

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DAVID H. BARAL, Petitioner v. UNITED STATES.

CASE NO: 98-1667 c.1

PLACE: Washington, D.C.

DATE: Tuesday, January 18, 2000

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID H. BARAL, :
4 Petitioner :
5 v. : No. 98-1667
6 UNITED STATES. :

7 - - - - -X
8 Washington, D.C.
9 Tuesday, January 18, 2000

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 WALTER J. ROCKLER, ESQ., Washington, D.C.; on behalf of
15 the Petitioner.

16 KENT L. JONES, ESQ., Assistant to the Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf
18 of the United States.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 98-1667, David Baral v. the
5 United States.

6 Mr. Rockler.

7 ORAL ARGUMENT OF WALTER J. ROCKLER

8 ON BEHALF OF THE PETITIONER

9 MR. ROCKLER: Mr. Chief Justice, and may it
10 please the Court:

11 This case involves a claim for overpayment of
12 income tax for the calendar year 1988. There is no
13 question of the overpayment. It occurred and is
14 acknowledged.

15 The taxpayer's claim was filed June 1, 1993 on
16 Mr. Baral's income tax return which was filed late.
17 Nevertheless, there is no dispute that the claim of
18 overpayment was timely for code section 6511(a) purposes.

19 The question of a limitations bar to recovery
20 arises under code section 6511(b), which provides that
21 only payment of tax sought to be refunded, made within 3
22 years before the claim, may be recovered. It's 3 years
23 plus any extension of time granted to file a return.

24 QUESTION: 4 months here?

25 MR. ROCKLER: 4 months in this case, yes.

1 If the starting date for limitations -- if the
2 starting date for limitations is April 15, 1989, the
3 payments could not be recovered. The starting date is
4 June 1, 1993. The statute of limitations does not apply.

5 The limitations period under section 6511(b)
6 starts running from the date of payment of the income tax,
7 not from the date that income tax liability arose or
8 accrued.

9 In the Government's view and that of the court
10 of appeals below, the payment of income tax was made April
11 15, 1989, the income tax return due date, although on that
12 date, the amount of income tax liability had not been
13 determined and was not known by anyone.

14 The Government and the court below assert that
15 section 6513(b) -- (b)(1) and (2) -- makes the return due
16 date the starting date for limitations, quote, as a matter
17 of law. In other words, they assert that deemed due date
18 of the return was the date of payment of the income tax.

19 In our view this is a misreading of the statute.
20 The statute provides that the -- the deemed date, the date
21 of the return being due, is the date to which withholding
22 taxes and estimated taxes are brought forward instead of
23 their actual payment dates which occurred during the
24 calendar year.

25 QUESTION: But the statute reads as though

1 estimated tax payments are prepaid income taxes. They are
2 deemed to be prepaid income taxes.

3 MR. ROCKLER: No, I don't think the -- I don't
4 think the section says that, Justice O'Connor. I think
5 it's a -- if I may refer to the section itself. That is
6 section 6513(b)(2).

7 QUESTION: Where will we find that, Mr. Rockler,
8 in the brief?

9 MR. ROCKLER: It's at the end of both briefs.
10 In our principal brief, it's at page A-12, appendix page
11 12.

12 That says, any amount paid as estimated income
13 tax for any taxable year -- I repeat estimated income tax
14 -- shall be deemed to have been paid on the last day
15 prescribed for filing the return under section 6012 for
16 such taxable year, determined without regard to any
17 extension. The deemed date is the date of payment of the
18 estimated tax.

19 Now, the court in considering this, at least
20 those courts that have been adverse to our position, have
21 without any focus simply assumed that the deemed date of
22 payment of the estimated tax is the deemed date for
23 payment of the income tax. And those are two totally
24 different things. An estimate is just what it claims to
25 be.

1 If I may digress for a moment and refer to the
2 Rosenman case, which has been featured heavily in the
3 briefs here. In that case, the remittance was --

4 QUESTION: May -- may I interrupt you, Mr.
5 Rockler, for just a second? Why would the Congress want
6 to draw a distinction? What is the significance of
7 deeming a date for the payment of the estimated tax other
8 than to establish the date of payment of the tax itself?

9 MR. ROCKLER: No, no. There -- if I may say so,
10 Justice Stevens, the statute which originally brought this
11 into the code, the 1943 tax act, made the point that the
12 deemed date was the deemed date, but not earlier than the
13 deemed date. In other words, that phrase appeared. It
14 got dropped in the '54 code.

15 But the significance I think is that you have
16 cases not unusual at all, where taxpayers file a return
17 early between December 31 and the due date of the return,
18 and the -- that -- that filing of a return and bringing
19 across the credits for withholding and estimated taxes
20 against the income tax would start the statute of
21 limitations running before the return date. It also would
22 start interest running before the return date.

23 And I think the real function was to limit the
24 application of the statute to not earlier than a return
25 filed on the due date --

1 QUESTION: But that language --

2 MR. ROCKLER: -- and to -- and to limit the
3 payment of interest to that date.

4 QUESTION: Mr. Rockler, you -- you recognize,
5 Mr. Rockler, that that language was dropped. And also
6 starting from the '39 code, the word was may and then it
7 -- not earlier than, and now the word is shall be. And
8 the caption of 6513(b) is prepaid income tax. So, at
9 least the caption, although it may not have the force of
10 law, at least the caption, prepaid income tax, and the
11 word shall seem to tug against the position you're taking.

12 MR. ROCKLER: As to the caption, first, I think
13 that is a -- a secondary or tertiary form of reading the
14 -- the statute. I think the words of the statute itself
15 are of more consequence.

16 But the word prepaid income tax can also be
17 viewed as a synonym for advanced payment of income tax, in
18 other words, can refer to a credit situation.

19 Let me refer the Court to section 6611 of the
20 code, which is cited in the briefs. It makes plain in two
21 sections on interest --

22 QUESTION: And where will we find this, Mr.
23 Rockler?

24 MR. ROCKLER: I think it's cited in the
25 Government's brief. It is cited. I'm not sure it's

1 reproduced in the briefs.

2 QUESTION: If you were going to rely on it, I
3 would have thought it would be a good idea to reproduce
4 it.

5 MR. ROCKLER: I regret, Your Honor -- Mr. Chief
6 Justice, that I don't think it is in the briefs.

7 But that has two subsections, one of which deals
8 with late return filing. It says, interest shall not be
9 paid until the return is filed. Then it has another
10 subsection entitled advanced payments, withholding taxes,
11 and estimated taxes, and that, in effect, deals with early
12 payments and says interest won't be paid until the due
13 date at the earliest. In effect, it repeats what was said
14 pretty much in the '43 act.

15 Now, one reason why we've referred to the '43
16 act is the Government has cited that act, I think without
17 any great effect, as controlling with respect to the
18 purpose for which this was adopted.

19 Incidentally, I may say, in response to Justice
20 Ginsburg's comments, that the Habig case, which we have
21 cited in the brief -- that's 390 U.S. at page 225 -- deals
22 with section 6513(a). The sections immediately involved
23 here are 6513(b). But that also has a deemed due date as
24 the date for the presumable starting point of the statute
25 of limitations. And in that case, the Court makes it very

1 clear that that is designed for the purposes which I
2 ascribed to 6513(b), namely not to start the statute
3 before the return due date, not to start interest payments
4 before the due date.

5 QUESTION: Mr. Rockler, the Habig case was
6 about, was -- was it not, filing a false tax return? So,
7 it seems to be quite far afield from this case.

8 MR. ROCKLER: Oh, it is not -- it is not
9 directly on point for this case. We -- we cited that case
10 primarily for the point that impossibility may override
11 the application of the statute. In that case, there was a
12 criminal case and a statute of limitations of 6 years.
13 And the question was, did the statute start on the return
14 due date or the actual filing of the return? And the
15 Court held it had to be the actual filing because the
16 offense was to be found in the return filed. How could
17 you have a statute of limitations running before the
18 offense occurred?

19 Similarly, in our situation, our position
20 basically is, how can you have the payment of a tax when
21 nobody knows what it is? And I might remind the Court
22 that long ago this Court held that to be the governing
23 principle here. That's -- that's the Rosenman case, and
24 the Rosenman case is very central to your consideration, I
25 think, of this situation.

1 The Rosenman case was very close to this case in
2 many respects. There the taxpayer, a month or so before
3 he filed a return, sent in a letter saying that he was
4 paying an estimated tax, which is involved here as well,
5 for the purpose of avoiding penalties and interest. And
6 the Court said at the time he remitted the estimate of
7 estate tax there, he couldn't be paying the estate tax
8 because nobody knew what the estate tax was at that time.

9 QUESTION: But -- but Rosenman too, Mr. Rockler,
10 involved a rather express agreement by the Government, did
11 it not, to kind of hold this in escrow?

12 MR. ROCKLER: No.

13 QUESTION: Certainly the Court said that in its
14 opinion.

15 MR. ROCKLER: No, I don't think the Court said
16 it was an express agreement. They said this was an
17 operating agreement whereby the taxpayer paid in an
18 estimate and the Government put it in the suspense
19 account.

20 And we have exactly the same situation. I refer
21 the Court to the record in this case. There is a
22 certificate of assessments which shows that until such
23 time as the return was filed and assessment was made, the
24 withholding taxes and the estimated taxes were -- were
25 held in a suspense account as credits. As a matter of

1 fact, the code says that withholding taxes are only
2 credits. It doesn't say that they're the payment of
3 income taxes. Section 31 of the code says that the
4 withheld taxes are credits to be used against the income
5 tax.

6 Now, the Government has carefully avoided any
7 discussion of the two governing regulations in this case.

8 QUESTION: Mr. Rockler, before you -- before you
9 get off Rosenman, there was -- there was another feature
10 in that case which -- which no longer exists and is -- is
11 not a factor in the present case, and that is the
12 Government there was -- was trying to have its cake and
13 eat it too. It was asserting that for purposes of the
14 statute of limitation, the -- the filing -- the filed date
15 was determinative, but -- but that no -- but that interest
16 would -- would -- well, let's see.

17 No. It was asserting that for purposes of -- of
18 the statute of limitation, the date on which it should
19 have been filed was determinative, but that for purposes
20 of whether interest runs, the date of actual filing was
21 determinative so that you would not get any interest on
22 the prepayment until the return was actually filed.

23 Now, that feature of the law has since been
24 changed by -- by statutory amendment so that you will get
25 interest from the date that the -- at least from the

1 return due date.

2 MR. ROCKLER: No, no. Under the present law,
3 you get interest from the date the return is actually
4 filed. That's 6611. You don't get interest from the
5 return due date. That just isn't so.

6 QUESTION: Well, that's to encourage you to file
7 your return on time to say if you don't file it on time,
8 then you won't get interest.

9 MR. ROCKLER: Yes.

10 QUESTION: Isn't that the purpose?

11 MR. ROCKLER: I -- I think that is correct.

12 But taxpayers have no incentive to delay the
13 filing of their returns. There is no real risk of that,
14 as we pointed out, particularly in the reply brief.

15 QUESTION: What was it --

16 MR. ROCKLER: If they've overpaid, they are
17 losing interest for whatever period of late filing they're
18 engaged in. If they've underpaid, they're subject to
19 penalties and interest which continue to run during the
20 period of delay. So, there's no incentive on the part of
21 taxpayers to file late. There are only penalties attached
22 to that.

23 And there's no advantage in litigation to filing
24 late because the burden of proof and the burden of coming
25 forward is going to be the taxpayer's in a refund suit.

1 QUESTION: Mr. Rockler, I'm concerned that the
2 argument that you -- you are making would be detrimental
3 to many taxpayers, and let me give you this example.

4 Suppose -- let's take the year 1988. \$100,000
5 in both estimated taxes and withholding were paid in, and
6 then a return is filed in the year 1993, as here. And the
7 Commissioner determines that the taxpayer underpaid by
8 \$10,000. Then on your theory, the taxpayer would owe
9 interest on \$110,000 rather than just \$10,000 because he
10 had never paid the tax.

11 MR. ROCKLER: No. I think in that case, on the
12 hypothetical you gave, if -- if there were accumulated
13 withholding and estimated taxes, as in our case, there
14 would not be any interest with respect to those amounts
15 that accumulated as a suspense credit item. If there were
16 no payment whatever --

17 QUESTION: But they were not paid.

18 MR. ROCKLER: If there were no payment whatever
19 in any form, then you're right.

20 QUESTION: Well, you say it's payment for some
21 purposes and not others?

22 MR. ROCKLER: No, no. It's not payment. It's a
23 credit. The -- the payment in the nature of a deposit,
24 which is what Rosenman described the remittance as, does
25 serve to mitigate against an interest charge against the

1 taxpayer. He doesn't get any -- he doesn't get any
2 benefits for the delay in filing, but he isn't penalized
3 because the money is there available to the Government
4 during that interval.

5 QUESTION: But what -- you say that quite
6 confidently, but what statutory provision is it that says
7 interest will run or not run in that situation?

8 MR. ROCKLER: Section 6611.

9 QUESTION: Which you don't cite in your brief.

10 MR. ROCKLER: That -- that is a section which
11 neither the Government nor the taxpayer here attached to
12 the briefs, I regret to say. I would like to have --

13 QUESTION: Let -- let me come back to -- to
14 Rosenman. You're quite right. The -- the issue in the
15 case was not an issue of timing, but it was an issue of
16 whether -- whether the -- the prepayment was a prepayment
17 of taxes. If it was a prepayment of taxes, interest would
18 be due. If it was only a deposit, interest would not be
19 due. And the Government was claiming that interest was
20 not due because it was not a prepayment of taxes for that
21 purpose, but that it was a prepayment of taxes for the
22 purposes of the statute of limitation. It was taking an
23 inconsistent position on that issue.

24 Now, that is not the situation here because the
25 statute now makes it clear that even if it is not a

1 prepayment of taxes, even if it is just -- whatever it is,
2 interest runs on it, on the overpayment amount.

3 MR. ROCKLER: I -- I think you're quite correct,
4 Justice Scalia, in your observations with respect to what
5 the case says. I think Justice Frankfurter made that
6 point very clearly. He said you can't have payment for
7 statute of limitations purpose, but not payment for
8 interest purpose.

9 QUESTION: And we don't have that problem here.

10 MR. ROCKLER: But the holding of that case is
11 more basic than that observation. The case really stands
12 for the proposition -- the Court made it expressly clear
13 -- that you cannot have the payment of a tax when you
14 don't know what the tax is. You can't apply a credit to
15 an unknown item. If I prepaid to a department store \$100
16 because I think my wife is going to run up charges, I
17 haven't paid any -- any debt to the department store until
18 such time as she runs up the charges. If I'm a law firm
19 and I receive a retainer, which is to be applied to
20 time --

21 QUESTION: No, but the charges have been run up
22 here. I mean, you're liable for the tax not by reason of
23 your filing the return. You're liable for it by reason of
24 your breathing in and out for a year --

25 (Laughter.)

1 QUESTION: And -- and getting some income.

2 MR. ROCKLER: You could say exactly the same
3 thing for the estate taxes in the Rosenman case. You
4 could say when the decedent died, there was a distinct tax
5 liability immediately. That is not --

6 QUESTION: But in Rosenman --

7 MR. ROCKLER: -- the position this Court took
8 then. This Court said until such time as the tax is known
9 and asserted. And it could be asserted in two ways. It
10 could be asserted by the taxpayer filing a return or self-
11 assessing himself in a sense. It could be determined by
12 the Government asserting an amount. They could file a
13 return for him. That's an available course for the
14 Government. But --

15 QUESTION: Is -- was there at the time of
16 Rosenman --

17 MR. ROCKLER: Pardon me?

18 QUESTION: At the time, did the statute
19 specifically say -- the language that we have -- that an
20 amount paid as an estimated tax shall be deemed to have
21 been paid on such and such a date?

22 MR. ROCKLER: No, no.

23 QUESTION: No, it didn't.

24 MR. ROCKLER: That -- that section was not
25 applicable.

1 QUESTION: Well, so we have a new section and we
2 have also the point Justice Scalia made. And I wondered
3 as well in Rosenman, although Frankfurter did use the word
4 estimated taxes, I don't know that the payor thought of it
5 that way because the payor said this payment is made under
6 protest and duress, just to avoid penalties and interest,
7 since it is contended by the executors that not all of
8 this sum is legally or lawfully due. And so, one might
9 say given that they didn't think they owed it, it wasn't
10 the payment of an estimated tax. But here it is an effort
11 to pay an estimated tax.

12 MR. ROCKLER: Justice Breyer, I think the answer
13 is that the transmittal letter of the taxpayer, according
14 to the Court, said it was an estimate on Federal estate
15 tax. The Court I think is referring to the transmittal
16 letter as protesting and also as trying to avoid penalties
17 and interest.

18 QUESTION: But -- but as Justice Breyer's
19 questions suggest, we're living in a post-Rosenman world,
20 and after Rosenman, the Government made express provision
21 in its revenue procedures so that if you paid a remittance
22 as a deposit, you had to expressly say it was a deposit.
23 So, even if Rosenberg were wholly in your favor, it seems
24 to me to have been altered by the revenue rulings after
25 that point saying that you must make -- make it very clear

1 that this is a deposit. And that wasn't done here.

2 MR. ROCKLER: Justice Kennedy, if I may say so,
3 both withholding taxes and an estimate do nothing but give
4 rise to credits, and there are regulations in effect which
5 say these credits are to be applied -- future tense --
6 when the return is filed, and they are set up against the
7 income tax then known to be due.

8 QUESTION: Well -- well, then you're saying that
9 the revenue procedure adopted in the wake of Rosenman was
10 absolutely to no effect.

11 MR. ROCKLER: No, I'm not saying it's to no
12 effect to taxpayers who are aware of it. A revenue
13 procedure is not widely disseminated and not viewed
14 necessarily as law. There's a difference between a rev.
15 proc. and a formally adopted Treasury regulation. If the
16 Government wants that to be the sole method by which
17 anybody could remit a payment to be treated as a credit or
18 a deposit, then why doesn't it adopt a regulation which
19 says so?

20 We have regulations in this case, and the
21 regulations are favorable to the taxpayer in this case.
22 And you will find a glaring omission of any reference to
23 those regulations in the briefs by the Government. I
24 mean, those regulations provide that the tax is paid on
25 the return. The overpayment is determined on the return,

1 and credits are applied on the return.

2 As to --

3 QUESTION: But, Mr. Rockler, the -- the
4 taxpayer, instead of filing this under the form for a
5 deposit, signed a voucher that went along with his
6 estimated tax payment that said he was tendering so much
7 as an income tax payment. That was the word used on the
8 voucher, was it not? Income tax payment?

9 MR. ROCKLER: The -- the voucher is a voucher
10 for an estimated tax payment. It's an estimated tax form.

11 QUESTION: Yes, but the words were I tender this
12 as an income tax payment.

13 MR. ROCKLER: The -- the taxpayer as such is not
14 the ultimate in sophistication on tax matters. When he
15 picks up a form which says estimated tax voucher, that's
16 what he thinks he's paying, and he certainly is paying an
17 estimate. He doesn't know what the tax is at that point.

18 In this particular case, as the Court well
19 knows, the taxpayer had no records and asked for them from
20 the Government. Ultimately he got them from the
21 Government, but he got them 4 years later. Until such
22 time as he got the 1099's which showed his income
23 receipts, until he got his prior year's return which
24 showed his capital loss, he couldn't file a return. He
25 was absolutely blocked. Now, he certainly wasn't paying a

1 tax at that point.

2 QUESTION: Well, that was not -- that was no
3 fault of the Government, was it, Mr. Rockler, that he
4 didn't retain --

5 MR. ROCKLER: No, no.

6 QUESTION: -- his return?

7 MR. ROCKLER: No. I'm -- I'm not asserting that
8 by virtue of these facts he's equitably entitled
9 irrespective of the statute. I'm saying the statute
10 doesn't apply. The reason the statute doesn't apply is,
11 to quote the essence of Rosenman, he didn't know what the
12 tax was and neither did the Government. Nobody knew what
13 the tax was at that point on the deemed return date.

14 QUESTION: Mr. Rockler --

15 MR. ROCKLER: I think what's involved here is a
16 -- is a serious misreading of 6513(b).

17 QUESTION: Mr. Rockler, you seem to be making a
18 sort of a -- I don't know -- a philosophical argument that
19 it is impossible to make a prepayment on a debt unless the
20 precise amount of the debt is -- is known, and -- and that
21 doesn't seem to me true.

22 Let's -- let's assume I'm leaving on -- I'm
23 going to be out of the country for 2 months and -- and I
24 know that I have run up credit card charges, and that when
25 the credit card bill comes, I won't be here to pay it, and

1 so I'll be charged interest later. Even though I don't
2 know the -- the precise amount of my indebtedness, I know
3 that I am indebted to the credit company. I could write a
4 check and mail it off to them in advance of their
5 submitting to me the precise bill for -- for the last
6 month, and that would be a perfectly valid prepayment of
7 my debt. Payment of my debt in advance of the date on
8 which they assess me.

9 And it seems to me that's precisely what happens
10 here. There's no -- there -- there's no philosophical
11 objection to it.

12 MR. ROCKLER: No. I think there's a difference
13 between a credit and a bill, a -- a stated bill with a
14 specific amount.

15 I -- my point of departure is this Court's
16 decision in the Rosenman case. That is what this Court
17 said. It said until such time as you know what the tax
18 is, until it's been asserted, until it's been specified,
19 you can't be paying it.

20 Now, in your credit case, it is true you will
21 have on deposit with your potential creditor an amount,
22 but you haven't paid any bill at that point because there
23 isn't any bill, and you don't pay an income tax until you
24 know what it is.

25 And that -- that is exactly what Judge Harlan in

1 the Lewyt case, which is cited by -- by the Government in
2 its brief, said about Rosenman. This is Judge Harlan who
3 was later Justice Harlan, Second Circuit. And I'm quoting
4 from 215 F.2d 518, a Second Circuit case at 522-523. I
5 quote. A remittance which does not satisfy an asserted
6 tax liability should not be treated as the payment of the
7 tax. That was his conclusion from Rosenman. That's my
8 conclusion from Rosenman. How can you say that every
9 credit constitutes a payment of a future bill?

10 QUESTION: Mr. Rockler, what -- I'm not familiar
11 with that case. Did it arise under the '39 code or the
12 '54 code?

13 MR. ROCKLER: Since the case was decided in '54,
14 it must have been the '39 code.

15 QUESTION: Right. So --

16 MR. ROCKLER: Now --

17 QUESTION: -- but we have -- we have a different
18 code, and we have a different Government practice.
19 Whatever you have explained about credits, Justice
20 Frankfurter did use the word escrow, that this was put in
21 an escrow account. So, it sounds like a special
22 arrangement that the Government had made.

23 MR. ROCKLER: No. I don't think you can view
24 the Rosenman case as peculiar to the '39 code. The
25 language of that case is broad language.

1 Now, the Government hasn't --

2 QUESTION: Yes, but the statute read may not
3 shall in -- in '39.

4 MR. ROCKLER: The -- the -- that is correct, but
5 in the '54 code, in the legislative committee reports that
6 accompany it, there was no intent really to change
7 anything except the deemed due date of returns. That was
8 extended by 1 month. Under the '39 code, you had a 2 and
9 a half month period for filing returns. Under the '54
10 code, a 3 and a half month period. There is nothing in
11 the history of that statute, there's no -- no discussion
12 whatever of the changes which some draftsman inserted
13 there and which I think got by unnoticed. There was no
14 intent to change anything except the due date. So, I
15 don't think the distinction is all that significant.

16 Moreover, getting -- getting back to basics, the
17 Rosenman case stands for the broader proposition, which I
18 have asserted here and which I believe, namely you cannot
19 pay a tax until you know what it is. You can set up
20 credits.

21 And there's no detriment to the Federal revenue
22 or the revenue system by the position we're taking here.
23 It's the taxpayer who, filing late, suffers whatever
24 penalties there are. The Government doesn't suffer any
25 penalties. The Government doesn't lose track of

1 taxpayers. Nowadays we're in the computer age.

2 QUESTION: Thank you, Mr. Rockler.

3 Mr. Jones, we'll hear from you.

4 ORAL ARGUMENT OF KENT L. JONES

5 ON BEHALF OF THE UNITED STATES

6 MR. JONES: Mr. Chief Justice, and may it please
7 the Court:

8 There really is a simple, straightforward,
9 textual answer to the question presented in this case, and
10 it only takes me about a minute to describe it.

11 Section 6511 of the code limits the amount of
12 any refund to the amount of taxes paid during the 3 years
13 prior to the filing of the refund claim. The question in
14 this case is simply when are remittances of estimated
15 withholding taxes to be regarded as paid for the specific
16 purpose of the refund limitations in section 6511, and the
17 introductory clause of section 6513(b) expressly and
18 concisely answers that question, for it says that
19 remittances of estimated tax and withholding taxes shall,
20 quote, for the purposes of section 6511, be regarded as
21 paid on the date the return is due.

22 The history of this provision makes perfectly
23 clear --

24 QUESTION: That isn't quite the way the -- the
25 -- at least the version of 6513(b)(2) that I have before

1 me reads, where it says -- would you -- would you read the
2 exact language again?

3 MR. JONES: Well, the language that I was
4 emphasizing is up there after prepaid income tax where it
5 says, for purposes of section 6511.

6 QUESTION: Ah, or 6512.

7 MR. JONES: Right, and 6512 is the statute of
8 limitations in Tax Court cases.

9 QUESTION: Okay, and then -- then -- so, from
10 there you dropped down to the text of --

11 MR. JONES: Then I was summarizing the rest of
12 the text. (b) (1) says that you -- that you use the -- for
13 withholding taxes, you treat those as paid on the date of
14 the -- that a return is due, and then (b) (2) says that for
15 estimated taxes, you treat those on the date the return is
16 due -- as paid on the date the return is due.

17 QUESTION: So, (1) and (2) distinguish between
18 two different situations.

19 MR. JONES: Both of which are involved in this
20 case because we have in this case both withholding and
21 estimated taxes, and so both (b) (1) and (b) (2) apply here.
22 And under both of those provisions, Congress said that for
23 purposes of the refund limitations in section 6511, these
24 kinds of payments are to be regarded as made -- paid on
25 the date the return is due.

1 QUESTION: Now, you also said 6511 --

2 MR. JONES: Yes, sir.

3 QUESTION: -- in your 1-minute summary.

4 MR. JONES: That's right. And that should be on
5 the prior page.

6 QUESTION: Now, what -- what part of section
7 6511?

8 MR. JONES: The -- the particular part involved
9 here is 6511(b)(2)(A), which begins to be quoted on
10 appendix A-11 of the blue brief.

11 QUESTION: Okay, and what -- point to the
12 specific language --

13 MR. JONES: The specific language would be in
14 the -- if the claim was filed by the taxpayer during the
15 3-year period following the filing of the return, and that
16 references us back up to 6511(a). But if you filed within
17 the 3-year period filing -- following the return, then the
18 amount that the -- the amount of the credit or refund
19 shall not exceed the portion of the tax paid within the
20 period immediately preceding the filing of the claim equal
21 to 3 years plus the period of any extension. And so, I
22 was summarizing this provision when I said that in --
23 6511(b)(2)(A) limits the amount of the refund or the taxes
24 paid within the period of 3 years of -- of the refund
25 claim.

1 And then you look to 6513(b) which says for
2 purposes of that section, withholding and estimated taxes
3 are to be regarded as paid on the date the return is due.

4 The legislative history of this is perfectly
5 clear. We've cited it in our brief. When Congress
6 enacted these interrelated provisions, it did so for the
7 very purpose of answering the question in this case, and
8 it says that these payments are to be regarded as paid for
9 purposes of the refund limitations on the date the returns
10 are -- are due.

11 QUESTION: Mr. Jones, Mr. Rockler referred to
12 regulations that he thought were supportive of his
13 position. Would you address the regulatory scheme?

14 MR. JONES: Well, the only thing that he -- he
15 cites in the regulations are simply provisions that direct
16 taxpayers as a general matter to make their refund claim
17 on their return. If they've made an overpayment -- as we
18 all know, the last line on the return is you put in the
19 overpayment. That satisfies the regulatory refund --

20 QUESTION: Well, Mr. Rockler wasn't overly
21 impressed with your revenue procedure, and he says there's
22 a glaring omission because the regs don't pick this up.
23 Why don't you have a regulation? That was his argument.

24 MR. JONES: Well, this is a procedural rule, so
25 I mean, it is a regulation in the -- in the broad sense of

1 the term. It is a rule adopted by the Service to govern
2 this procedural aspect of its work. It's not a
3 substantive regulation like a Treasury regulation that
4 might interpret some substantive provision of the code,
5 but it sets out procedures that the Service will follow in
6 accepting deposits.

7 And -- and I should emphasize that -- maybe out
8 of context, but the reason why we accept deposits is not
9 discussed in any of these cases and it's kind of obscure.
10 The only reason why a taxpayer would ever want to make a
11 deposit would be because he wanted to preserve his
12 opportunity of going to Tax Court. If he pays the tax,
13 then there would be no deficiency to be noticed, and
14 therefore no way for him to go into Tax Court to review
15 the notice of deficiency.

16 QUESTION: How -- how is it supposed to work if
17 some taxpayer doesn't know that much about it, is in some
18 complicated situation? He files his return all right, but
19 he isn't certainly about something. So, he sends in a
20 check for \$10,000 and just says, gee, I -- I don't have a
21 clue what I'm supposed to do here. Here are all the facts
22 and sets them all out. And he never hears from anybody
23 for 5 years or so. And finally, after about 5 years, he
24 gets back a letter, oh, you don't owe anything. And --
25 and what's supposed to happen?

1 MR. JONES: Well, if he -- oh, you mean that he
2 didn't even owe the \$10,000.

3 QUESTION: Yes, right.

4 MR. JONES: Well, that would certainly be an
5 unfortunate situation.

6 (Laughter.)

7 MR. JONES: I'm not sure that I can think of a
8 situation like that ever happening, but --

9 QUESTION: Well, I don't know.

10 (Laughter.)

11 MR. JONES: To try to parse through the -- the
12 hypothetical, if -- if he made it as a payment, which I
13 assume he did because he didn't --

14 QUESTION: He just -- you know, he gets his tax
15 -- a very honest person. He sends it in. He says, I
16 couldn't owe more than this. I -- I'm sure I don't owe
17 more than \$10,000. Help. I don't -- can't -- I -- I
18 never go near lawyers.

19 (Laughter.)

20 QUESTION: I expect you to help me. Just,
21 please, tell me what I owe. I'll pay it.

22 MR. JONES: I can answer your question. He made
23 a payment. He made a payment that was applied against his
24 taxes. If he didn't need to make the payment, he made an
25 overpayment. If he made an overpayment, he should have

1 filed a refund request in a timely manner.

2 QUESTION: Yes, but he didn't because he never
3 heard from anybody for 5 years.

4 MR. JONES: Well, I'm not sure what it was he
5 needed to hear from us because --

6 QUESTION: Well, in other words, suppose 5 years
7 goes by. He never hears a word. He sent in the \$10,000,
8 and then he gets a letter 5 years later, you didn't owe
9 anything.

10 MR. JONES: All taxpayers are on notice of the
11 law, and the law in this respect says --

12 QUESTION: He's out of luck.

13 QUESTION: That's this case, isn't it?

14 MR. JONES: On the bare facts that you
15 described, yes, he's out of luck.

16 QUESTION: Isn't the hypothetical precisely the
17 same as this case?

18 MR. JONES: I mean, that's why there are
19 statutes of limitations that are designed to cut off stale
20 claims. You've described what is a stale claim.

21 QUESTION: We have a self-assessment system.
22 This is a taxpayer who simply doesn't want to -- doesn't
23 want to self-assess.

24 MR. JONES: That's exactly right.

25 QUESTION: And I guess you're not allowed to do

1 that.

2 MR. JONES: The whole concept of -- of
3 petitioner's position is alien to our system of taxation.
4 He says you can't pay a tax until it's been assessed. We
5 have a system of self-assessment. Taxpayers are supposed
6 to figure out their own tax liability and are supposed to
7 pay it with the return at the time the return is due.

8 Section 6151 of the --

9 QUESTION: It may be worth \$10,000 not to have
10 to do that.

11 (Laughter.)

12 MR. JONES: Well, he should still file a return
13 even if he doesn't owe us money because, I mean, both as a
14 matter of exposing himself to penalties, but beyond that,
15 I mean, we can't know -- we can't go out and investigate
16 everybody without any record. We need a return to -- at
17 least as a point of departure, to figure out people's
18 liabilities.

19 QUESTION: I'm simply pointing out it -- it
20 could be a really honest mistake situation. The taxpayer
21 has done everything possible, and perhaps the IRS is at
22 fault if they don't respond promptly. Now, I guess what
23 you're saying is there's just no remedy, and I wonder if
24 there -- there is any. And I agree --

25 MR. JONES: People need to be diligent in

1 protecting their rights. I -- I don't think --

2 QUESTION: Well, you might also say that the
3 taxpayer has not done everything he could possible.

4 MR. JONES: That's right.

5 QUESTION: He's supposed to file -- he's
6 supposed to file a return.

7 MR. JONES: And he's supposed to file a return,
8 and he's supposed to file a refund claim. And -- and in
9 your hypothetical, his failure to comply with the law --

10 QUESTION: He did in my hypothetical. He did.

11 MR. JONES: His failure to comply with the law
12 means that he's not entitled to a refund.

13 The -- the court of appeals disposed of this
14 case in -- in a one-page opinion, and frankly, that --
15 that was not an unrealistic approach because the text of
16 the statute is clear. Congress plainly has it within
17 their right to deem what is paid for purposes of the
18 limitations period, and they quite clearly did so and
19 quite clearly intended to do so.

20 Now, what petitioner says is, well, his only
21 textual argument is that, well, these are payments of
22 estimated taxes and withholding taxes and that's somehow
23 different from income taxes. And -- and that's plainly
24 not correct. As -- as has already been pointed out, the
25 title of -- of this provision, when Congress enacted it,

1 is prepaid income taxes. And section 6315 of the code
2 specifically describes estimated tax payments as payments
3 on account of the income tax.

4 And section 6401(b) specifically says that if
5 you have withholding -- withholding credits, the only way
6 -- that are applied against your income tax, the only way
7 you can recover them is if they have resulted in an
8 overpayment of your income tax. And the only way you can
9 recover them is if you file a timely claim under 6511 for
10 recovery of an overpayment of income tax.

11 Congress really worked pretty hard to make all
12 these provisions work together, and they really do when
13 you carefully pull them apart and look at how they work.

14 The -- setting aside the text of the statute,
15 petitioner then says, well, just as a matter of logic, you
16 can't pay a tax before it's actually been finally
17 determined and assessed. Well, we're supposed to self-
18 assess. We're not supposed to wait for the Service to
19 tell us what our obligations are.

20 In the Manning case, this Court pointed out that
21 on the date the return is due, under section 6151 of the
22 code, every taxpayer has a positive obligation to pay his
23 tax without, in the words of the Court, an actual
24 assessment of it.

25 An assessment is not a prerequisite to

1 liability. An assessment -- interest accrues on a
2 liability without assessment. The United States may bring
3 a suit to enforce a tax liability without assessment. An
4 assessment is simply, in the words of the code, an
5 administrative record of the liability. It is an
6 administrative determination which, when made, authorizes
7 additional enforcement devices such as liens and levies,
8 and it gives us an additional 10 years to collect the tax.
9 But it's not a prerequisite to liability, and -- and
10 payments are routinely to be made before the tax is
11 assessed under the code.

12 QUESTION: Mr. Jones, Mr. Rockler does get some
13 comfort from the language in Rosenman that says that you
14 don't pay it till it's determined how much it should be.

15 MR. JONES: Rosenman really addressed a
16 completely different subject. First of all, let me point
17 out, as I begin discussing Rosenman, that it did not
18 address or consider the provisions at issue here, and so
19 it doesn't consider and certainly doesn't override the
20 clear textual determination that these types of
21 remittances are paid as a matter of law on the date the
22 return is due.

23 What Rosenman dealt with was something entirely
24 different, an administrative practice that Congress has
25 repudiated and that no longer applies. In Rosenman,

1 before the case arose, the Service had long taken the
2 position that a remittance of tax from a taxpayer who in
3 fact owed no liability would not be treated as a payment
4 of tax but would be held in a suspense account on which no
5 interest would accrue.

6 The reason the Service had done this back in the
7 '20's and '30's was because of a concern they had about a
8 potential abuse. The potential abuse related to the fact
9 that overpayment interest is more than the interest on
10 ordinary Federal funds. Right now it's 3 percent over the
11 short-term Federal funds rate. The Service didn't want
12 the Treasury to be used as a bank that would allow
13 taxpayers to simply -- in the words of the Congress that
14 discussed this, to simply throw the money at the Service
15 and go -- and collect this higher rate of interest. So,
16 to prevent the abuse, the Service had a prophylactic
17 approach of saying all of these payments from taxpayers
18 who don't owe us anything we're going to put in a suspense
19 account.

20 Now, what the Court said in Rosenman was, well,
21 if you treat these matters as non-payment --

22 QUESTION: Excuse me. Before you go on any
23 further, how did they know that the taxpayer didn't owe
24 them anything?

25 MR. JONES: They had no -- no way in --

1 QUESTION: I mean, until there's --

2 MR. JONES: The Service had nothing in their
3 records to indicate what the liability would be for the
4 taxpayer.

5 QUESTION: Okay. So, it -- the taxpayer
6 could --

7 MR. JONES: Oh, yes. The taxpayer might have
8 owed money, but if from the Service's perspective -- this
9 broad, prophylactic approach was, if from the Service's
10 perspective there was no indication of what that liability
11 was, they'd just suspense it. They didn't want to -- they
12 didn't want to be used as a bank.

13 QUESTION: Well, did the suspense account apply
14 only to estate taxes or to income tax payments?

15 MR. JONES: No. This -- this was generally
16 applied to other types. My assumption is it was to any
17 type of tax obligation for which overpayment interest
18 would have been available, which would --

19 QUESTION: So, it would have --

20 QUESTION: Your argument about not using the
21 Government as a bank -- it seems to me that's his
22 explanation for 1613(b)(2), namely that you didn't want
23 the -- the date the estimated payment was made to serve as
24 the date to begin the running of interest. So, that kind
25 of fits into his interpretation of the section.

1 MR. JONES: No, because as I will explain to you
2 next, Congress repudiated the Service's practice in the -
3 - in the Current Tax Payment Act of 1943. In section 4(d)
4 of that act, Congress said basically stop treating these
5 matters as deposits. Treat it as a payment even if the
6 taxpayer has no liability.

7 In the legislative report on that bill at page
8 28 I think -- it might be 48, but I think 28 -- the -- the
9 Congress discusses this and says the Service has
10 overreacted to this potential abuse. We don't think it's
11 that big a problem. But there might be a problem if some
12 taxpayer threw money on the Treasury when they really did
13 not, in good faith, have any belief that they had a
14 liability.

15 And so, Congress worded this provision very
16 carefully. It's section 4(d) of the -- of that act. It's
17 now section 6401(c) of the code. And what it says is that
18 a payment shall not be treated not as an overpayment
19 merely because the taxpayer had no liability. That
20 protected the Service's right to say in a particular case,
21 well, I'm not going to give you overpayment interest even
22 though it's a payment. I'm not going to give you
23 overpayment interest because it's not a good faith
24 overpayment. You were throwing money at me.

25 But as the United States said in its brief in

1 the Rosenman case, on the last two pages of its brief in
2 the Rosenman case, under that new statute the payment
3 transmitted in Rosenman would have been treated as a
4 payment. It was treated as a payment on which overpayment
5 interest would accrue. And, indeed, the strange argument
6 the United States made in the Rosenman case was that the
7 legislative determination that that was to be treated as a
8 payment for purposes of overpayment interest somehow
9 resolved an uncertainty that had existed in the past about
10 whether those kinds of payments would be held as suspense
11 or as payments for purposes of the limitations provisions.

12 Well, the Court, to be blunt, would have none of
13 that. In the Rosenman case, the Court said it will not do
14 to treat these funds as a payment or not as a payment
15 depending on whether the Government wins or loses. And
16 because the Government treated -- at the time of the
17 Rosenman case arose treated it as a deposit and not as a
18 payment, that's -- that's the way it should be treated.

19 Now, after Rosenman, after the new section 4(d)
20 of the Current Tax Payment Act, those types of remittances
21 are not held in special suspense accounts, are not held in
22 deposits. The only way we accept a deposit now is under
23 the revenue procedure. And under the revenue procedure,
24 it is generally required that the taxpayer specifically
25 designate at the time of the remittance that he is making

1 a deposit and not a payment, and that protects everybody
2 and everybody knows what's happening.

3 QUESTION: Given the I think the Tax Payment Act
4 of 1943, what's your authority to accept the deposit
5 anymore under -- under your revenue procedure?

6 MR. JONES: I suppose it's -- it was not
7 statutory. It's consent. It's contractual. If the -- if
8 the taxpayer wants to -- wants to reserve his right to get
9 to Tax Court and make his deposit instead of making the
10 payment, we can agree to that. We can't compel it. We
11 can't, under -- under the Current Tax Payment Act, we
12 can't compel it.

13 QUESTION: The Tax Payment Act sets more or less
14 a default rule absent the Government's agreement to the
15 contrary?

16 MR. JONES: Well, I think the Tax Payment Act
17 sets the rule, but I think that this is a situation that
18 where the parties can vary it by agreement. I don't -- I
19 don't know of a reason why we couldn't, although I have to
20 confess it isn't perfectly clear to me why the Service is
21 willing to participate in these types of agreements, but I
22 think it's a historical thing. And there may be one
23 explanation.

24 Congress has provided that a payment of a tax
25 made after the notice of deficiency has been issued and

1 the -- and the Tax Court case has begun that if you pay it
2 after you've begun the Tax Court case, then you don't
3 divest the court of jurisdiction. It's only if you pay it
4 before the case has begun that you do. And so, these
5 deposit agreements allow the taxpayer to -- to get into
6 Tax Court even by curtailing the interest before the
7 notice of deficiency is issued.

8 QUESTION: Mr. Jones, I just was going to -- I
9 understand your argument. I understand also that his
10 counter-argument isn't necessarily controlling with regard
11 to what you say. But it, nevertheless, is true, I think,
12 that his reading of -- of 6513(b)(2) would at least serve
13 the function of preventing the Government being used as a
14 bank by somebody who wanted to overpay his estimated
15 payments.

16 MR. JONES: It's consistent with that goal.

17 QUESTION: That's really all I'm --

18 MR. JONES: It certainly doesn't replace it, I
19 mean.

20 The -- the one other thing I wanted to say about
21 the revenue procedure, which our brief doesn't address,
22 and I want to make sure there's no confusion. In
23 paragraph 4.04 of the revenue procedure, if a taxpayer
24 makes a remittance at a time when there's no identified
25 liability and we don't know how to apply it -- he doesn't

1 designate the year or the tax to which the remittance
2 would apply -- we will temporarily treat it as a deposit.
3 We will promptly notify the taxpayer of this and request
4 him to tell us how he wants us to designate it. And so,
5 in that one brief instance, there can be a deposit without
6 an express designation.

7 There is a -- a broad point that I want to
8 mention, and that is if petitioner's argument were
9 accepted, it would seriously disadvantage the vast
10 majority of taxpayers who pay timely, who file timely
11 returns, and who file timely claims for refund. And that
12 is because on petitioner's theory, payments of estimated
13 taxes, of withholding, payments made with -- with the
14 return, and any payment made before the tax is assessed
15 would simply be a deposit and would not be a payment on
16 which overpayment interest would run. Since under the
17 code, the Service can take 3 years after the return is
18 filed to make an assessment, petitioner's theory would
19 mean that these taxpayers would lose their overpayment
20 interest for that 3-year period.

21 QUESTION: When I put that case to Mr. Rockler,
22 he said no, that's not what would happen.

23 MR. JONES: Well, I -- I didn't understand his
24 answer, and I don't agree with it. The overpayment
25 interest runs -- oh, I -- I'm sorry.

1 Mr. Rockler was making the -- the point that --
2 that overpayment interest doesn't begin to run from the
3 date of the return if you file a late return. I didn't
4 hear him to be making any other contention on that issue.
5 From the date -- even if you filed -- even in Mr.
6 Rockler's situation, if you file a late return, you get -
7 - the Service could still have 3 years to assess, and his
8 taxpayer would lose 3 years of interest even if -- even
9 from that overpayment -- I mean, even from that special
10 date that the interest begins to run.

11 For interest to run on an overpayment, there has
12 to be an overpayment. There can't be an overpayment if
13 there's not a payment. His theory it's a deposit, not a
14 payment. So, all -- all the -- I think in the Brockamp
15 case, the Court noted that something like 90 million
16 refunds are given every year. Most of those are people
17 who pay their taxes through withholding, through estimated
18 taxes, or with their return. And none of those taxpayers
19 would get overpayment interest under this theory.

20 QUESTION: How come you're here on this side of
21 the case? It raises that question.

22 MR. JONES: Pardon me?

23 QUESTION: I say it -- it would seem to be in
24 the interest of the Government to be on the other side of
25 this case. I -- I --

1 MR. JONES: I think it's always in our interest
2 to --

3 QUESTION: I've never seen this happen before.
4 (Laughter.)

5 MR. JONES: It's always in our interest to try
6 to do what Congress intended, and I don't say that in
7 anything other than in -- in full meaning. I mean, our
8 job is simply to accomplish what Congress indicated we
9 should accomplish and -- and we're pointing out that what
10 his -- what Mr. Rockler's position would result in would
11 be a drastic difference from what Congress intended, both
12 in terms of determining when the -- when the statute of
13 limitations has run and in determining when overpayment
14 interest accrues.

15 If -- are there questions?

16 QUESTION: I was going to just say -- before Mr.
17 Rockler's red light went on, I was going to ask him if
18 there was no 54(b) issue in this case, I don't think.

19 (Laughter.)

20 MR. JONES: Thank you. I'm finished.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.
22 The case is submitted.

23 (Whereupon, at 10:55 a.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

DAVID H. BARAL, Petitioner v. UNITED STATES.
CASE NO: 98-1667

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BY: Jonathan M. May
(REPORTER)