Supreme Court, U.S.
FILED

11-139 AUG 3- 2011

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HOME CONCRETE & SUPPLY, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOHN A. DICICCO
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
MICHAEL J. HAUNGS
JOAN I. OPPENHEIMER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Blank Page

QUESTIONS PRESENTED

As a general matter, the Internal Revenue Service (IRS) has three years to assess additional tax if the agency believes that the taxpayer's return has understated the amount of tax owed. 26 U.S.C. 6501(a). That period is extended to six years, however, if the taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the [taxpayer's] return." 26 U.S.C. 6501(e)(1)(A). The questions presented are as follows:

1. Whether an understatement of gross income attributable to an overstatement of basis in sold property is an "omi[ssion] from gross income" that can trigger the extended six-year assessment period.

2. Whether a final regulation promulgated by the Department of the Treasury, which reflects the IRS's view that an understatement of gross income attributable to an overstatement of basis can trigger the extended six-year assessment period, is entitled to judicial deference.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America.

Respondents are Home Concrete & Supply, LLC; Robert L. Pierce; Susanne D. Pierce; Stephen R. Chandler; Rebecca R. Chandler; and Home Oil and Coal Company, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation:

Statutes and regulation—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

HOME CONCRETE & SUPPLY, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 634 F.3d 249. The opinion of the district court (App., *infra*, 23a-46a) is reported at 599 F. Supp. 2d 678.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2011. A petition for rehearing was denied on April 5, 2011 (App., *infra*, 22a). On June 22, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August

3, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 47a-72a.

STATEMENT

1. As a general matter, the Internal Revenue Service (IRS) has three years to assess additional tax if the agency believes that the taxpayer's return has understated the amount of tax owed. 26 U.S.C. 6501(a). That period is extended to six years, however, if the taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the [taxpayer's] return." 26 U.S.C. 6501(e)(1)(A). The question presented in this case is whether that six-year assessment period applies to a tax-avoidance scheme that operated by overstating a taxpayer's basis in property.

a. When a taxpayer sells property, any "[g]ain[]" that he realizes from the sale contributes to his "gross income." 26 U.S.C. 61(a)(3). The taxpayer's gain, however, is not the sale price of his property. Rather, it is the sale price minus the taxpayer's capital stake in the sold asset, which is generally the amount paid to obtain the property, as adjusted by various other factors. 26 U.S.C. 1012. For tax purposes, that capital stake is commonly referred to as the taxpayer's "basis" in property. 26 U.S.C. 1011(a). Because the taxable income from a property sale is generally determined by subtracting the taxpayer's basis from the property's sale price, an overstatement of basis will typically decrease

the amount of the taxpayer's gain (and thus the amount of federal income-tax liability) that is attributable to the sale.

This case involves a particular kind of tax shelter, known as a Son-of-BOSS (Bond and Option Sales Strategy) transaction. In a Son-of-BOSS transaction, a taxpayer uses some mechanism, often a short sale, to artificially increase his basis in an asset before the asset is sold. A short sale is a sale of a security that the seller does not own or has not contracted for at the time of the sale. To close the short sale, the seller is obligated to purchase and deliver the security at some point in the future, often by using the proceeds from the short sale itself. App., *infra*, 3a n.1. Typically in a Son-of-BOSS transaction, a taxpayer enters into a short sale and transfers the proceeds as a capital contribution to a partnership. The partnership then closes the short sale by purchasing and delivering the relevant security on the open market. See *Beard* v. *CIR*, 633 F.3d 616, 617-618 (7th Cir. 2011), petition for cert. pending, No. 10-1553 (filed June 23, 2011).

When the taxpayer and partnership file their tax returns for the year in which a transaction of the kind described above occurs, they are required under 26 U.S.C. 722, 723, and 752 to report their taxable bases in the partnership. The taxpayer's basis in the partnership is called an "outside basis," while the partnership's basis in its own assets is called an "inside basis." See *Kornman & Assocs., Inc.* v. *United States*, 527 F.3d 443, 456 n.12 (5th Cir. 2008). In a Son-of-BOSS transaction, when computing both "outside" and "inside" basis, the taxpayer and the partnership include the short-sale proceeds contributed to the partnership, without decreasing that amount by the corresponding obligation (*i.e.*, to

close the short sale by purchasing and delivering the relevant security) that the partnership has assumed. As a result, the taxpayer either generates a large paper loss that can be used to offset capital gains on other unrelated investments, or turns what would otherwise have been a sizeable capital gain into a smaller taxable gain or even a capital loss.[1] See *Beard*, 633 F.3d at 618.

b. In this case, respondents Stephen R. Chandler and Robert L. Pierce were the sole shareholders of respondent Home Oil and Coal Company, Inc. (Home Oil), which they planned to sell. In order to minimize their tax liability, they formed a pass-through entity in April 1999 called Home Concrete & Supply, LLC (Home Concrete).[2] In May 1999, the taxpayers participated in a short sale of United States Treasury Notes, receiving cash proceeds of more than $7.4 million. They then transferred that entire amount, along with the obligation to close out the short position, to Home Concrete.

---

[1] In 2000, the IRS issued a notice informing taxpayers that Son-of-BOSS transactions were invalid under the tax laws. See Notice 2000-44, 2000-36 I.R.B. 255 (describing arrangements that unlawfully "purport to give taxpayers artificially high basis in partnership interests"). In the wake of that notice, courts largely have invalidated Son-of-BOSS transactions as lacking in economic substance. See, *e.g.*, *Jade Trading, LLC* v. *United States*, 80 Fed. Cl. 11, 45-46 (2007), aff'd in relevant part, 598 F.3d 1372, 1376-1377 (Fed. Cir. 2010). In 2004, the IRS offered a settlement to approximately 1200 taxpayers. Many taxpayers who had engaged in Son-of-BOSS transactions, however, either did not qualify, chose not to participate in the settlement, or had not yet been identified. See *Beard*, 633 F.3d at 618.

[2] Home Concrete was a limited liability corporation, which for present tax purposes is treated in the same manner as a partnership. See 26 U.S.C. 752; 26 C.F.R. 301.7701-3(b)(1)(i). This brief therefore refers to the ownership interests in Home Concrete as partnership interests.

The following day, Home Concrete closed the short sale by purchasing and delivering Treasury Notes for slightly less than $7.4 million. The taxpayers later executed a series of transactions through which they transferred virtually all of Home Oil's assets to Home Concrete, and they then sold Home Concrete for approximately $10.6 million. App., *infra*, 2a-3a.

In April 2000, Chandler and his wife, respondent Rebecca R. Chandler; Pierce and his wife, respondent Susanne D. Pierce; and Home Concrete filed their federal income-tax returns for 1999. In computing both their inside and outside bases, the taxpayers and Home Concrete included the amount of the short-sale proceeds (more than $7.4 million) that had been contributed to Home Concrete, without reducing that amount to reflect Home Concrete's offsetting obligation to close the short position. As a result, Home Concrete reported only a modest gain of $69,125 on the $10.6 million sale of its assets. App., *infra*, 4a.

2. In September 2006, the IRS issued a Final Partnership Administrative Adjustment (FPAA), decreasing to zero the taxpayers' outside bases in Home Concrete and thereby substantially increasing their taxable income for 1999. Respondents challenged the FPAA, arguing that it was barred because it was issued after the expiration of the three-year assessment period provided by 26 U.S.C. 6501(a). The government contended that the FPAA was governed instead by the extended six-year assessment period in 26 U.S.C. 6501(e)(1)(A), which applies when a taxpayer "omits from gross income an amount properly includible therein which is in excess

of 25 percent of the amount of gross income stated in the return."[3]

The district court granted partial summary judgment to the United States. App., *infra*, 23a-46a. It ruled that "where a taxpayer overstates basis and, as a result, leaves an amount out of gross income, the taxpayer 'omits from gross income an amount properly includible therein' for purposes of [Section] 6501(e)(1)(A)." *Id.* at 39a. The court therefore concluded that the six-year period in Section 6501(e)(1)(A), and not the three-year period in Section 6501(a), applied to the IRS's assessment. *Ibid.* The court rejected respondents' argument that this Court's decision in *The Colony, Inc.* v. *CIR*, 357 U.S. 28 (1958) (*Colony*), required a different result. The court explained that *Colony* had involved an earlier provision of the Internal Revenue Code, and that subsequent statutory amendments make clear that *Colony*'s holding does not apply to the current Section 6501(e)(1)(A). App., *infra*, 32a-38a.

3. The court of appeals reversed. App., *infra*, 1a-21a. The court concluded that "*Colony* forecloses the argument that Home Concrete's overstated basis in its reporting of the short sale proceeds resulted in an omission from its reported gross income." *Id.* at 11a. The court declined to apply a regulation promulgated in temporary form by the IRS in September 2009, which became final while the appeal was pending, and which con-

---

[3] Although the FPAA was issued in September 2006, more than six years after the taxpayers filed their returns in April 2000, the assessment period was suspended for approximately five months (between December 2003 and May 2004) due to a third-party recordkeeper's tardy compliance with an IRS summons. See C.A. App. 326 n.5; see also 26 U.S.C. 7609(e)(2). Respondents do not dispute that if the six-year assessment period applies, the FPAA in this case was timely.

strues the phrase "omits from gross income" to encompass situations in which a taxpayer understates his income by overstating his basis in property. *Id.* at 16a. The court held that the regulation was inapplicable by its terms, and that this Court's decision in *Colony* had found the relevant statutory language unambiguous and thus precluded any contrary agency interpretation. *Id.* at 12a-16a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether an understatement of gross income attributable to an overstatement of basis in sold property is an "omi[ssion] from gross income" that can trigger the six-year assessment period in 26 U.S.C. 6501(e)(1)(A). That question is presented in a petition for a writ of certiorari currently pending before the Court. See *Beard* v. *CIR*, 633 F.3d 616 (7th Cir. 2011), petition for cert. pending, No. 10-1553 (filed June 23, 2011). The government agrees with the petitioners in *Beard* that this Court should grant review in that case in order to resolve a conflict among the circuits. See Gov't Br., *Beard*, *supra*, at 19-20 (filed July 27, 2011).

Beard is the earlier-filed petition, and the government is not aware of any reason why this case would present a more suitable opportunity than *Beard* for resolving the circuit conflict. If the Court grants the petition in *Beard* and concludes that an overstatement of basis in sold property does trigger the extended six-year assessment period, then the assessments at issue in this case were timely and the court of appeals erred in holding otherwise. Accordingly, the Court should hold this petition pending the disposition of *Beard*, including any

subsequent proceedings on the merits, and then dispose of the petition as appropriate in light of those decisions.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's final disposition of *Beard* v. *CIR*, petition for cert. pending, No. 10-1553 (filed June 23, 2011), and then disposed of as appropriate.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOHN A. DICICCO
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
MICHAEL J. HAUNGS
JOAN I. OPPENHEIMER
Attorneys

AUGUST 2011