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In this article, Cullinan argues that a statute of limitations should apply to tax shelter promoter penalties to help speed up the enforcement of rules against abusive transactions and limit the pool of affected taxpayers.

Two of the statutes the IRS commonly relies on when pursuing civil penalties against tax shelter promoters are sections 6700 ("Promoting abusive tax shelters, etc.") and 6701 ("Penalties for aiding and abetting understatement of tax liability").[1] The IRS's position is that there is no statute of limitations on the time that it has to assess those penalties.[2] As discussed below, that position has been sustained by every appellate court to consider it, albeit for conflicting reasons, and with some dissenting opinions.

I believe that there should be a statute of limitations for these penalties. Frankly, I think Congress has already provided one, as the dissenting opinions point out. On the other hand, if the majority opinions are correct in their holdings that there is not presently a statute of limitations, I think Congress should enact one, for two reasons.

First, I believe that increased IRS enforcement against promoters is critical to stopping the mass-marketing of transactions that can quickly involve thousands of taxpayers. A statute of limitations that would require the IRS to more swiftly examine those marketing activities and assess any warranted penalty would likely reduce the population of affected taxpayers.

Second, public policy generally supports a statute of limitations, especially when the government seeks to impose a penalty. The government has immense resources, and it can be quite unfair to require an alleged promoter to defend himself many years after the alleged conduct occurred, when memories have faded and evidence is lost.

This article seeks to help lay the groundwork for Supreme Court review. As discussed later, 28 U.S.C. section 2462 is one of the two statutes that could supply a statute of limitations for promoter penalties. In the past decade, the Supreme Court has twice issued unanimous opinions rejecting government efforts to narrow the applicability of that statute.[3] I believe that the Court that issued those opinions would likewise reject the government's argument that the IRS has forever to assess promoter penalties. The problem is that Supreme Court review is hard to get. But the likelihood increases when there is a split in the lower courts, so this article identifies various conflicts that the lower court jurisprudence has created, rather than debating the merits of the various positions.

I. Timely Assessments Are Important

Promoter penalties are an important tool in the IRS's arsenal when combating abusive transactions. Penalties may serve multiple purposes,[4] but in my mind, these particular

[1] *See* Internal Revenue Manual 20.1.6.3.2.

[2] *See* IRM 20.1.6.18(1).

[3] *See Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Gabelli v. SEC*, 568 U.S. 442 (2013).

[4] According to the IRS, the main purpose of a tax-related penalty is to encourage voluntary compliance, which penalties do by: "defining standards of compliant behavior, defining consequences for noncompliance, and providing monetary sanctions against taxpayers who do not meet the standard." IRM 20.1.1.2.

penalties mainly serve two: to deter continuing promotion and penalize past conduct. Assessing promoter penalties more quickly would serve both purposes.

Promoters harm the tax system by getting taxpayers to take return positions that inappropriately reduce the fisc. It is therefore critically important that the IRS intervene as early as possible, before transactions have the chance to spread and potentially involve hundreds or even thousands of taxpayers. Assessing a promoter penalty many years after the underlying conduct — indeed, when the promoter may have already stopped the activity — does not serve that purpose.[5]

Likewise, as anyone who has tried to collect on an old account receivable knows, the older the receivable the less likely you are to collect. To the extent that the purpose of promoter penalties is to penalize the misconduct, it would seem prudent to assess them as soon as reasonably possible and start the collections process. The longer the IRS waits, the less likely it is to collect, which undermines the penalty.

In times past, I would worry that a statute of limitations would simply cause the IRS to pursue fewer promoter examinations because of a lack of resources. The Inflation Reduction Act (P.L. 117-169), however, provided the IRS with the funding it needs to pursue more promoter activity, and the IRS has identified "emerging issues" (which would seem to include promoted transactions) as one of the areas in which it intends to deploy the new funding.[6]

Of course, the IRS could just act more quickly without a statute of limitations hanging over its head. But deadlines matter. I can say from my time working at the IRS that the agency pays very close attention to statutes of limitations. The Internal Revenue Manual is full of directives designed to keep IRS employees from "blowing a statute." I believe that if there were a statute of limitations on promoter penalties, the IRS would find a way to meet it, which would better serve the purposes outlined above.

II. The Importance of a Statute of Limitations

The Supreme Court has explained that:

> The basic policies of all limitations provisions [are]: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities. Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs. We have deemed them vital to the welfare of society, and concluded that even wrongdoers are entitled to assume that their sins may be forgotten.[7]

Notably, the belated assessment of promoter penalties can put alleged promoters at a particular disadvantage, because those penalties often depend, in part, on taxpayer conduct. In my experience, the IRS will typically audit at least a few taxpayers who invested in whatever the alleged promoter was selling and will use those results to set up the promoter penalty. (I have personal experience here, having represented many alleged promoters in promoter audits as a tax lawyer.) In auditing those taxpayers (or the promoter) the IRS may issue information document requests or summonses, or conduct interviews. Promoters have far less ability to preserve evidence while the IRS conducts its inquiries. Simply said, the IRS has access to information and legal options to preserve that information that promoters do not. In my experience, the longer it takes the IRS to complete its work, the more that can disadvantage the alleged promoter.

Finally, the policies supporting a statute of limitations are amplified when the government is seeking penalties, as the Supreme Court has also

[5] One could argue that the assertion of the penalty long after the fact could still have some continuing utility as a deterrent because it may serve as a warning to later would-be promoters, but that would only be true when the original promoter makes the penalty public (usually through litigation).

[6] Tom Cullinan and Juan F. Vasquez Jr., "Emerging Issues in Tax Compliance After IRS Funding Increase," *Tax Notes Federal*, May 8, 2023, p. 963.

[7] *Gabelli*, 568 U.S. 442, 448 (internal citations and quotations omitted).

explained: "Chief Justice Marshall used particularly forceful language in emphasizing the importance of time limits on penalty actions, stating that 'it would be utterly repugnant to the genius of our laws if actions for penalties could be brought at any distance of time.'"[8]

I have not seen a case that attempts to defend, from a policy perspective, the position that there should not be a statute of limitations for promoter penalties. Indeed, several of the courts that have held that there is no statute of limitations have noted the potential harshness of that result.[9]

III. The Law Is Messy

The two statutes that promoters typically argue create limitations for promoter penalties are section 6501 and 28 U.S.C. section 2462. But those arguments have been rejected by every appellate court to consider them, albeit for different reasons and with some dissents. The majority opinions create some inconsistencies with (1) Supreme Court precedent, (2) other appellate court decisions, and (3) judicial interpretations of unrelated provisions. I'll start with a brief review of the arguments and the appellate court decisions.

A. The Section 6501 Argument

The argument that section 6501 supplies a statute of limitations for promoter penalties was laid out by Judge Justin R. Walker in his dissent in *Crim*:

> 1. The tax code's general statute of limitations for tax assessments says "the amount of any tax imposed by [the tax code] shall be assessed within 3 years after the return was filed." Section 6501(a).
>
> 2. The tax code defines "tax" to include "tax penalties": "any reference . . . to 'tax' . . . shall be deemed also to refer to . . . penalties." *Id.*, section 6671(a).
>
> 3. So in effect, the general statute of limitations says: "any [*penalty*] . . . shall be assessed within 3 years after the return was filed." *Id.*, section 6501(a).
>
> 4. Because a tax-shelter-promotion penalty is a "penalty," the statute of limitations applies. *Id.*, section 6700 (setting out tax-shelter-promotion penalties).
>
> The IRS concedes that this textual argument works for other statutes of limitations in the tax code. It even accepts that the limitations period for tax *collections* in section 6502(a) covers collection of tax-shelter-promotion penalties. Note why that is so. The limitations period for tax collections applies to tax-shelter-promotion penalties *only* because the tax code defines a "tax" to include a "tax penalty." If that logic works for tax collections, it should also work for tax assessments.[10] [Emphasis in original.]

The Fifth and D.C. circuits (the latter in a split decision) rejected that argument for two main reasons: (1) They relied on the maxim that statutes of limitations against the government are strictly construed, and (2) section 6501(a) keys off the filing of a return, whereas sections 6700 and 6701 can apply without any return being filed.[11]

B. The 28 U.S.C. Section 2462 Argument

The text of 28 U.S.C. section 2462 states: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

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[8] *Id.* at 452.

[9] *Capozzi v. United States*, 980 F.2d 872, 875 (2d Cir. 1992); *Mullikin v. United States*, 952 F.2d 920, 929 (6th Cir. 1991).

[10] *Crim v. Commissioner*, 66 F.4th 999 (D.C. Cir. 2023) (Walker, J., dissenting) (internal citations omitted).

[11] *Id.*; *Sage v. United States*, 908 F.2d 18, 24-25 (5th Cir. 1990). In *Crim*, the D.C. Circuit stated that the Second and Eighth circuits had also held that section 6501 does not apply to promoter penalties. In *Barrister Associates v. United States*, 989 F.2d 1290, 1296-1297 n.1 (2d Cir. 1993), the Second Circuit rejected application of section 6501 to section 6700 penalties in a footnote without analysis. This article does not further discuss that decision. The D.C. Circuit's citation to the Eighth Circuit opinion in *Lamb v. United States*, 977 F.2d 1296 (8th Cir. 1992), is confusing because section 6501 was not at issue in that appeal.

The argument that it applies to promoter penalties is straightforward: (1) An IRS assessment of a promoter penalty is "an action, suit, or proceeding for the enforcement of" a penalty, and (2) no act of Congress provides otherwise, so (3) the limitation period is five years from when the claim accrued.

The Sixth Circuit rejected that argument, as it applied to section 6701 penalties, in *Mullikin*.[12] The court began by noting that its analysis must be guided by the principle that "a statute of limitations sought to be applied to bar a claim of the government must receive a strict construction." The court found section 6701 "silent as to a period of limitations," and that its legislative history "does not offer any direct evidence regarding the intent of Congress as to an applicable statute of limitations." It reasoned, however, that Congress enacted section 6701 to combat "fraud by imposing penalties on individuals who aid in the fraudulent underpayment of taxes." Finding that "Congress typically provides for unlimited periods of assessment" for anti-fraud provisions like section 6701, the court "construed Section 6701 in light of other anti-fraud provisions [to find] that Congress intended that no limitations period apply to initial assessments of Section 6701 penalties." The Sixth Circuit then found that Congress "otherwise provided for a statute of limitations" through section 6502, making 28 U.S.C. section 2462 inapplicable by virtue of its opening clause (that is, "Except as otherwise provided by Act of Congress"). The court explained that while there is no statute of limitations on the assessment of penalties, "once an assessment is made, however, the statute of limitations on the collection of assessed taxes set forth in Section 6502 applies."

Judge Danny J. Boggs dissented, finding that 28 U.S.C. section 2462 "applies to bar penalties for any action more than five years before the penalty assessments were made." He reasoned that 28 U.S.C. section 2462 is a catchall provision that applies in "all cases where the Internal Revenue Code does not otherwise provide such a statute." He noted that 28 U.S.C. section 2462 "makes no . . . exception" for anti-fraud provisions, and Congress knows how to provide an unlimited assessment period when it wants, citing section 6501(c)(1) and (2) and section 6696(d)(1).

The Eighth Circuit in *Lamb*[13] followed the Sixth Circuit without further analysis in a per curiam opinion and extended the holding to section 6700.

The Second Circuit also rejected the argument in *Capozzi*,[14] but for very different reasons. It did join the Sixth and Eighth circuits in finding that "no statute of limitations will block federal government actions unless Congress clearly and specifically says so" but then approached the argument more textually, considering whether the IRS's assessment of the penalty was "an action, suit or proceeding" for the "enforcement" of the penalty. The Second Circuit found that it was not, because it determined those terms "implicate some adversarial adjudication, be it administrative or judicial" whereas an IRS assessment is "an ex parte act. It is merely the determination of the amount of the penalty and the official recording of the liability."

Most recently, the D.C. Circuit also held that 28 U.S.C. section 2462 does not apply to section 6700 penalties. Like the other three circuits, the D.C. Circuit began with the maxim that "statutes of limitation against the government are strictly construed." The court then adopted the rationales of all three prior circuits:

> The Second and Eighth Circuits persuasively reason that Section 2462's statute of limitations is inapplicable to Section 6700 penalty assessment. *See Capozzi v. United States*, 980 F.2d 872, 874-75 (2d Cir. 1992); *Lamb*, 977 F.2d at 1297. Similarly, the Sixth Circuit has held Section 2462 inapplicable to analogous Section 6701 penalties for aiding and abetting understatement of tax liability. *Mullikin*, 952 F.2d at 929. These courts point out that Congress has "otherwise provided" a relevant statute of limitations in Section 6502(a) that requires collection of an assessed tax penalty within ten years of assessment. *See id.; see also Lamb*, 977 F.2d at 1297. Distinguishing assessment of

[12] *Mullikin*, 952 F.2d 920.

[13] *Lamb*, 977 F.2d 1296.

[14] *Capozzi*, 980 F.2d 872.

> a tax penalty from "an action, suit or proceeding," 28 U.S.C. section 2462, the Second Circuit states in *Capozzi*, 980 F.2d at 872, that Section 2462 "implicate[s] some adversarial adjudication, be it administrative or judicial," while "*assessment* of a penalty . . . is an *ex parte* act" that "is merely the determination of the amount of the penalty and the official recording of the liability," *id*. at 874. So too this court concluded in *3 M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), noting that the Second Circuit's "action, suit or proceeding" reasoning was "consistent with [its] analysis" that EPA proceedings under the Toxic Substances Control Act were "action[s], suit[s] or proceeding[s]" in part *because* they are "adversarial adjudications." *Id*. at 1459 n.11.[15] [Emphasis in original.]

C. Maxims Can Matter

Each of the majority opinions discussed above analyzed the applicability of section 6501 and 28 U.S.C. section 2462 under the maxim that an "action on behalf of the United States in its governmental capacity is subject to no time limitation, in the absence of congressional enactment clearly imposing it."[16] As the D.C. Circuit recently explained, "statutes of limitation against the government are strictly construed."[17] While in my experience maxims do not usually affect the result, in these cases I think the maxim mattered quite a lot, as the courts seemed to struggle to sustain the government's position.[18]

As other courts have explained, however, the maxim that "statutes of limitation against the government are strictly construed" does not apply when the government is seeking a penalty. Indeed, the same D.C. Circuit that relied on that maxim in *Crim* has previously rejected it when penalties are at issue:

> The ALJ also supported his ruling that no limitations period applied by invoking a maxim: statutes of limitations ought to be strictly construed in favor of the government. While this accurately recites the Supreme Court's general pronouncements, *see Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984), there is another Supreme Court maxim, older still, a maxim specifically relating to actions for penalties and one pointing in quite the opposite direction: "In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) (Marshall, C.J.). Justice Story, sitting as a circuit justice in a civil penalty case, made the same point as Chief Justice Marshall: "it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence." *United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15,754). *See also H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819, 822 (1st Cir. 1965); *United States v. Maillard*, 26 F. Cas. 1140, 1142 (S.D.N.Y. 1871) (No. 15,709).[19]

The D.C. Circuit reiterated that view in *Johnson*,[20] writing that when the government is pursuing a penalty, those "cases which serve up maxims about the need for strict construction of statutes of limitation . . . are unpersuasive, as they run counter to the Supreme Court's basic position on the subject, first stated by Chief Justice Marshall."

It is impossible to reconcile the D.C. Circuit's reliance on a maxim in *Crim* that the D.C. Circuit itself expressly rejected in two earlier cases. Moreover, for the reasons that the D.C. Circuit explained in *3M* and *Johnson*, the application of

[15] *Crim*, 66 F.4th 999.

[16] *See, e.g.*, *Mullikin*, 952 F.2d at 926 (quoting *Dupont DeNemours & Co. v. Davis*, 264 U.S. 456 (1924)) (internal alterations omitted).

[17] *Crim*, 66 F.4th 999.

[18] The holdings of the Sixth and Eighth circuits that Congress "intended" for there to be no statute of limitations in particular seem to conflict with the plain meaning analysis that the Supreme Court has used to resolve other questions about 28 U.S.C. section 2462. *See Kokesh*, 137 S. Ct. 1635; *Gabelli*, 568 U.S. 442.

[19] *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994).

[20] *Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996).

that maxim in all the appellate cases discussed earlier would seem contrary to Supreme Court precedent that favors a statute of limitations when penalties are in issue.

D. Fraud I Win; Fraud You Lose

According to the Sixth, Eighth, and D.C. circuits' majority opinions, Congress "intended" that there be no statute of limitations for sections 6700 and 6701 because they are "anti-fraud" provisions, and Congress "typically" provides an unlimited time for the IRS to assess a tax or penalty that arises from fraud.

On the other hand, the Second and Eighth circuits have held that sections 6700 and 6701 are *not* anti-fraud provisions.[21] In those cases, the government argued, and the appellate courts agreed, that they were not anti-fraud provisions so that the government could carry its burden of proof via a preponderance of the evidence, rather than clear and convincing evidence. The Eighth Circuit decision is particularly noteworthy, because, as noted, that same circuit held one year later that sections 6700 and 6701 *are* anti-fraud provisions, to support its conclusion that Congress did not intend for there to be a statute of limitations.

More recently, the Eleventh Circuit held that section 6701 *is* an anti-fraud provision for purposes of determining the appropriate burden of proof, relying on the Eighth Circuit decision in *Lamb* and the Sixth Circuit decision in *Mullikin*.[22] At the same time, the Eleventh Circuit noted that its decision was "at odds" with the Second and Eighth circuits (in *Mattingly* but not in *Lamb*, because the Eighth Circuit disagreed with itself in those cases).

E. Appellate Court Conflict Scorecard

The D.C. Circuit disagreed with itself in *Crim* on the one hand, and *3M* and *Johnson* on the other, about the maxim that guides the analysis. The application of the "strictly construed" maxim by the Fifth, Sixth, and Eighth circuits conflicts with the D.C. Circuit decisions in *3M* and *Johnson* (and more importantly, the Supreme Court in *Gabelli* and *Kokesh*).

The Eighth Circuit disagreed with itself in *Lamb*, finding that promoter penalties are "anti-fraud" provisions, and *Mattingly*, in which it earlier found that they are not. The Sixth Circuit (*Mullikin*) agrees with *Lamb*, but not *Mattingly*. The Second Circuit (*Barr*) agrees with *Mattingly*, but not *Lamb*. The Eleventh Circuit (*Carlson*) relied on *Lamb* and *Mullikin*, but disagreed with *Barr* and *Mattingly*.

There is a lot here for the Supreme Court to resolve.

F. Conflicts With Other Provisions

The holdings also conflict with other case law. For example, earlier this year the Southern District of Florida held that the IRS assessment of a section 6700 penalty constituted a "proceeding" within the "plain meaning" of that term for purposes of Federal Rule of Civil Procedure 36(b). The government argued as it did in the context of 28 U.S.C. section 2462, that "proceeding" means something adversarial, but the court found otherwise:

> The United States argues that "proceeding" within Rule 36(b) refers to "litigation" and "not an administrative matter that is not governed by the Federal Rules of Civil Procedure or the Federal Rules of Evidence." ECF No. [121] at 6 n.2. Relatedly, the United States asserts that the IRS's "administrative investigation . . . is neither a 'judicial proceeding' nor 'preliminarily to or in connection with a judicial proceeding.'" *Id.* at 7 (quoting *United States v. Baggot*, 463 U.S. 476, 481 (1983)).
>
> The United States' arguments draw no support from the plain terms of Rule 36(b), which broadly prohibit the use of admissions in "any other proceeding." The prohibition is not limited to "litigation" or "judicial proceeding[s]," as the United States contends, but rather extends to "*any*" proceeding. Rule 36(b) (emphasis added). The plain meaning of "proceeding" includes both "judicial and administrative proceedings." *BP America*

[21] *See Mattingly v. United States*, 924 F.2d 785 (8th Cir. 1991); *Barr v. United States*, 67 F.3d 469 (2d Cir. 1995).

[22] *Carlson v. United States*, 754 F.3d 1223 (11th Cir. 2014).

Prod. Co. v. Burton, 549 U.S. 84, 92 (2006). It encompasses "investigatory or adjudicatory" actions. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (noting that the Fifth Amendment "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory[.]"). It includes "[a]ny procedural means for seeking redress from a tribunal or agency." Black's Law Dictionary (11th ed. 2019) (definition of "proceeding"). In short, the plain meaning of "proceeding" is a broad term that extends to administrative adjudications or assessments.[23]

Obviously, finding that an IRS assessment of the section 6700 penalty is a "proceeding" for one purpose but not another, all under a plain meaning analysis, seems strange. Of course, one of these courts may simply have gotten it wrong. But my point in this article is merely to point out the conflict, and not to argue which position is correct.

IV. Conclusion

I hope that this issue somehow, someway, makes it to the Supreme Court. If it does, I'd bet that the Court finds that either section 6501 or 28 U.S.C. section 2462 applies, given the Court's very textual approach to 28 U.S.C. section 2462 in recent cases. If not, I hope that Congress considers enacting a statute of limitations for promoter penalties. I think either would be a good thing for tax administration. ■

[23] *United States v. Meyer*, No. 18-cv-60704 (S.D. Fla. Mar. 28, 2023).