(h): Running of periods of limitation suspended while taxpayer is unable to manage financial affairs due to disability.—(1) In general.—In the case of an individual, the running of the periods specified in subsections (a), (b), and (c) shall be suspended during any period of such individual's life that such individual is financially disabled. (2) Financially disabled.—(A) In general.—For purposes of paragraph (1), an individual is financially disabled if such individual is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require. (B) Exception where individual has guardian, etc.—An individual shall not be treated as financially disabled during any period that such individual's spouse or any other person is authorized to act on behalf of such individual in financial matters.

LAW AND ANALYSIS

We are not aware of any regulation or case which directly answers this question.¹ Whether section 6511(h) suspends the period of limitations for refunds attributable to an

¹ In *Bova v. United States*, 80 Fed. Cl. 449 (2008), the court applies section 6511(h) to section 6511(d)(2), but the decision turns on whether the conditions of subsection (h) were met. It does not appear that the

NOL or capital loss carryback under section 6511(d)(2)(A) requires an exercise in statutory construction. The first approach to statutory construction is to look at the plain meaning. Section 6511(h) provides that the periods specified in subsections (a), (b), and (c) are suspended during the period that the taxpayer is financially disabled. Subsection (d) is not included in this list and is not referenced in the text of subsection (h). Similarly, subsection (h) is not referenced or incorporated into paragraph (d)(2)(A).

Consequently, it would appear under a plain meaning interpretation that a period specified in subsection (d), and not in subsection (a), (b), or (c), would be excluded from the tolling provisions found in subsection (h).²

A waiver of sovereign immunity, which includes periods of limitations, must be strictly construed in favor of the government. See *Lane v. Pena*, 518 U.S. 187, 192 (1996) (“A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text”). See also, *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984). The statutory scheme in section 6511 is set forth in a highly detailed, technical manner and should not be read in a manner to create extensions or exceptions which have not been clearly expressed in the text. See *United States v. Brockamp*, 519 US 347 (1997). Because subsection (h) is not expressly applicable to subsection (d), the case law requiring a narrow construction of section 6511 also indicates that subsection (h) should not be interpreted to suspend the periods prescribed in subsection (d).

In addition, the doctrine of *expressio unius est exclusio alterius*, provides that when a statute lists specific exceptions to a general rule, the court will infer that Congress intended to exclude further exceptions. See e.g., *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 885 (9th Cir.2005) (*en banc*). See also, *Debough v. Commissioner*, 142 T.C. No. 17 (2014). Since Congress has explicitly listed the periods “specified” in subsections (a), (b), and (c), the omission of other periods should be interpreted as an exclusion of those periods.

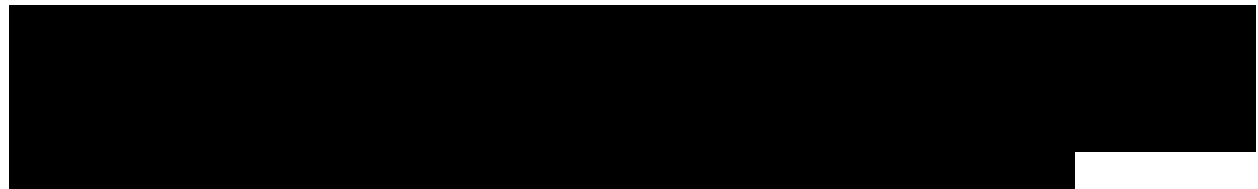
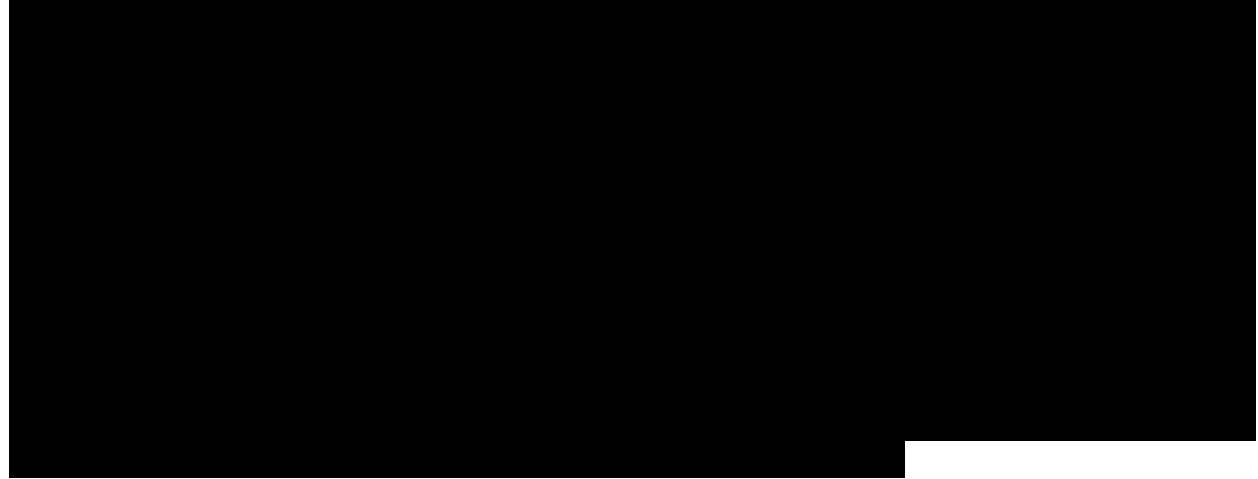
While explicit legislative history sometimes conveys Congress’s intent, the legislative history on this issue does not provide clear guidance. It indicates that following

parties raised the question of whether subsection (h) should apply to periods specified in subsection (d), and the court did not explicitly decide that issue. The court held that the taxpayer was not financially disabled within the meaning of subsection (h). As such, the apparent application of subsection (h) to subsection (d) is implicit dicta at best. Furthermore, the court in quoting subsection (h) paraphrased the portion of the Code which listed subsections (a), (b), and (c), effectively reading this limitation out of the Code. As such we do not find this case to be precedential or persuasive with respect to this narrow point of law.

² This is a logical outcome because subsection (d)(2)(A) is generally only relied upon as an additional period once the periods in subsection (a) and (c) are closed with respect to the carryback year. When the periods under (a) and (c) are closed, the concept of “suspending” the period has little meaning. Section 6511(d)(2)(A) would not be relevant until the claim is filed in a future year showing the NOL and carrying that NOL back to claim a refund. Once this happens, the taxpayer can use the additional period under subsection (d)(2)(A), but since the period under (a) and (c) for the carryback year would typically be closed at this point, and the period under subsection (d)(2)(A) adds a new period that is only applicable once the claim is filed, there would be no continuous period that is subject to suspension.

Brockamp, where the Court held that equitable tolling was entirely unavailable in tax refund suits, Congress wanted to allow tolling in certain specified circumstances, for individuals who are “severely disabled.” See *generally*, STAFF OF THE JOINT COMM. ON TAXATION, JCS-6-98, GEN. EXPLANATION OF TAX LEGIS. ENACTED IN 1998 72, (Committee Print 1998); H.R. Rep. No. 105-599 at 255 (1998); H.R. Rep. 105-364 pt. 1 at 62 (1997); S. Rep. 105-174 at 60 (1998). The legislative history does not explain why subsections (a), (b), and (c) are enumerated to the exclusion of other subsections.³

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



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³ Beside the periods specified in subsection (d), the language in subsection (h) also does not include the periods referenced by subsections (g).