



Fall 9-1-1996

A Webb of Confusion: Equitable Tolling in Tax Refund Suits

Matthew L. Weidner

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Tax Law Commons](#)

Recommended Citation

Matthew L. Weidner, *A Webb of Confusion: Equitable Tolling in Tax Refund Suits*, 53 Wash. & Lee L. Rev. 1571 (1996).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol53/iss4/9>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

A *Webb* of Confusion: Equitable Tolling in Tax Refund Suits

Matthew L. Weidner*

Table of Contents

I. Introduction	1571
II. Statutes of Limitations	1574
III. The Statutory Framework	1581
IV. The Confusion Created by the Supreme Court	1583
A. The Traditional Approach	1583
B. The <i>Irwin</i> Decision	1585
V. The Debate in the Lower Courts	1587
A. The Initial Rejection of the <i>Irwin</i> Rule	1587
B. The Analogy to Securities Law	1589
C. The Sovereign Rights Approach	1593
D. A Split in the Circuits	1595
VI. Resolving the Debate	1596
A. Reconciling <i>Dalm</i> and <i>Irwin</i>	1596
1. The Argument Favoring <i>Dalm</i>	1597
2. The Argument Favoring <i>Irwin</i>	1598
3. The Argument for Reconciliation	1599
B. Applications of the <i>Irwin</i> Rule	1602
1. The Securities Fraud Analogy	1602
2. Should Sovereign Rights Matter?	1606
3. A Narrow Doctrine of Equitable Tolling	1608
VII. Conclusion	1612

I. Introduction

Few would contradict the assertion that the assessment and collection of taxes represents a fundamental and recurring source of tension between the government and the citizens of the United States. Within this realm of

* The author wishes to thank Professor Keith E. Engel and M. Annette Lanning for their advice, assistance, and encouragement in the development of this Note.

anxiety and uncertainty, perhaps few discoveries would prove more upsetting to a taxpayer than to realize that the taxpayer had overpaid taxes, but that the time for seeking recovery of that payment had elapsed. Taxpayers unfortunate enough to make such a discovery traditionally have had little hope of ever obtaining a refund.¹ Nonetheless, recent judicial developments suggest that help may be on the horizon, at least for individuals demonstrating persuasive equitable considerations.² Yet many courts have not welcomed these developments with open arms,³ as the United States Court of Appeals for the Fourth Circuit recently demonstrated in *Webb v. United States*.⁴

In *Webb*, the Fourth Circuit considered the tragic circumstances surrounding the last years of Mary Morton Parsons.⁵ An elderly woman who had inherited considerable wealth early in life, Parsons possessed only a limited understanding of financial matters.⁶ Consequently, Parsons relied on close relatives to manage her personal and financial affairs for her entire life.⁷ Following the deaths of her husband in 1970 and of her sister-in-law in 1972, Parsons hired Dr. Alvin Q. Jarrett, a social acquaintance, to serve as her personal physician and manager.⁸ Jarrett, in turn, hired B. Roland Freasier, Jr. to serve as Parsons's personal attorney.⁹ Over the next fourteen years, Jarrett and Freasier physically and emotionally abused Parsons, forced her to move into virtual seclusion, and confined her to her bed through heavy sedation.¹⁰ The two men also convinced Parsons to give each of them power

1. See *Webb v. United States*, 66 F.3d 691, 694 (4th Cir. 1995) (stating that courts traditionally have declined to apply equitable principles to toll statutes of limitations), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360).

2. See, e.g., *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995) (holding that statute of limitations in tax refund suit may be equitably tolled), *cert. granted*, 116 S. Ct. 1875 (1996); *Scott v. United States*, 847 F. Supp. 1499, 1507-08 (D. Haw. 1993) (same), *aff'd*, 70 F.3d 120 (9th Cir. 1995), *cert. granted sub nom. United States v. Brockamp*, 116 S. Ct. 1875 (1996); *Wiltgen v. United States*, 813 F. Supp. 1387, 1394-95 (N.D. Iowa 1992) (same); *Johnsen v. United States*, 758 F. Supp. 834, 836 (E.D.N.Y. 1991) (same).

3. See, e.g., *Webb*, 66 F.3d at 702 (holding that statute of limitations in tax refund suit cannot be equitably tolled); *Oropallo v. United States*, 994 F.2d 25, 31 (1st Cir. 1993) (same); *Vintilla v. United States*, 931 F.2d 1444, 1447 (11th Cir. 1991) (same).

4. 66 F.3d 691 (4th Cir. 1995).

5. *Webb*, 66 F.3d at 692.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

of attorney, thereby enabling the men to take total control of her personal and financial affairs.¹¹

During this period, Jarrett and Freasier used their power to fraudulently divert large sums of Parsons's assets to themselves and to their families.¹² In 1980, in connection with these conveyances, Jarrett and Freasier filed a gift tax return on Parsons's behalf and paid gift taxes of \$4,324,822.54 out of Parsons's funds.¹³ In 1986 and 1987, following an audit by the Internal Revenue Service (IRS), the two men paid more than \$7,000,000 from Parsons's assets in additional taxes, penalties, and interest.¹⁴ In the summer of 1987, Parsons discovered these illegal transactions and filed a claim with the IRS to recover her lost assets.¹⁵ The IRS acknowledged that the gift taxes were paid wrongfully and refunded \$9,844,541.03 to Parsons, which included the taxes and interest paid in 1986 and 1987.¹⁶ Nevertheless, the IRS refused to refund the \$4,324,822.54 paid in 1980 because Parsons had not filed her claim for refund within the statutory limitations period.¹⁷ Parsons's executors then filed suit in federal district court to recover the improperly paid taxes.¹⁸ The district court concluded that the statute of limitations barred the suit and dismissed the action for lack of subject matter jurisdiction.¹⁹

On appeal, the Fourth Circuit upheld the district court's dismissal of the suit.²⁰ In so doing, the court specifically rejected the assertion that Parsons's incapacity equitably tolled the statute of limitations.²¹ The court's decision thus allowed the United States to keep a \$4.32 million windfall at Parsons's expense.²²

The outcome of *Webb* and similar cases raises the question of whether courts should continue to adhere to this traditional approach when it leads to such seemingly harsh results. Three days after the decision in *Webb*, the

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 693.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 702; see also *infra* Part V.C (discussing Fourth Circuit's analysis in *Webb*).

21. *Webb*, 66 F.3d at 694-702; see also *infra* Part V.C (discussing Fourth Circuit's rationale for rejecting equitable tolling in tax refund suits).

22. See *Webb*, 66 F.3d at 702-03 (Russell, J., dissenting) (noting that government was unintentional beneficiary of fraud).

United States Court of Appeals for the Ninth Circuit answered this question in the negative, thereby creating a split of opinion in the circuit courts of appeals.²³ In *Brockamp v. United States*,²⁴ the Ninth Circuit held that a taxpayer's mental incapacity, if proved, could equitably toll the statute of limitations governing tax refund suits.²⁵ The Government appealed the Ninth Circuit's decision in *Brockamp*, however, and the United States Supreme Court recently granted certiorari.²⁶

In anticipation of the Supreme Court's resolution of this debate, this Note explores the history and rationale behind the strict enforcement of the statute of limitations in tax refund suits and offers its own conclusions about whether the doctrine of equitable tolling should apply in such cases. Toward this end, Part II of this Note discusses the underlying rationales for both statutes of limitations and the equitable doctrines designed to mitigate their sometimes harsh effects. Part III then provides a basic discussion of the particular statutory provisions that govern tax refund suits. Part IV considers the Supreme Court decisions informing this issue, and Part V discusses the lower courts' subsequent attempts to resolve this question in light of the Court's decisions. Based on the results of this analysis, this Note concludes by discussing the proper role for equitable tolling in tax refund suits and by defining the constraints on the use of that doctrine in such cases.

II. Statutes of Limitations

Statutory limitations on the time in which a claimant may file suit now govern almost all forms of public and private actions within the United States.²⁷ The central rationale underlying statutes of limitations is a desire to promote fairness to defendants.²⁸ Statutes of limitations further this goal

23. See *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995) (holding that statute of limitations in tax refund suit may be equitably tolled), cert. granted, 116 S. Ct. 1875 (1996).

24. 67 F.3d 260 (9th Cir. 1995).

25. See *Brockamp*, 67 F.3d at 263; see also *infra* notes 183-202 and accompanying text (discussing *Brockamp*).

26. See *United States v. Brockamp*, 116 S. Ct. 1875 (1996) (granting certiorari).

27. See *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) [hereinafter *Developments*] (discussing prevalence of statutes of limitations in modern law).

28. See *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (discussing purposes of statutes of limitations). In *Burnett*, the Supreme Court stated:

Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of

by providing that, after a given period of time, an individual can expect that the slate will be wiped clean and that she will not be forced to defend herself against claims involving evidence or testimony that has become lost or unreliable due to the passage of time.²⁹ Similarly, statutes of limitations relieve courts of the burden of adjudicating stale or tenuous claims with respect to which judicial effectiveness may be undermined.³⁰

Although statutes of limitations governing actions between private parties and the sovereign further these policies, the underlying rationales for such provisions arise from slightly different considerations.³¹ In particular, statutory limitations on private claims asserted against the sovereign mostly serve to further public and administrative convenience.³² Thus, in interpreting the statutes of limitations governing tax refund suits, courts generally focus more on the competing policies of finality and correctness than on concerns about the government's ability to defend itself.³³

By providing specific periods of time in which a taxpayer may commence a tax refund suit, the statutory limitations governing such actions promote finality in the law.³⁴ According to the United States Supreme Court:

It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never

claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Id. (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)); see also *Developments*, *supra* note 27, at 1185 (discussing purposes of statutes of limitations).

29. See *Burnett*, 380 U.S. at 428 (discussing purposes of statutes of limitations); see also *Developments*, *supra* note 27, at 1185 (same).

30. See *Burnett*, 380 U.S. at 428 (discussing purposes of statutes of limitations). The *Burnett* Court noted that "the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Id.*; see also *Developments*, *supra* note 27, at 1185 (same).

31. See *Developments*, *supra* note 27, at 1186 (noting distinction between statutes of limitations governing most actions and statutes governing actions between private parties and sovereign).

32. *Id.*

33. See James E. Tierney, *Equitable Recoupment Revisited: The Scope of the Doctrine in Federal Tax Cases after United States v. Dalm*, 80 Ky. L.J. 95, 95 (1991) (discussing competing policies underlying statutes of limitations in tax refund cases). But see *infra* note 35 and accompanying text (indicating that courts should still consider fairness to government).

34. Tierney, *supra* note 33, at 95.

would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence, a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.³⁵

In matters of taxation, as in most areas of the law, the price of this finality is correctness.³⁶ Frequently, one can discover the inaccurate treatment of a particular matter only after the passage of time.³⁷ Nevertheless, if the discovery occurs after the statute of limitations has run, both the government and private litigants lack a remedy for correcting that error.³⁸ Failure to rectify such a problem not only offends the desire for accuracy, but also may contribute to future inequity.³⁹ Because the federal tax system functions on a temporal basis rather than a transactional basis, an unrectified error made in one tax year, if treated properly in another, may result in either double taxation or no taxation, depending on the circumstances.⁴⁰

Recognizing the inequities that statutes of limitations impose on the tax system, courts have developed several doctrines to alleviate the impact of those inequities.⁴¹ In particular, on different occasions and to varying

35. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946) (discussing important role played by statutes of limitations in federal tax system).

36. *See Tierney, supra* note 33, at 96 (discussing effects of statutes of limitations).

37. *Id.* at 97.

38. *Id.*

39. *Id.*

40. *Id.* The following example illustrates how double taxation might occur:

Assume, for example, that a cash-method taxpayer erroneously, but in good faith, believes that an item of gross income actually received in 1991 was constructively received in 1990. She thus includes the item on her 1990 federal income tax return filed April 15, 1991 and omits it from her 1991 return, filed April 15, 1992. On these facts, the taxpayer ordinarily must file a refund claim for 1990 on or before April 15, 1994, but the government will have until April 15, 1995 to determine a deficiency for 1991. Thus, if the government asserts an income tax deficiency for 1991 based on this item between April 15, 1994 and April 15, 1995, that determination will be timely and effective, even though, strictly applying the statute of limitations, the taxpayer will be barred from claiming a refund of the tax overpaid for 1990 resulting from the erroneous inclusion of the item in income for that year.

Id. at 97-98 n.8; *see also* Hoffman F. Fuller, *Finality and Equity in Tax Litigation*, 10 AM. J. TAX POL'Y 51, 51-52 (1992) (discussing inequities created by statutes of limitations given temporal nature of federal tax system).

41. *See Tierney, supra* note 33, at 100 (discussing judicial development of equitable

degrees, courts have invoked the doctrines of equitable recoupment, equitable estoppel, and equitable tolling to mitigate the inequities resulting from the strict application of statutes of limitations in tax-related cases.⁴² Although each doctrine operates to introduce an element of fairness where it otherwise would be lacking, the rationale and function of each doctrine arise from unique considerations.⁴³

Equitable recoupment, the first of these judicial doctrines, permits the use of a time-barred claim as a defense to a tax-related claim commenced in a timely manner if both claims arise from the same transaction.⁴⁴ This doctrine specifically responds to the inequities created by the temporal nature of the tax system.⁴⁵ To achieve its purpose, equitable recoupment

doctrines).

42. See *Bull v. United States*, 295 U.S. 247, 251-63 (1935) (applying doctrine of equitable recoupment to permit taxpayer's otherwise time-barred claim for recovery of previously paid estate taxes); *Brockamp v. United States*, 67 F.3d 260, 261-63 (9th Cir. 1995) (applying doctrine of equitable tolling to allow taxpayer to assert claim for refund of erroneously paid taxes that statute of limitations otherwise would have barred), *cert. granted*, 116 S. Ct. 1875 (1996); *Miller v. United States*, 500 F.2d 1007, 1011 (2d Cir. 1974) (applying doctrine of equitable estoppel to prevent government from disallowing claim when taxpayers had reasonably relied on mistaken government action that indicated deadline for filing claim had been extended).

43. See *infra* notes 44-64 and accompanying text (discussing theoretical distinctions among three equitable doctrines).

44. See *Bull*, 295 U.S. at 261-62 (discussing equitable recoupment); see also Arthur W. Andrews, *Modern-Day Equitable Recoupment and the "Two Tax Effect:" Avoidance of the Statutes of Limitations in Federal Tax Controversies*, 28 ARIZ. L. REV. 595, 598-615 (1986) (detailing evolution and refinement of doctrine of equitable recoupment by Supreme Court); Tierney, *supra* note 33, at 101-16 (same). Although the doctrine of equitable recoupment usually is invoked by taxpayers, the Supreme Court has held that the government may invoke the doctrine when appropriate in defense to tax refund suits. See *Stone v. White*, 301 U.S. 532, 539 (1937) (extending right to invoke doctrine of equitable recoupment to government).

45. See Andrews, *supra* note 44, at 600 (discussing rationale for equitable recoupment); see also *Bull*, 295 U.S. at 261 (discussing need for doctrine of equitable recoupment to protect taxpayer's rights). In *Bull*, the Supreme Court considered a case involving double taxation:

[T]he Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding [involving estate taxes]. This time, however, its claim was for income tax. The taxpayer opposed payment in full, by demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. . . . The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights.

permits courts to consider certain time-barred claims.⁴⁶ However, as a matter of policy the doctrine does not conflict with the central purposes underlying statutes of limitations because the time-barred claim must be asserted in an already existing action.⁴⁷ Thus, the doctrine does not undermine the goal of finality because, by bringing the initial action, the defendant in the recoupment claim (the claimant in the initial action) has demonstrated that the treatment of the issue has not been finalized. Moreover, considering a claim for recoupment arising from the same transaction does not create an excessive burden on the judiciary because the court already must adjudicate at least one aspect of that transaction. Today, courts invoke equitable recoupment primarily in cases involving the assessment of two different types of taxes on a single transaction.⁴⁸

Equitable estoppel, the second judicial doctrine, protects a claimant who reasonably relied on a representation made by the defendant that induced the claimant to take or to refrain from taking action to the claim-

Id. (citations omitted); *see also supra* note 40 (providing example of how temporal structure of tax system can result in double taxation).

46. *See Bull*, 295 U.S. at 261-62 (discussing equitable recoupment).

47. *See supra* notes 27-35 and accompanying text (discussing purposes of statutes of limitations).

48. *See Andrews, supra* note 44, at 623-24 (discussing situations in which equitable recoupment could be invoked); *see also Tierney, supra* note 33, at 104-08 (discussing *Bull v. United States*, 295 U.S. 247 (1935)). To understand how equitable recoupment operates, consider this simplified version of the facts in *Bull v. United States*, 295 U.S. 247 (1935), in which the Supreme Court held that the doctrine of equitable recoupment permitted adjudication of a refund claim that the statute of limitations otherwise barred. *Bull*, 295 U.S. at 258. A member of a lucrative partnership died in February 1920. *Id.* at 251. By agreement, the partner's estate continued to receive his share of profits from the partnership for one year following his death. *Id.* The partner's share of profits for 1920 consisted of \$24,000 accrued prior to his death and \$212,000 accrued thereafter. *Id.* at 252. The partnership paid \$200,000 to the decedent's estate in 1920 and \$12,000 to the estate in 1921. *Id.* In the estate tax return, the decedent's interest in the partnership was valued at \$24,000. *Id.* However, the Commissioner determined that the entire \$236,000 received actually represented the value of the decedent's interest, and the estate therefore paid taxes on that basis. *Id.* In 1921, the estate filed an income tax return for 1920 that did not account for the \$200,000 received from the partnership because that amount already had been subject to taxation. *Id.* In 1925, the Commissioner notified the estate of a deficiency in income taxes for 1920. *Id.* This deficiency was calculated in part based on the \$200,000. *Id.* The lower court found that the \$200,000 constituted income and thus upheld the income tax assessment based on that amount. *Id.* at 253. The estate was therefore forced to pay taxes twice on the \$200,000. *Id.* Without the doctrine of equitable recoupment, the statute of limitations barred any claim for recovery of the estate taxes erroneously paid in 1920. *Id.* at 258. However, in *Bull*, the Supreme Court adopted the doctrine of equitable recoupment and permitted the taxpayer to credit the estate taxes previously paid against the deficiency in income taxes asserted by the Commissioner. *Id.* at 251-63.

ant's detriment.⁴⁹ Traditionally, equitable estoppel requires the presence of three elements: "(1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things; (2) wilfulness or negligence with regard to the acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated."⁵⁰ In suits against the government, the claimant bears a heavier burden to demonstrate equitable circumstances than in cases involving only private parties.⁵¹ The Supreme Court has noted that it has "reversed every finding of estoppel [against the government]" that the Court has reviewed.⁵² Nonetheless, lower courts have applied the doctrine in several tax refund suits in which appropriate circumstances justified doing so.⁵³ Although equitable estoppel thus allows a claimant to escape the effects of the statute of limitations, the doctrine presents little conflict with respect to the underlying rationales of such provisions.⁵⁴ Equitable estoppel focuses on the actions of the defendant and permits a court to strip the defendant of the statute's protection only when the defendant engaged in conduct that would justify such a step.⁵⁵ Consequently, defendants who wish to rely on the protection of the statute need only to refrain from such egregious behavior.

Equitable tolling, the third judicial doctrine and the subject of this Note, permits a taxpayer to initiate an action after the expiration of the statute of limitations when neither the taxpayer nor the government is at fault for the lack of a timely claim.⁵⁶ Equitable tolling does not apply to a specific factual scenario; rather, a diverse array of equitable considerations may justify the use of the doctrine.⁵⁷ Nonetheless, in all of the cases in

49. See *Bokum v. Commissioner*, 992 F.2d 1136, 1141 (11th Cir. 1993) (discussing equitable estoppel); see also *Developments*, *supra* note 27, at 1222-23 (same).

50. *Bokum*, 992 F.2d at 1141 (citations and internal quotations omitted).

51. *Id.*

52. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 422 (1990), *quoted in Bokum*, 992 F.2d at 1141.

53. See, e.g., *Miller v. United States*, 500 F.2d 1007, 1011 (2d Cir. 1974) (finding that Government was estopped from asserting that statute of limitations barred taxpayer's claim); *Southeast Bank of Orlando v. United States*, 676 F.2d 660, 664 (Cl. Ct. 1982) (same); *Heath v. United States*, 219 Ct. Cl. 582, 584-85 (1979) (same).

54. See *supra* notes 27-35 and accompanying text (discussing purposes of statutes of limitations).

55. See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) (discussing doctrine of equitable estoppel).

56. See *id.* at 451-53 (discussing doctrine of equitable tolling).

57. See *Developments*, *supra* note 27, at 1229-33 (discussing factors that may toll statutes of limitations). Infancy, insanity, imprisonment, and death are factors that courts may consider in deciding whether to apply the doctrine of equitable tolling. *Id.*

which tolling might apply, the underlying rationale for the doctrine arises from the belief that a claimant should not be barred from asserting his rights because he was incapable of taking the requisite steps to protect them in a timely manner.⁵⁸ Thus, in contrast to recoupment and estoppel, equitable tolling focuses on the actions or characteristics of the claimant rather than on the conduct of the defendant.⁵⁹ As a result, equitable tolling presents a greater conflict with the policies underlying statutes of limitations than either estoppel or recoupment.⁶⁰ In the latter two doctrines, the defendant has acted in some way that results in the waiver or loss of the statutory protection.⁶¹ In equitable tolling, a claimant is permitted to assert an otherwise time-barred claim even if the defendant is blameless.⁶² Because tax laws are technical in nature and tax refund suits rely on a statutory waiver of sovereign immunity, courts traditionally have refused to apply the doctrine of equitable tolling in such cases.⁶³ However, recent judicial developments suggest that courts may be moving away from this traditional approach.⁶⁴

58. See *Cada*, 920 F.2d at 451-53 (discussing purposes of equitable tolling).

59. See *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995) (contrasting doctrine of equitable tolling with doctrine of equitable estoppel). In *Supermail Cargo*, the Ninth Circuit distinguished equitable tolling from equitable estoppel by noting "that the former focuses on the plaintiff's excusable ignorance of the limitations period and the lack of prejudice to the defendant, while the latter usually focuses on the actions of the defendant." *Id.* (internal quotations omitted).

60. See *supra* notes 27-35 and accompanying text (discussing purposes of statutes of limitations).

61. See *supra* notes 44-48 and accompanying text (discussing doctrine of equitable recoupment); *supra* notes 49-55 and accompanying text (discussing doctrine of equitable estoppel).

62. See *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 721 (7th Cir. 1993) (distinguishing equitable estoppel from equitable tolling). In *Tregenza*, Chief Judge Posner noted that "[e]quitable tolling just means that without fault by either party the plaintiff does not have enough information to sue within the period of limitations." *Id.* (emphasis added).

63. See *Webb v. United States*, 66 F.3d 691, 694 (4th Cir. 1995) (discussing traditional approach that statute of limitations governing tax refund suits may not be equitably tolled), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360); see also *infra* Part IV.A (same).

64. See, e.g., *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995) (holding that statute of limitations in tax refund suit can be equitably tolled), *cert. granted*, 116 S. Ct. 1875 (1996); *Scott v. United States*, 847 F. Supp. 1499, 1507-08 (D. Haw. 1993) (same), *aff'd*, 70 F.3d 120 (9th Cir. 1995), *cert. granted sub nom. United States v. Brockamp*, 116 S. Ct. 1875 (1996); *Wiltgen v. United States*, 813 F. Supp. 1387, 1394-95 (N.D. Iowa 1992) (same); *Johnsen v. United States*, 758 F. Supp. 834, 836 (E.D.N.Y. 1991) (same).

III. The Statutory Framework

Under 28 U.S.C. § 1346(a)(1), federal courts may exercise jurisdiction over actions relating to any tax alleged to have been assessed or collected erroneously.⁶⁵ However, prior to bringing suit under § 1346, a taxpayer must file a claim for refund with the IRS as required by 26 U.S.C. § 7422(a).⁶⁶ Moreover, 26 U.S.C. § 6511(a) limits the period for making this claim by requiring a taxpayer to assert a tax refund claim: (1) within three years from the time a return was filed or within two years from the time the tax was paid, whichever date is later; or (2) if no return was filed, within two years from the time the tax was paid.⁶⁷ While § 6511(a) determines when a claim must be filed, § 6511(b) imposes statutory limits on

65. See 28 U.S.C. § 1346(a)(1) (1994) (granting district courts broad jurisdiction over tax refund actions). Section 1346(a)(1) provides:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

Id.; see also *United States v. Dalm*, 494 U.S. 596, 601-02 (1990) (discussing statutory structure governing tax refund suits).

66. See 26 U.S.C. § 7422(a) (1994) (requiring claimant to file claim with IRS prior to commencing suit). Section 7422(a) provides:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Id.; see also *Dalm*, 494 U.S. at 601-02 (discussing statutory structure governing tax refund suits).

67. See 26 U.S.C. § 6511(a) (1994) (defining time period in which taxpayer must file claim). Section 6511(a) provides:

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

Id.; see also *Dalm*, 494 U.S. at 601-02 (discussing statutory structure governing tax refund suits).

when a credit or refund may be recovered.⁶⁸ In particular, § 6511(b)(1) prohibits a credit or refund from being granted after the expiration of either the three- or two-year limitations period set forth in § 6511(a), whichever is applicable to a particular situation.⁶⁹ In addition, § 6511(b)(2) limits the amount of refund or recovery both in cases in which § 6511(a) has been satisfied as well as in cases in which it has not been satisfied.⁷⁰ Read together, the various provisions of § 6511 address a wide range of circumstances and place distinct limits on the recovery of a tax refund.⁷¹

68. See 26 U.S.C. § 6511(b) (1994) (limiting allowance of credit or refunds).

69. See *id.* § 6511(b)(1) (prohibiting recovery unless taxpayer files claim within prescribed period). Section 6511(b)(1) provides:

Filing of claim within prescribed period

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

Id.

70. See *id.* § 6511(b)(2) (limiting amount of credit or refund). Section 6511(b)(2) provides:

Limit on amount of credit or refund

(A) Limit where claim filed within 3-year period

If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) Limit where claim not filed within 3-year period

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) Limit if no claim filed

If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

Id.

71. To understand the interplay among the provisions of § 6511, consider a hypothetical individual who made a tax payment on May 1, 1990, but failed to file a return in connection with this payment until June 1, 1991. This taxpayer then discovered on May 15, 1994 that she overpaid her taxes and had a valid claim for a tax refund. Under § 6511(a), she could file a claim with the IRS anytime on or before June 1, 1994. If she failed to do so, § 6511(a) and § 6511(b)(1) would bar her from recovery. Assume this taxpayer filed her claim for refund on May 15, 1994 when she discovered her overpayment. The taxpayer therefore satisfied § 6511(a) and § 6511(b)(1) by asserting her claim within three years of

IV. *The Confusion Created by the Supreme Court*

A. *The Traditional Approach*

Until recently, courts uniformly had rejected the doctrine of equitable tolling in tax refund suits.⁷² The principal rationale for this strict approach arises from the doctrine of sovereign immunity.⁷³ The Supreme Court most recently discussed the significance of sovereign immunity with respect to tax refund suits in *United States v. Dalm*,⁷⁴ a tax refund case involving the doctrine of equitable recoupment.⁷⁵

In *Dalm*, the Supreme Court considered whether a taxpayer could maintain a suit for a refund of overpaid gift taxes under the doctrine of equitable recoupment despite the expiration of the statute of limitations.⁷⁶ Francis Dalm served as administrator of the estate of her former employer and received two payments as fees for her services.⁷⁷ The decedent's brother also gave Dalm two large payments in the form of gifts from the estate.⁷⁸ After auditing Dalm, the IRS asserted that the two gifts represented additional payments for her services as administrator and therefore required Dalm to pay income taxes on these payments.⁷⁹ Dalm petitioned the Tax Court for a redetermination of the asserted deficiencies, but the IRS and Dalm settled the case after two days of trial.⁸⁰ Although Dalm agreed to pay certain stipulated amounts, she made no claim in the Tax Court and received no offsetting credit for the gift taxes that she previously had paid.⁸¹

when she filed her return. Nevertheless, the taxpayer could still not recover a refund because § 6511(b)(2)(A) limits the recovery or refund to the amount of taxes actually paid during the three-year period prior to the filing of the claim. Thus, in order to satisfy § 6511(b)(2)(A), the taxpayer would have had to discover the overpayment and file her claim on or before May 1, 1993.

72. See *Webb v. United States*, 66 F.3d 691, 694-95 (4th Cir. 1995) (discussing traditional rejection of equitable tolling in tax refund suits based on concerns of sovereign immunity), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360).

73. *Id.* at 694.

74. 494 U.S. 596 (1990).

75. *United States v. Dalm*, 494 U.S. 596, 608-10 (1990) (holding that doctrine of equitable recoupment cannot create jurisdiction in tax refund case after expiration of statute of limitations).

76. *Id.* at 598.

77. *Id.* at 598-99.

78. *Id.* at 599.

79. *Id.*

80. *Id.*

81. *Id.* Significantly, at the time the Supreme Court decided *Dalm*, it was widely believed that the Tax Court could not exercise jurisdiction over a claim for recoupment.

Immediately after settling this income tax dispute, Dalm filed a claim with the IRS for a refund of the gift tax payments.⁸² When the IRS failed to act on this claim, Dalm brought suit in the district court.⁸³ The district court granted the Government's motion for summary judgment on the ground that the statute of limitations jurisdictionally barred the action.⁸⁴ On appeal, the United States Court of Appeals for the Sixth Circuit concluded that Dalm's claim satisfied all of the requirements of equitable recoupment and reversed the district court's dismissal of the case.⁸⁵

The Supreme Court reversed and held that the statute of limitations barred Dalm's claim.⁸⁶ The Court examined the statutory provisions restricting the time and manner in which a taxpayer may file a claim or bring a suit and concluded that, read together, the provisions permitted only those actions involving claims made within the time limits of § 6511.⁸⁷ The Court explained that under the doctrine of sovereign immunity, "the United States, as sovereign, 'is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'"⁸⁸ When Congress enacts a statute of limitations to govern a particular type of claim or cause of action, that provision represents one of the terms of the government's consent to be sued.⁸⁹ Thus, according to the *Dalm* Court, courts should not extend lightly the government's waiver of sovereign immunity beyond the limit that Congress intended.⁹⁰ The Supreme Court therefore concluded that the doctrine of equitable recoupment cannot provide a court with independent

See id. at 614-15 (Stevens, J., dissenting) (criticizing majority for not considering this issue). Thus, Dalm's decision not to make a claim for a setoff or refund in the Tax Court proceedings seemed perfectly logical. *Id.* at 615 n.3 (Stevens, J., dissenting). Three years later, in *Estate of Mueller v. Commissioner*, 101 T.C. 551 (1993), the Tax Court reconsidered this issue in light of *Dalm* and concluded that the Tax Court can exercise jurisdiction over claims of recoupment in tax deficiency actions. *Mueller*, 101 T.C. at 557. The holding in *Mueller* therefore greatly reduces any inequities that might result from future application of the rule announced by the Supreme Court in *Dalm*.

82. *Dalm*, 494 U.S. at 599.

83. *Id.* at 600.

84. *Id.*

85. *Id.*

86. *Id.* at 601.

87. *Id.* at 602; *see also supra* Part III (discussing statutes governing tax refund suits).

88. *Dalm*, 494 U.S. at 608 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941))).

89. *Id.*

90. *Id.*

jurisdiction over a suit in which a taxpayer asserted a claim for recoupment after the expiration of the statute of limitations.⁹¹

Although *Dalm* addressed the issue of sovereign immunity in the context of equitable recoupment, courts have followed a similar approach with respect to the doctrine of equitable tolling in tax refund suits.⁹² Thus, the principle of sovereign immunity traditionally has precluded claimants from overcoming the statute of limitations in tax refund suits on equitable grounds. However, less than a year after the Supreme Court issued its decision in *Dalm*, the Court dramatically altered its approach to the doctrine of equitable tolling in suits against the government.⁹³

B. The Irwin Decision

In *Irwin v. Department of Veterans Affairs*,⁹⁴ the Supreme Court considered whether the expiration of the statute of limitations jurisdictionally barred an individual's complaint alleging violations of his civil rights under Title VII of the Civil Rights Act of 1964.⁹⁵ Irwin asserted that the Veterans' Administration improperly dismissed him from his job.⁹⁶ After exhausting his administrative remedies, Irwin filed suit in district court in May 1987.⁹⁷ He did so, however, forty-four days after his attorney had received a letter of notification from the Equal Employment Opportunity Commission; thus, Irwin filed suit after the applicable thirty-day statute of limitations had expired.⁹⁸ Irwin nonetheless asserted that the statute of limitations had been tolled because his attorney had been out of the country

91. *Id.* at 611. The *Dalm* Court distinguished *Bull v. United States*, 295 U.S. 247 (1935), on the grounds that the taxpayer in *Bull* asserted the tax refund claim in an already existing action over which the court had proper jurisdiction. *Dalm*, 494 U.S. at 602-08; see also *Bull*, 295 U.S. at 261-63 (holding that equitable recoupment permitted adjudication of claim for tax refund). In contrast, the taxpayer in *Dalm* sought to use the doctrine of equitable recoupment as the sole basis for an independent action for a tax refund. *Dalm*, 494 U.S. at 606.

92. See *Webb v. United States*, 66 F.3d 691, 694 (4th Cir. 1995) (discussing traditional reluctance to toll statute of limitations in tax refund suits due to concerns of sovereign immunity), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360).

93. See *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (declaring new rule that rebuttable presumption of equitable tolling applies in suits against government).

94. 498 U.S. 89 (1990).

95. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92 (1990).

96. *Id.* at 91.

97. *Id.*

98. *Id.*

and Irwin had filed suit within thirty days of the date on which he personally received notice.⁹⁹

In addressing whether the doctrine of equitable tolling applied in this case, the Supreme Court reiterated its longstanding position that a statute of limitations constitutes a condition to the waiver of sovereign immunity by the government.¹⁰⁰ In contrast with *Dalm*, however, the *Irwin* Court concluded that applying the doctrine of equitable tolling to suits against the government would constitute, at most, only a minimal broadening of the congressional waiver of sovereign immunity.¹⁰¹ The Court therefore announced a new general rule to govern the application of equitable tolling in suits against the government.¹⁰² In particular, the *Irwin* Court held that a rebuttable presumption of equitable tolling applies in suits against the United States in the same way that it applies in suits against private individuals.¹⁰³ Despite the adoption of this new rule, the Court concluded that the facts presented in *Irwin* did not justify tolling the statute of limitations.¹⁰⁴ The Supreme Court therefore affirmed the dismissal of Irwin's complaint.¹⁰⁵

Although the Supreme Court announced a new rule of general applicability, the Court failed to define clearly the scope of the *Irwin* decision.¹⁰⁶ Significantly, the Court acknowledged that "our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent, even though the cases may be distinguished on their facts."¹⁰⁷ The recognition of this inconsistency suggests that the Court might have reached different results in prior cases addressing this issue if it had applied the *Irwin* rule; nevertheless, *Irwin* did not explicitly overrule any precedent.¹⁰⁸

In the context of tax refund suits, the Supreme Court's failure to define the scope of the *Irwin* rule has proved especially troublesome.¹⁰⁹ By not

99. *Id.* at 92-93.

100. *Id.* at 94.

101. *Id.* at 95. The *Irwin* Court stated that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id.*

102. *Id.*

103. *Id.* at 95-96.

104. *Id.* at 96.

105. *Id.*

106. *Id.*

107. *Id.* at 94.

108. *See id.* at 98 (White, J., concurring) (noting that majority essentially overruled at least one prior Supreme Court decision).

109. *See infra* Part V (discussing difficulty lower courts have encountered in attempting

discussing *Dalm*, which the Court decided only nine months prior to *Irwin*, the Court left unresolved whether *Irwin* overruled *Dalm* or whether the two cases could be reconciled.¹¹⁰ As tax refund cases involving the doctrine of equitable tolling have begun to proliferate after *Irwin*, lower courts have struggled with the proper approach to this issue.¹¹¹

V. *The Debate in the Lower Courts*

A. *The Initial Rejection of the Irwin Rule*

The traditional reluctance of courts to apply principles of equitable tolling in tax refund suits continued to be evident in the initial decisions of the circuit courts following *Irwin*.¹¹² In *Vintilla v. United States*,¹¹³ the United States Court of Appeals for the Eleventh Circuit clearly favored the strict approach taken in *Dalm* over the rule announced in *Irwin*.¹¹⁴ Vintilla worked for a Venezuelan subsidiary of the United States Steel Corporation (U.S. Steel).¹¹⁵ After the subsidiary terminated Vintilla in 1978, he received a severance benefit in the form of a lump sum payment in accordance with Venezuelan law.¹¹⁶ U.S. Steel claimed that this benefit represented an advance payment of Vintilla's retirement benefits and thus offset the payment against Vintilla's monthly benefits.¹¹⁷ In 1983, Vintilla and other former employees sued U.S. Steel, alleging that U.S. Steel acted wrongfully in deducting their severance payments from their retirement benefits.¹¹⁸ During this period, the IRS determined that Vintilla and his wife failed to declare the severance payment as income in 1978 and therefore required the Vintillas to pay additional income taxes on this amount.¹¹⁹ Before making the payment, the Vintillas informed the IRS of the pending suit, and the IRS allegedly assured them that it would refund their taxes if

to apply *Irwin*).

110. See *infra* Part VI.A (analyzing relationship between *Irwin* and *Dalm*).

111. See *infra* Part V (discussing lower courts' attempts to resolve this issue).

112. See generally *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993) (rejecting doctrine of equitable tolling in tax refund suits); *Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991) (same).

113. 931 F.2d 1444 (11th Cir. 1991).

114. See *Vintilla*, 931 F.2d at 1446-47 (holding that district court could not exercise jurisdiction over tax refund suit when statute of limitations had expired).

115. *Id.* at 1445.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

the suit was unsuccessful.¹²⁰ In 1987, after the end of the unsuccessful litigation, the Vintillas filed a claim with the IRS for a refund of the erroneously assessed tax payment.¹²¹ When the IRS failed to respond, the Vintillas commenced an action in court for the recovery of the payments.¹²²

On appeal, the Eleventh Circuit held that the statute of limitations jurisdictionally barred the Vintillas' suit.¹²³ The court emphasized *Dalm's* focus on sovereign immunity and the jurisdictional nature of the statute of limitations in suits against the government.¹²⁴ The only discussion of *Irwin* occurred in a footnote in which the Eleventh Circuit noted that the Supreme Court failed to reconcile its holding in *Irwin* with the contradictory language in *Dalm*.¹²⁵ In addition, the court of appeals cited a discussion in the *Irwin* opinion about two limited circumstances in which the Supreme Court had permitted equitable tolling of a statute of limitations and concluded that the Vintillas did not qualify under either of those exceptions.¹²⁶ Thus, according to the Eleventh Circuit, *Irwin* did little to change the traditional position that taxpayers may not invoke the doctrine of equitable tolling in tax refund suits.¹²⁷

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1446-47. The court of appeals also dismissed two additional arguments asserted by the Vintillas. *Id.* First, the court concluded that the Vintillas' oral notification to the IRS made within the statute of limitations period did not qualify as filing a claim. *Id.* at 1446. Second, the court rejected the assertion that the "law of the case" doctrine applied to the facts of the case. *Id.* at 1447.

124. *Id.* at 1446.

125. *Id.* at 1447 n.1.

126. *Id.* The Eleventh Circuit noted:

The *Irwin* court went on . . . to opine that the equitable relief concerning limitations periods typically afforded private litigants in federal courts is sparse. "We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." The Vintillas do not claim to fit into either of these categories.

Id. (citations omitted) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

127. *But see* *First Alabama Bank v. United States*, 981 F.2d 1226, 1228 (11th Cir. 1993) (assuming *arguendo* that statute of limitations in tax refund suit could be equitably tolled but dismissing claim because facts did not justify tolling). In *First Alabama Bank*, the Eleventh Circuit considered whether the applicable statute of limitations jurisdictionally barred a tax refund suit. *Id.* at 1227. Interestingly, the court of appeals cited neither *Dalm* nor *Vintilla* in addressing the question of equitable tolling; rather, the court cited *Irwin* and

B. *The Analogy to Securities Law*

In *Oropallo v. United States*,¹²⁸ the United States Court of Appeals for the First Circuit joined the Eleventh Circuit in rejecting the doctrine of equitable tolling in tax refund suits.¹²⁹ During 1983, Charles Oropallo worked for Raytheon Service Company.¹³⁰ In 1985, Oropallo was incarcerated.¹³¹ Four years later, the IRS informed Oropallo that he had failed to file tax returns since 1982.¹³² After obtaining his W-2 form from Raytheon and completing his 1983 return, Oropallo discovered that he had overpaid his taxes for that year.¹³³ In March 1990, he filed his return and asserted a claim for a tax refund.¹³⁴ The IRS mailed Oropallo a notice denying his claim for relief and informing him that he could sue within two years from the date of the notice.¹³⁵ Oropallo then filed suit, alleging that "extremely mitigating and extenuating circumstances" prevented him from filing his 1983 tax return on time.¹³⁶ In particular, Oropallo asserted three arguments. First, he believed a six-year statute of limitations period applied.¹³⁷ Second, in March 1983, Oropallo suffered carbon monoxide poisoning that left him incapacitated for several years and unaware that he had not filed his 1983 tax return.¹³⁸ Third, during his incarceration, the prison authorities impeded his legal efforts, and he therefore did not receive notice of his failure to file until 1989.¹³⁹ The district court dismissed the action for lack of subject matter jurisdiction.¹⁴⁰

assumed "*arguendo* that the statute of limitations governing tax refund suits, [in this case] 26 U.S.C. § 6532(a)(1), may under some circumstances be equitably tolled." *Id.* at 1228. Although the court of appeals affirmed the district court's dismissal of the case on factual grounds, the court's dicta suggest that if presented with this issue again, the court might reconsider its decision in *Vintilla*. See *id.* (noting that *Irwin* created presumption of equitable tolling in suits against government).

128. 994 F.2d 25 (1st Cir. 1993).

129. See *Oropallo v. United States*, 994 F.2d 25, 26-31 (1st Cir. 1993) (holding that statute of limitations in tax refund suit cannot be equitably tolled).

130. *Id.* at 25.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 26.

On appeal, the First Circuit affirmed the dismissal and stated that the statute of limitations barred Oropallo's suit.¹⁴¹ The First Circuit, however, employed a theoretical analysis different from the Eleventh Circuit's approach in *Vintilla*.¹⁴² In particular, the First Circuit found that the presumption of equitable tolling announced in *Irwin* applied to tax refund suits, but the court concluded that the statutory framework governing such suits served to rebut that presumption.¹⁴³ The court of appeals reached this conclusion by analogizing § 6511(a) and § 6511(b)(2)(A) to the one- and three-year statutory limitations provisions governing securities fraud actions.¹⁴⁴ The significance of this analogy arose from the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,¹⁴⁵ a post-*Irwin* case that rejected the application of equitable tolling in securities fraud suits.¹⁴⁶

141. *Id.* On appeal, Oropallo asserted several alternative theories in addition to the equitable tolling argument claiming that the statute of limitations should not bar his suit. *Id.* First, Oropallo alleged that the dismissal of his suit violated his constitutional rights by depriving him of his property without due process of law and of his right of access to the courts to address grievances. *Id.* In addition, Oropallo asserted that applying the limitations period to him violated his equal protection rights because the IRS can reach back further in time to collect unpaid taxes than a taxpayer can to collect a refund. *Id.* Finally, Oropallo claimed that the notice to him from the IRS constituted a waiver of the limitations period. *Id.* The First Circuit rejected each of these claims. *Id.* at 31-32. First, the court found that the due process claim lacked merit because postcollection review sufficiently satisfies due process in tax cases. *Id.* at 31. Second, the court noted that the IRS notice to Oropallo gave him the right to file suit within two years, but said nothing with respect to satisfying the criteria governing the filing of a claim with the IRS. *Id.* at 31-32; *see also supra* Part III (discussing statutory framework and noting need to exhaust administrative remedies before filing suit). Finally, the court of appeals stated that the IRS and the taxpayers are not similarly situated parties to whom equal protection of the law applies. *Oropallo*, 994 F.2d at 32.

142. *Compare Oropallo*, 994 F.2d at 26-32 (applying *Irwin* rule but finding that presumption of equitable tolling was rebutted) with *United States v. Vintilla*, 931 F.2d 1444, 1446-47 (11th Cir. 1991) (dismissing *Irwin* rule in tax refund context).

143. *Oropallo*, 994 F.2d at 28-31.

144. *Id.* at 30.

145. 501 U.S. 350 (1991).

146. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (holding that statute of limitations governing private securities fraud suits cannot be equitably tolled). In *Lampf*, the Supreme Court considered which statute of limitations governed an implied private cause of action under Section 10(b) of the Securities Exchange Act of 1934 (1934 Act) and whether that limitations period could be equitably tolled. *Id.* at 352. The plaintiffs in *Lampf* alleged that the defendants violated Section 10(b) and Rule 10b-5 by misrepresenting the tax benefits of partnerships in which the plaintiffs invested between 1979 and 1981. *Id.* at 353. The plaintiffs received notice in 1982 and 1983 that the IRS was investigating the partnerships, but the plaintiffs asserted that they did not

In *Lampf*, the Supreme Court held that the statutory limitations structure governing implied private causes of action under Section 10(b) of the Securities Exchange Act of 1934 was incompatible with the doctrine of equitable tolling.¹⁴⁷ The statutory provisions considered in *Lampf* provided that a suit may be commenced up to one year following the discovery of facts giving rise to a cause of action, but may not be initiated more than three years after the occurrence of the events that gave rise to that cause of action.¹⁴⁸ According to the *Lampf* Court, this one- and three-year statutory

discover the alleged misrepresentations until 1985. *Id.* at 352-53. The plaintiffs filed suit in 1986 and 1987. *Id.* at 352. The district court dismissed the complaints on the grounds that the plaintiffs did not file the suits in a timely manner. *Id.* at 353. In addition, the court stated that the state's two-year limitations period on fraud claims governed the implied cause of action. *Id.* Because the plaintiffs received inquiry notice in 1982, the court concluded that the statute of limitations barred the action. *Id.* On appeal, the Ninth Circuit reversed and remanded the cases, stating that factual disputes regarding when the plaintiffs received notice precluded the district court from granting summary judgment. *Id.* at 354. The court of appeals, however, agreed with the district court that the state statute of limitations should govern the action. *Id.* The Supreme Court rejected the lower courts' conclusion that state law governed and held that the federal statute of limitations applicable to express causes of action under the 1934 Act also governed the implied causes of action at issue in *Lampf*. *Id.* at 355. The *Lampf* Court acknowledged that when Congress fails to provide a specific statute of limitations for a federal cause of action, courts generally should adopt the local rule most analogous to that action. *Id.* However, the Court noted the existence of exceptions to this rule and considered several factors to determine whether a federal or state limitations period should be adopted. *Id.* at 356-58. The *Lampf* Court concluded that when the cause of action at issue was judicially created from a federal statute, courts should adopt the statute of limitations governing express causes of action under the statute of origin. *Id.* at 358-61. The Supreme Court also rejected an argument raised by the plaintiffs that the limitations period contained in an amendment to the 1934 Act should govern the case; rather, the Court found that the limitations structure originally enacted to govern actions brought under the statute best reflected congressional intent. *Id.* at 361-62. The limitations provisions adopted by the Court set up a one- and three-year structure limiting the period in which an action may be commenced. *Id.* at 361. More specifically, the statute provided that an action for fraud could be brought within one year from the time of discovery, but no suit could be commenced more than three years after the occurrence of the events giving rise to the cause of action, regardless of notice. *Id.* at 363. The Supreme Court concluded that this one- and three-year structure was incompatible with the doctrine of equitable tolling. *Id.* The Court explained this conclusion by noting that the one-year period begins only after the discovery of the fraudulent actions and thereby makes equitable tolling unnecessary. *Id.* Moreover, the three-year limitation represents a statute of repose that cannot be equitably tolled because its sole purpose is to place an outer limit on the time in which a claim can be made. *Id.* Thus, the Supreme Court concluded that the statute of limitations governing implied causes of action under Section 10(b) barred the plaintiffs' actions in this case. *Id.* at 364.

147. *Id.* at 363.

148. *Id.* Although the *Lampf* Court considered several provisions in the Securities Act

limitations structure reflected the congressional intent to place an absolute limit on the time in which a securities fraud claim could be commenced.¹⁴⁹

In *Oropallo*, the First Circuit analogized § 6511(a) to the one-year limitation period discussed in *Lampf*.¹⁵⁰ The court of appeals first asserted that both statutes represented open-ended provisions that placed no real time limits on when a suit can be brought.¹⁵¹ In *Lampf*, the one-year limit required an individual to file suit within one year after discovering the facts needed to file suit.¹⁵² Because discovery of these facts might occur at any time, the one-year period did not truly limit the time in which the individual could assert a claim.¹⁵³ According to the First Circuit, § 6511(a) was similarly open-ended.¹⁵⁴ Although the court noted a split in authority as to whether a return filed after its due date was a "return" for the purposes of § 6511(a), the court assumed for purposes of the case that an untimely return constituted a "return" under § 6511(a).¹⁵⁵ Under this interpretation, a taxpayer could file a return at any time and still have three years to file a claim for refund.¹⁵⁶ Consequently, the three-year time limit of § 6511(a) becomes "totally illusory" because it will not commence until a taxpayer has filed a return.¹⁵⁷ The First Circuit therefore concluded that both § 6511(a) and the one-year limit in *Lampf* constituted open-ended statutory limitations provisions.¹⁵⁸

In addition, the First Circuit found that § 6511(a) resembled the one-year limit in *Lampf* on more substantive grounds.¹⁵⁹ In *Lampf*, the Supreme Court stated that the one-year period for filing suit rendered tolling unnecessary because the time limitation did not begin until after the taxpayer

of 1933 and the 1934 Act that set up a one- and three-year structure, the Court adopted as the governing standard the language of Section 9(e) of the 1934 Act, which provides: "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at 360, 364 n.9 (quoting 15 U.S.C. § 78i(e) (1988)); see also *Oropallo*, 994 F.2d at 30 (discussing *Lampf*).

149. *Lampf*, 501 U.S. at 363; see also *Oropallo*, 994 F.2d at 30 (discussing *Lampf*).

150. *Oropallo*, 994 F.2d at 30.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 27.

156. *Id.*

157. *Id.* at 30.

158. *Id.*

159. *Id.*

actually discovered the fraud.¹⁶⁰ The First Circuit interpreted this finding to stand for the principle that, in a situation like *Lampf*, once an individual knew the relevant facts, the one-year period provided sufficient time for that person to file suit.¹⁶¹ The First Circuit then concluded that because a tax return contains all the information required to determine whether a refund is due, the three-year limitation in § 6511(a) provides a taxpayer with ample time to file suit.¹⁶² Thus, by equating the filing of a tax return with the discovery of fraud, the court of appeals concluded that § 6511(a) should not be subject to equitable tolling.¹⁶³

The First Circuit also concluded that § 6511(b)(2)(A) represents an absolute outer limit on the time in which a refund may be recovered.¹⁶⁴ The court reached this conclusion by analogizing § 6511(b)(2)(A) to the three-year limitations period discussed in *Lampf*.¹⁶⁵ The court of appeals stated that "[b]y imposing an 'outside limit' or 'cut-off' on the amount of taxes which can be recovered, section 6511(b)(2)(A) operates like the three-year portion of the limitations period in *Lampf*, and thus is a 'period of repose inconsistent with tolling.'"¹⁶⁶ The First Circuit therefore concluded that § 6511(a) and § 6511(b)(2)(A) function together like the statutory provisions governing securities fraud actions that the *Lampf* Court held to be inconsistent with tolling.¹⁶⁷

C. The Sovereign Rights Approach

In the most recent case rejecting the doctrine of equitable tolling in a tax refund suit, *Webb v. United States*,¹⁶⁸ the United States Court of Appeals for the Fourth Circuit asserted a different rationale for rejecting the *Irwin* rule than either the First or Eleventh Circuits previously had offered.¹⁶⁹ Like those courts, the Fourth Circuit acknowledged that statutes

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 31.

165. *Id.* at 30-31.

166. *Id.* at 31 (citing *Lampf*, 501 U.S. at 363).

167. *Id.*

168. 66 F.3d 691 (4th Cir. 1995).

169. See *Webb v. United States*, 66 F.3d 691, 702 (4th Cir. 1995) (holding that statute of limitations jurisdictionally barred tax refund suit), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360); see also *supra* text accompanying notes 5-22 (providing summary of essential facts in *Webb*).

of limitations represent waivers of sovereign immunity and, as such, must be construed strictly.¹⁷⁰ The court also noted the traditional reluctance of courts to subject § 6511 to equitable tolling, but then acknowledged that *Irwin* created a need to reconsider this traditional approach.¹⁷¹ Unlike the First or Eleventh Circuits, the Fourth Circuit focused on the Supreme Court's statement in *Irwin* that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."¹⁷² The Fourth Circuit therefore concluded that the "[e]qual treatment of private and government defendants was . . . the basis for the [Supreme] Court's formulation of its 'general rule.'"¹⁷³ Thus, the court of appeals noted that when the doctrine of equitable tolling applies to an action brought against a private litigant, the doctrine also presumptively applies to a similar action brought against the United States.¹⁷⁴ However, the Fourth Circuit concluded that tax refund suits differ substantially from tort or employment cases because "tax refund cases cannot be brought against private litigants, nor are they even comparable to suits that can be brought against private litigants."¹⁷⁵ According to the court, the power to tax represents a sovereign power, and tax refund suits in which the government seeks to enforce its sovereign rights represent distinct cases from those in which the government attempts to protect essentially private rights.¹⁷⁶ Consequently, the Fourth Circuit concluded that the rule announced in *Irwin* does not apply to tax refund suits because such actions cannot be brought against private parties.¹⁷⁷

In addition, the Fourth Circuit stated that even if the rebuttable presumption announced in *Irwin* did apply to the present case, the statutory limitations structure rebutted that presumption.¹⁷⁸ The court cited *Oropallo* in support of this conclusion and essentially adopted the analysis of the First Circuit in that case.¹⁷⁹

170. *Webb*, 66 F.3d at 695.

171. *Id.* at 693-97.

172. *Id.* at 696-97 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)).

173. *Id.*

174. *Id.* at 697.

175. *Id.*

176. *Id.*

177. *Id.* at 698.

178. *Id.* at 699.

179. *Id.* at 699-700; see also *supra* Part V.B (discussing First Circuit's analysis in *Oropallo*).

D. A Split in the Circuits

As the decisions of the Eleventh, First, and Fourth Circuits demonstrate, federal courts remain reluctant to apply the doctrine of equitable tolling in tax refund suits.¹⁸⁰ Moreover, this reluctance exists despite the Supreme Court's decision in *Irwin* instructing courts to presume that equitable tolling principles apply in suits against the United States.¹⁸¹ Nonetheless, several courts have departed from this traditional approach and have applied the doctrine of equitable tolling in tax refund suits.¹⁸²

Most notably, in *Brockamp v. United States*,¹⁸³ the United States Court of Appeals for the Ninth Circuit created a split among the circuits by holding that a taxpayer's mental incapacity, if proved, could equitably toll the statute of limitations in a tax refund suit.¹⁸⁴ Stanley B. McGill was a ninety-three-year-old man who was not in possession of his full mental faculties.¹⁸⁵ In 1984, McGill sent the IRS a check for \$7000 along with an application for an automatic extension of time to file his 1983 income tax return.¹⁸⁶ However, McGill never filed his 1983 return, and in 1986 the IRS transferred the \$7000 from McGill's account to an "Excess Collection Account."¹⁸⁷ McGill died in 1988.¹⁸⁸ The sole beneficiary and administrator of McGill's estate was his daughter Marian Brockamp.¹⁸⁹ During the administration of the estate, Brockamp discovered that her father had overpaid his 1983 taxes and sent a letter informing the IRS that her father mistakenly had written a check for \$7000 when he should have sent only \$700.¹⁹⁰ In 1991, Brockamp filed

180. See *supra* Part V.A-C (discussing decisions of Eleventh, First, and Fourth Circuits rejecting equitable tolling).

181. See *supra* Part IV.B (discussing *Irwin* decision).

182. See, e.g., *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995) (holding that statute of limitations in tax refund suit may be equitably tolled), *cert. granted*, 116 S. Ct. 1875 (1996); *Scott v. United States*, 847 F. Supp. 1499, 1507-08 (D. Haw. 1993) (same), *aff'd*, 70 F.3d 120 (9th Cir. 1995), *cert. granted sub nom. United States v. Brockamp*, 116 S. Ct. 1875 (1996); *Wiltgen v. United States*, 813 F. Supp. 1387, 1394-95 (N.D. Iowa 1992) (same); *Johnsen v. United States*, 758 F. Supp. 834, 836 (E.D.N.Y. 1991) (same).

183. 67 F.3d 260 (9th Cir. 1995).

184. See *Brockamp*, 67 F.3d at 261-63 (holding that taxpayer's mental incompetence equitably tolled statute of limitations in tax refund suit).

185. *Id.* at 261.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

a tax return for McGill's 1983 tax liability.¹⁹¹ The IRS assessed \$427 in taxes and declined to refund any of the excess amount McGill had paid.¹⁹² In response, Brockamp filed suit against the government to recover the taxes that her father had paid erroneously.¹⁹³ The district court concluded that the statute of limitations jurisdictionally barred the action and therefore dismissed the case.¹⁹⁴

On appeal, the Ninth Circuit considered the statutory provisions governing tax refund suits and acknowledged that those provisions would jurisdictionally bar Brockamp's action absent equitable tolling.¹⁹⁵ The court then evaluated the impact of *Irwin* on *Dalm* and concluded that the rule the Supreme Court announced in *Irwin* severely limited *Dalm*.¹⁹⁶ The Ninth Circuit therefore considered § 6511 in light of the *Irwin* rule.¹⁹⁷ The court of appeals stated that neither the statute's specific language nor its legislative history expressly prohibited the application of equitable principles.¹⁹⁸ In addition, the court noted that since the Supreme Court decided *Irwin* Congress had taken no action to indicate that the doctrine of equitable tolling should not apply to § 6511.¹⁹⁹ Finally, the court dismissed the *Oropallo* argument analogizing § 6511 with the securities statutes considered in *Lampf*.²⁰⁰ Having determined that § 6511 could be equitably tolled, the court of appeals then concluded that mental incapacity represented a legitimate ground for tolling the statute of limitations.²⁰¹ Consequently, the Ninth Circuit remanded the case to determine the extent of McGill's mental incapacity when he overpaid his taxes in 1983.²⁰²

VI. Resolving the Debate

A. Reconciling *Dalm* and *Irwin*

To resolve the debate over the role of equitable tolling in tax refund suits, one must first determine the relationship between the Supreme Court's

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 262.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 262 n.1.

201. *Id.* at 263.

202. *Id.*

decision in *Irwin* and its prior decision in *Dalm*. This determination requires choosing one of three alternatives: First, the *Irwin* Court did not intend to alter the *Dalm* Court's approach advocating the strict enforcement of the statute of limitations in tax refund suits.²⁰³ Second, and in direct contrast to the first alternative, the *Irwin* Court essentially invalidated the Court's approach in *Dalm* and other prior inconsistent cases.²⁰⁴ Third, *Irwin* and *Dalm* may be reconciled because each deals with a distinct judicial doctrine arising from different policy considerations.²⁰⁵ An analysis of these three alternatives reveals that the third approach — focusing on the distinct doctrinal considerations of each case — represents the most logical and appropriate explanation for the conflicting language within *Irwin* and *Dalm*.²⁰⁶

1. The Argument Favoring *Dalm*

The first alternative posits that the *Dalm* decision, rather than the *Irwin* decision, controls the issue of equitable tolling in tax refund suits.²⁰⁷ Advocates of this approach assert that one can factually distinguish the two cases because *Irwin* involved a Title VII employment discrimination claim while *Dalm* involved a tax refund suit.²⁰⁸ Thus, although *Irwin* may have announced a general presumption of equitable tolling in suits against the government, *Dalm* precludes the application of that doctrine in the tax refund context.²⁰⁹ At least one court has suggested that the Supreme Court's failure to address the conflicting language in *Dalm* and *Irwin* reinforces this argument.²¹⁰ In addition, for *Irwin* to invalidate *Dalm*, several Justices on the

203. See *infra* Part VI.A.1 (discussing position that *Dalm* controls issue of equitable tolling).

204. See *infra* Part VI.A.2 (discussing position that *Irwin* controls issue of equitable tolling).

205. See *infra* Part VI.A.3 (asserting that *Dalm* and *Irwin* may be reconciled).

206. See *infra* Part VI.A.3 (same).

207. See *Vintilla v. United States*, 931 F.2d 1444, 1446 (11th Cir. 1991) (finding that *Irwin* did not alter *Dalm* Court's approach to statute of limitations in tax refund suits); *Brockamp v. United States*, 859 F. Supp. 1283, 1288-89 (C.D. Cal. 1994) (applying *Oropallo* and *Dalm* decisions to reject doctrine of equitable tolling), *rev'd*, 67 F.3d 260, 263 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1875 (1996); *Webb v. United States*, 850 F. Supp. 489, 492 (E.D. Va. 1994) (finding *Dalm* more instructive than *Irwin*), *aff'd on other grounds*, 66 F.3d 691, 702 (4th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360).

208. See *Webb*, 850 F. Supp. at 492-93 (distinguishing *Dalm* and *Irwin*).

209. *Id.*

210. See *Vintilla*, 931 F.2d at 1447 n.1 (finding that *Irwin* did not alter holding in *Dalm*); see also *supra* notes 113-27 and accompanying text (discussing *Vintilla*).

Supreme Court would have had to change their position on the issue over a span of just nine months.²¹¹

Critics of this first approach note that this alternative does not account for several key elements of the *Irwin* decision.²¹² First, the Supreme Court did not limit its holding in *Irwin* simply to the context of Title VII suits, but instead employed broad language to announce a new general rule.²¹³ As *Lampf* demonstrates, the Supreme Court has recognized that courts should apply the *Irwin* rule in contexts other than Title VII disputes.²¹⁴ Second, the *Irwin* Court's failure to discuss *Dalm* indicates nothing about whether *Dalm* survived the *Irwin* decision.²¹⁵ The *Irwin* Court acknowledged that a general inconsistency existed among prior decisions; nonetheless, the Court specifically discussed only a few of the cases that *Irwin* essentially invalidated.²¹⁶ These criticisms suggest that another approach may better account for the discrepancies between *Irwin* and *Dalm*.

2. The Argument Favoring *Irwin*

The second alternative asserts that *Irwin* invalidated *Dalm*'s strict adherence to the statute of limitations in tax refund suits.²¹⁷ This approach finds support in the criticisms stated above, particularly with respect to the broad language employed by the *Irwin* Court in announcing a new general rule.²¹⁸ Support for this alternative also arises from the *Irwin* Court's

211. Compare *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 90 (1990) (Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia, and Kennedy constituted majority), with *United States v. Dalm*, 494 U.S. 596, 598 (1990) (Chief Justice Rehnquist and Justices White, Blackmun, O'Connor, Scalia, and Kennedy constituted majority).

212. See Ronald A. Stein, *Will Equitable Tolling of the Statute of Limitations Gain Wider Acceptance in Tax Cases?*, 81 J. TAX'N 370, 373 (1994) (criticizing courts that refused to apply *Irwin* rule in tax refund suits).

213. See *Scott v. United States*, 795 F. Supp. 1028, 1034-35 (D. Haw. 1992) (criticizing *Vintilla* decision).

214. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (evaluating statute governing securities fraud actions in light of *Irwin* rule). Although the Supreme Court concluded that the statute in *Lampf* could not be equitably tolled, the Court reached this decision only by determining that the presumption of *Irwin* had been rebutted by the statutory structure. *Id.*

215. See Stein, *supra* note 212, at 373 (noting that *Irwin* discussed few prior cases).

216. *Id.*

217. See *Johnsen v. United States*, 758 F. Supp. 834, 836 (E.D.N.Y. 1991) (applying *Irwin* rule and concluding that statute of limitations was equitably tolled).

218. See *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (announcing new general rule); see also *supra* Part IV.B (discussing *Irwin*).

discussion of *Soriano v. United States*,²¹⁹ in which the Supreme Court refused to apply the doctrine of equitable tolling in an action against the government.²²⁰ The *Irwin* Court compared the statutory provisions at issue in *Irwin* and *Soriano* and concluded that the two statutes did not differ significantly enough to suggest a different congressional intent with respect to equitable tolling.²²¹ Nonetheless, the *Irwin* Court held that a general presumption of equitable tolling applies to suits against the government.²²² In so holding, the *Irwin* Court essentially overruled *Soriano* without explicitly doing so.²²³ Thus, although the *Irwin* Court failed to address the *Dalm* decision specifically, the Court may well have implicitly overruled *Dalm* and similar cases, as well as *Soriano*.²²⁴

This second alternative nonetheless fails to address several troubling points raised by the first alternative. In particular, this approach does not account for the fact that, for *Irwin* to invalidate *Dalm*, several of the Justices who joined the majority decisions in both cases must have changed their position on this issue within just nine months.²²⁵ Second, given the close proximity in time of these two decisions, one would expect the *Irwin* Court to have addressed the *Dalm* decision despite its reliance on broad language to announce a new general rule. Consequently, like the first alternative, the second approach fails to address fully the seemingly conflicting positions advanced by the Supreme Court in *Irwin* and *Dalm*.

3. *The Argument for Reconciliation*

The third analytical approach asserts that *Irwin* and *Dalm* can be reconciled because the two cases involve theoretically distinct doctrines that arise from different policy considerations.²²⁶ In *Dalm*, the Supreme Court held that a taxpayer cannot invoke the doctrine of equitable recoupment to

219. 352 U.S. 270 (1957).

220. See *Soriano v. United States*, 352 U.S. 270, 275-77 (1957) (refusing to toll statute of limitations governing claim for just compensation).

221. *Irwin*, 498 U.S. at 95.

222. *Id.*

223. *Id.* at 98 (White, J., concurring) (stating that majority's opinion directly overrules *Soriano*).

224. *Id.*

225. See *supra* note 211 (discussing which Justices constituted majority in *Dalm* and in *Irwin*).

226. See *Webb v. United States*, 66 F.3d 691, 698 (9th Cir. 1995) (distinguishing *Dalm* and *Irwin*), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360); *Scott v. United States*, 795 F. Supp. 1028, 1032 (D. Haw. 1992) (same).

provide the courts with jurisdiction over a tax refund suit when the statute of limitations bars such a claim.²²⁷ In contrast, the *Irwin* Court held that a rebuttable presumption of equitable tolling applies to suits against the government.²²⁸

The *Dalm* decision is both analytically sound and practically reasonable when viewed in light of the policy considerations underlying the doctrine of equitable recoupment.²²⁹ As the *Dalm* Court noted: "The essence of the doctrine of recoupment is . . . [that] recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded."²³⁰ Equitable recoupment does not look to see whether some disability or nefarious government action prevented a taxpayer from asserting a claim for refund prior to the expiration of the statute of limitations; instead, the doctrine recognizes that any problems concerning finality or fairness essentially have been eliminated because the court already must adjudicate the matter.²³¹ As a result, even if a claimant acted negligently in failing to assert a timely claim for refund, such negligence does not undermine the justification for a court to consider the recoupment claim. However, in a situation like *Dalm*, in which the taxpayer asserted a claim for recoupment not as a defense but as an affirmative basis for an independent action, the equitable considerations that justify recoupment disappear.²³²

227. See *United States v. Dalm*, 494 U.S. 596, 598 (1990) (holding that court cannot exercise independent jurisdiction over otherwise time-barred claim based on equitable recoupment); see also *supra* Part IV.A (discussing *Dalm*).

228. See *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (holding that rebuttable presumption of equitable tolling applies in suits against government); see also *supra* Part IV.B (discussing *Irwin*).

229. See *supra* notes 44-48 and accompanying text (discussing rationales underlying equitable recoupment).

230. *Dalm*, 494 U.S. at 611 (citing *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946) (quoting *Bull v. United States*, 295 U.S. 247, 262 (1935))). The *Dalm* Court continued: "[Equitable recoupment] has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole." *Id.* (citations omitted).

231. See *supra* notes 44-48 and accompanying text (discussing rationales underlying equitable recoupment).

232. *But see Dalm*, 494 U.S. at 614-16 (Stevens, J., dissenting) (concluding that doctrine of equitable recoupment should apply). Justice Stevens noted that the equitable considerations in *Dalm* were arguably significant because the taxpayer had not raised the claim for recoupment in the Tax Court because she believed that court lacked jurisdiction over such claims. *Id.* The majority's holding in *Dalm* therefore effectively barred the taxpayer from having her recoupment claim adjudicated. *Id.* Nonetheless, the majority did

In contrast to *Dalm*, *Irwin* focused on the doctrine of equitable tolling in suits against the government.²³³ The primary purpose of equitable tolling is to permit an individual to assert an affirmative claim despite the expiration of the statute of limitations when that individual was unable to assert a timely claim through no fault of his own.²³⁴ Equitable tolling thus focuses more on whether the plaintiff demonstrates an especially sympathetic factual situation and less on whether concerns of finality or fairness have been diminished.²³⁵ Because *Dalm* involved the latter and not the former, the *Irwin* Court had no reason to discuss or even to consider *Dalm*.²³⁶ This distinction explains why several Justices could join the majority opinion in both *Irwin* and *Dalm* without having changed their positions on the respective issues.²³⁷

not discuss this inequity, but instead dismissed the issue in a footnote, stating: "We have no occasion to pass upon the question whether *Dalm* could have raised a recoupment claim in the Tax Court." *Id.* at 611 n.8. Justice Stevens sharply criticized the majority's dismissal of this fact: "The Court reserves in a footnote an issue that would render obsolete its holding." *Id.* at 612. Stevens later added:

Of course, if this Court were eventually to decide the reserved issue by holding that the Tax Court has jurisdiction to hear an equitable recoupment claim, today's decision would become a complete dead letter. No taxpayer would have any reason to litigate the deficiency and the recoupment issues separately, and in any event a judgment upon the former would bar a subsequent suit upon the latter under the doctrine of *res judicata*.

Id. at 615 n.3. Although the Supreme Court has not taken up that issue, the Tax Court decided it has jurisdiction to hear a claim for recoupment. *See Estate of Mueller v. Commissioner*, 101 T.C. 551, 557 (1993) (holding that Tax Court has jurisdiction over recoupment claims); *see also supra* note 81 (discussing *Mueller*).

233. *See Irwin*, 498 U.S. at 93-96 (holding that rebuttable presumption of equitable tolling applies to suits against United States); *see also supra* Part IV.B (discussing *Irwin*).

234. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451-53 (7th Cir. 1990) (discussing doctrine of equitable tolling); *see also supra* notes 56-64 and accompanying text (discussing rationales underlying equitable tolling).

235. *See Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (discussing policies underlying equitable tolling). In *Burnett*, the Supreme Court noted that "[t]his policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights." *Id.*; *see also supra* notes 56-64 and accompanying text (discussing policies underlying equitable tolling).

236. *See Stein, supra* note 212, at 373 (criticizing several courts that relied on *Dalm*). Stein noted that "while [*Dalm*] involved a tardy refund claim, the Supreme Court neither directly nor indirectly ruled on the notion of equitable tolling. . . . This probably explains why the *Irwin* briefs and decision never cite *Dalm* — courts and litigants have little reason to invoke an irrelevant decision." *Id.* (citation omitted).

237. *See supra* note 211 (discussing composition of majority in both *Dalm* and *Irwin*).

B. Applications of the Irwin Rule

Assuming *Irwin* and *Dalm* can be reconciled based upon their consideration of two distinct judicial doctrines, one must then consider how courts should apply the *Irwin* rule in the context of tax refund suits. Current law provides three alternatives.²³⁸ The first approach, advocated by the First Circuit in *Oropallo*, posits that the *Irwin* presumption of equitable tolling is rebutted by analogizing § 6511 to the securities fraud provisions that the *Lampf* Court found to be incompatible with equitable tolling.²³⁹ The second alternative, articulated by the Fourth Circuit in *Webb*, asserts that although the *Irwin* rule generally controls in actions against the government, suits involving sovereign powers are not subject to equitable tolling.²⁴⁰ The third approach, asserted by the Ninth Circuit in *Brockamp*, permits courts to invoke the doctrine of equitable tolling in tax refund suits.²⁴¹ As the following analysis will reveal, this third alternative represents the best resolution of how to apply the *Irwin* rule, although certain constraints should limit the use of equitable tolling in the context of tax refund suits.²⁴²

1. The Securities Fraud Analogy

In *Oropallo*, the First Circuit rejected the doctrine of equitable tolling in tax refund suits by analogizing § 6511 with the statutory limitations period governing securities fraud suits.²⁴³ The First Circuit's analysis acknowledged that *Irwin* controlled the equitable tolling issue, but the court

238. See *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995) (holding that statute of limitations in tax refund suit may be equitably tolled), *cert. granted*, 116 S. Ct. 1875 (1996); *Webb v. United States*, 66 F.3d 691, 702 (4th Cir. 1995) (concluding that equitable tolling cannot be applied in suits involving sovereign rights), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360); *Oropallo v. United States*, 994 F.2d 25, 29-31 (1st Cir. 1993) (rejecting equitable tolling by analogizing § 6511 with one- and three-year limitations provision discussed in *Lampf*); *Scott v. United States*, 847 F. Supp. 1499, 1507-08 (D. Haw. 1993) (same), *aff'd*, 70 F.3d 120 (9th Cir. 1995), *cert. granted sub nom. United States v. Brockamp*, 116 S. Ct. 1875 (1996).

239. See *Oropallo*, 994 F.2d at 29-31 (analogizing § 6511 with one- and three-year limitations provision discussed in *Lampf*).

240. See *Webb*, 66 F.3d at 702 (concluding that equitable tolling cannot be applied in suits involving sovereign rights).

241. See, e.g., *Brockamp*, 67 F.3d at 263 (holding that statute of limitations in tax refund suit may be equitably tolled); *Scott*, 847 F. Supp. at 1507-08 (same).

242. See *infra* Part VI.B.3 (discussing when courts should and should not apply doctrine of equitable tolling in tax refund suits).

243. See *Oropallo*, 994 F.2d at 29-31 (analogizing statute considered in *Lampf* with § 6511); see also *supra* Part V.B (discussing First Circuit's analysis in *Oropallo*).

believed that *Lampf* altered the analysis again.²⁴⁴ The court thus analogized § 6511(a) and § 6511(b)(2)(A) to the one- and three-year limitations period that the *Lampf* Court found to be incompatible with equitable tolling.²⁴⁵ In making this analogy, the First Circuit concluded that both § 6511(a) and the one-year limit in *Lampf* constituted open-ended limitations provisions.²⁴⁶ In addition, the court found that a tax return provides an individual with all the information needed to determine if a refund is due in the same way that discovery of fraud provides an individual with the information required to file suit.²⁴⁷ The court thus concluded that § 6511(a) provides a taxpayer with sufficient time to file a claim for refund with the IRS and is therefore not subject to equitable tolling.²⁴⁸ The First Circuit also found that § 6511(b)(2)(A) resembled the three-year limitation in *Lampf* and thus represented a statute of repose inconsistent with the doctrine of equitable tolling.²⁴⁹ Despite this elaborate analysis, an examination of the First Circuit's decision in *Oropallo* demonstrates that the court's analogy cannot serve as a general approach to the doctrine of equitable tolling in tax refund suits.²⁵⁰

First, not all courts share the First Circuit's belief that § 6511(a) represents an open-ended provision.²⁵¹ In *Brockamp*, the Ninth Circuit noted that it previously had held that individuals who fail to file a tax return in a timely manner cannot invoke the provisions of § 6511(a) to recover a refund.²⁵² Under this interpretation, the time limit in § 6511(a) is not

244. *Oropallo v. United States*, 994 F.2d 25, 29 (1st Cir. 1993).

245. *Id.* at 30-31.

246. *Id.* at 30.

247. *Id.*

248. *Id.*

249. *Id.* at 31.

250. *See, e.g., Brockamp v. United States*, 67 F.3d 260, 261-63 (9th Cir. 1995) (rejecting First Circuit's analysis in *Oropallo*), *cert. granted*, 116 S. Ct. 1875 (1996); *First Interstate Bank of Nevada v. United States*, 874 F. Supp. 286, 288-90 (D. Nev. 1994) (same); *Scott v. United States*, 847 F. Supp. 1499, 1505 (D. Haw. 1993) (same), *aff'd*, 70 F.3d 120 (9th Cir. 1995), *cert. granted sub nom. United States v. Brockamp*, 116 S. Ct. 1875 (1996).

251. *See Brockamp*, 67 F.3d at 262 n.1 (dismissing *Oropallo*).

252. *Id.* The Ninth Circuit had previously stated:

A two-year period for filing a claim is mandated by section 6511(a) in this case.

.....

To hold that the filing of a return more than two years after payment of taxes invokes the three-year period of § 6511(a) would reward strategic behavior on the part of the taxpayers and create a discrepancy in limitations periods that was not intended by the Internal Revenue Code.

"totally illusory," and the Ninth Circuit therefore rejected the analogy between § 6511(a) and the one-year limit in *Lampf*.²⁵³

In addition, the First Circuit's attempt to analogize § 6511(a) to the one-year period in *Lampf* suffers when applied to a factual scenario different than *Oropallo*.²⁵⁴ A tax return does not always contain the information required to determine whether an overpayment has been made; in fact, taxpayers often must evaluate other sources of information to make such a determination.²⁵⁵ More significantly, a mentally incompetent taxpayer will often lack the ability to assess accurately a tax return or any other information to determine if a refund is due.²⁵⁶ Finally, as *Webb* demonstrates, in extreme cases a taxpayer may be prevented from evaluating her own tax return.²⁵⁷ The Fourth Circuit specifically noted in *Webb* that "[t]he facts of the case at hand belie this observation [of the First Circuit with respect to § 6511(a)]."²⁵⁸ Consequently, the First Circuit's comparison between the one-year limitation period in *Lampf* and § 6511(a) does not accurately reflect the function and role of § 6511(a) in tax refund suits.

The First Circuit's attempt to analogize § 6511(b)(2)(A) to the three-year limitations period discussed in *Lampf* is equally unpersuasive. In particular, the language of the two provisions discussed in *Oropallo* differs substantively.²⁵⁹ The securities fraud provision states that no "action shall be maintained to enforce any liability created under this section, unless brought . . . within three years after such violation."²⁶⁰ In contrast, § 6511(b)(2)(A) provides that "the credit or refund shall not exceed the

Id. (citing *Miller v. United States*, 38 F.3d 473, 475-76 (9th Cir. 1994) (holding that taxpayer who files return more than two years after it was due cannot take advantage of three-year period to file claim for refund)).

253. *Id.*; see also *supra* Part V.B (discussing *Oropallo's* interpretation of § 6511(a)).

254. See *Webb v. United States*, 66 F.3d 691, 700 n.5 (4th Cir. 1995) (noting that factual circumstances in *Webb* would not support First Circuit's analysis in *Oropallo*), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360); *Scott v. United States*, 847 F. Supp. 1499, 1505 (D. Haw. 1993) (criticizing First Circuit's opinion in *Oropallo*), *aff'd*, 70 F.3d 120 (9th Cir. 1995), *cert. granted sub nom. United States v. Brockamp*, 116 S. Ct. 1875 (1996).

255. *Scott*, 847 F. Supp. at 1506.

256. *Id.*

257. *Webb*, 66 F.3d at 700 n.5.

258. *Id.*

259. See *Scott*, 847 F. Supp. at 1505 (criticizing *Oropallo*).

260. 15 U.S.C. § 78(i)(e) (1994); see also *Scott v. United States*, 847 F. Supp. 1499, 1505 (D. Haw. 1993) (discussing statutory provision considered in *Lampf*), *aff'd*, 70 F.3d 120 (9th Cir. 1995), *cert. granted sub nom. United States v. Brockamp*, 116 S. Ct. 1875 (1996).

portion of the tax paid within the [3-year] period [prescribed in subsection (a)]"²⁶¹ Thus, § 6511(b)(2)(A) does not serve as a total bar to any action, but only limits the amount of credit or refund that a taxpayer may recover.²⁶²

Moreover, the legislative history of the earliest predecessor of § 6511(b)(2)(A) reveals that Congress did not intend for such a provision to serve as a statute of repose.²⁶³ Rather, Congress enacted the provision simply to prevent a taxpayer from reviving an otherwise barred claim by paying a minimal portion of the tax due prior to filing a refund claim for the entire amount of the tax.²⁶⁴ The legislative history contains no discussion of equitable tolling nor any indication that Congress intended the provision not to be subject to equitable tolling.²⁶⁵

Beyond these textual considerations, the First Circuit's analogy fails because the overall structure of the one- and three-year limitations provision in *Lampf* does not accurately reflect the structure of § 6511. In *Lampf*, the Supreme Court stated that "[b]ecause the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period."²⁶⁶ Thus, the Supreme Court's conclusion that the three-year period in *Lampf* could not be equitably tolled rested heavily on the notion that the three-year provision served to cut off the open-ended one-year limitations period.²⁶⁷ However, in courts sharing the Ninth Circuit's belief that § 6511(a) does not resemble the open-ended one-year period in *Lampf*,

261. 26 U.S.C. § 6511(b)(2)(A) (1994); see also *Scott*, 847 F. Supp. at 1505 (comparing text of statutes). In comparing the statutes, the *Scott* court mistakenly quoted the text of § 6511(b)(2)(B) rather than the text of § 6511(b)(2)(A). *Id.* Nevertheless, because the key language in each provision is nearly identical, this minor mistake does not undermine the court's analysis.

262. *Id.*

263. See S. REP. NO. 68-398, at 33 (1924); see also Stein, *supra* note 212, at 373 (discussing legislative history of predecessor of § 6511(b)(2)(A)).

264. See S. REP. NO. 68-398, at 33. The Senate report states:

In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four years immediately preceding the filing of the claim.

Id.; see also Stein, *supra* note 212, at 373 (discussing legislative history of predecessor of § 6511(b)(2)(A)).

265. See Stein, *supra* note 212, at 373 (discussing legislative history of predecessor of § 6511(b)(2)(A)).

266. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991).

267. *Id.*

§ 6511(b)(2)(A) has nothing to cut off.²⁶⁸ As a result, analogizing § 6511(b)(2)(A) to the three-year period in *Lampf* does not accurately reflect the role of that provision in tax refund suits.

Finally, the *Lampf* decision on which *Oropallo* relied generated substantial controversy in and of itself.²⁶⁹ Several commentators have criticized the *Lampf* Court's rationale for rejecting the doctrine of equitable tolling in securities fraud actions.²⁷⁰ Moreover, in response to *Lampf*, Congress immediately drafted legislation that would have extended the limitations period, permitted equitable tolling, and prohibited the retroactive application of the *Lampf* decision.²⁷¹ Although most aspects of this legislation were defeated as a result of substantial opposition from accounting firms and the securities industry,²⁷² this controversy raises doubts as to whether the Supreme Court accurately evaluated congressional intent in the *Lampf* case and whether the Court should rely upon that controversial decision in evaluating the role of equitable tolling in tax refund suits.

2. Should Sovereign Rights Matter?

In *Webb*, the Fourth Circuit held that *Irwin's* rebuttable presumption did not apply to tax refund suits because such actions directly involve the sovereign powers of the government.²⁷³ The court of appeals strictly

268. See *Brockamp v. United States*, 67 F.3d 260, 262 n.1 (9th Cir. 1995) (criticizing First Circuit's analysis in *Oropallo*), cert. granted, 116 S. Ct. 1875 (1996).

269. See Christopher R. Leslie, Comment, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CAL. L. REV. 1587, 1608-09 (1993) (discussing aftermath of *Lampf* decision). Leslie noted:

Lampf was controversial for three reasons. First, on average, it shortened the statute of limitations from that which had been applied using analogous state statutes of limitations. Second, the decision eliminated equitable tolling for securities fraud claims. Third, the decision was applied retroactively, causing dismissal of the case before the Court as well as all other pending Rule 10b-5 cases which did not meet the new *Lampf* statute of limitations.

Id. at 1608.

270. See generally Lyman Johnson, *Securities Fraud and the Mirage of Repose*, 1992 WIS. L. REV. 607 (asserting that Supreme Court failed to distinguish normative grounds underlying tolling principles and thus erred in completely rejecting equitable principles in securities fraud cases); Leslie, *supra* note 269 (arguing for application of equitable tolling principles in Rule 10b-5 cases).

271. Leslie, *supra* note 269, at 1608-09.

272. *Id.* at 1609.

273. See *Webb v. United States*, 66 F.3d 691, 695-98 (4th Cir. 1995) (holding that statute of limitations in tax refund suit was not equitably tolled), petition for cert. filed, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360); see also *supra* Part V.C (discussing

interpreted the Supreme Court's decision in *Irwin* and thus distinguished tax refund suits from other actions that can be brought against either the government or private litigants.²⁷⁴ However, the Fourth Circuit's justification for this narrow reading of *Irwin* does not properly address the legal reasoning and policy considerations of the *Irwin* decision.

First, the Fourth Circuit's literal interpretation of the *Irwin* rule does not comport with the overall language of the Supreme Court's opinion in that case. The *Irwin* Court stated: "We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government."²⁷⁵ The *Irwin* Court's implicit overruling of *Soriano* further indicates the broad nature of the *Irwin* decision.²⁷⁶ *Soriano* involved a claim to recover just compensation for property requisitioned by the United States Armed Forces during the Japanese occupation of the Philippine Islands, a claim not unlike the typical tax refund suit.²⁷⁷ When the *Soriano* Court held that the claimant could not invoke the doctrine of equitable tolling against the Government in that case, the Court recognized that if it had applied the doctrine, "statutes permitting suits for *tax refunds*, tort actions, . . . and other claims against the Government would all be affected."²⁷⁸ Consequently, when the *Irwin* Court implicitly overruled *Soriano*,²⁷⁹ the Court sanctioned the application of *Irwin*'s rebuttable presumption to all suits against the government. By improperly narrowing the scope of the *Irwin* rule, the Fourth Circuit essentially contradicted the language and reasoning of that case.

In addition to this interpretative criticism, the Fourth Circuit's emphasis in *Webb* on sovereign rights does not properly address the policy considerations implicated by equitable tolling. As stated above, the court of appeals focused on the sovereign nature of the power to tax and distinguished tax refund suits from other actions such as tort and employment disputes that can be brought against private parties, as well as against the government.²⁸⁰ In support of this distinction, the court cited an opinion by

Webb).

274. *Webb*, 66 F.3d at 695-98.

275. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990).

276. *See id.* at 94-95; *Soriano v. United States*, 352 U.S. 270, 275 (1957) (rejecting assertion that statute of limitations governing claim for just compensation could be equitably tolled); *see also supra* notes 219-24 and accompanying text (discussing *Soriano*).

277. *Soriano*, 352 U.S. at 275.

278. *Id.* (emphasis added).

279. *See Irwin*, 498 U.S. at 98 (White, J., concurring) (stating that majority's opinion directly overrules *Soriano*).

280. *See Webb v. United States*, 66 F.3d 691, 695-98 (4th Cir. 1995) (distinguishing

Chief Judge Posner discussing the doctrine of laches and suggesting that drawing a line along such grounds may be justified.²⁸¹ However, in that opinion, Posner also noted that "the questions when the government may be stopped from suing and when it may be stopped from pleading a defense of statute of limitations in a suit against it may not demand identical answers."²⁸² Policy considerations demonstrate the validity of this latter observation. Invoking equitable doctrines to preclude the government from enforcing its sovereign rights could present a serious threat to the sovereign's ability to govern.²⁸³ In contrast, allowing equitable considerations to permit the assertion of a claim against the government poses no such threat when that claim simply alleges that the government has been unjustly enriched. Thus, these policy considerations undermine the sovereign rights distinction advocated by the Fourth Circuit in *Webb*.

3. A Narrow Doctrine of Equitable Tolling

Having dismissed the securities analogy and the sovereign rights approach, no cogent argument remains to suggest that the doctrine of equitable tolling should not be applied in tax refund cases.²⁸⁴ However, having concluded that courts should not be barred from invoking the doctrine per se, one must still consider the circumstances in which courts should allow a taxpayer to invoke the doctrine of equitable tolling. Although by its nature equitable tolling demands that courts resolve this question on a case-by-case basis, and a thorough discussion of this issue is beyond the scope of this Note, the relevant case law and statutory provi-

tax refund suits from other types of actions), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360); *see also supra* Part V.C (discussing *Webb*).

281. *Webb*, 66 F.3d at 697. The Fourth Circuit stated:

Chief Judge Posner, in a recent case addressing the applicability of the doctrine of laches against the government, suggested the possibility of "draw[ing] a line between government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights, and government suits to enforce sovereign rights," and allowing equitable relief only in the former class of cases. . . . The language in *Irwin* certainly supports this distinction.

Id. at 697 n.2 (citations omitted) (quoting *United States v. Administrative Enters., Inc.*, 46 F.3d 670, 673 (7th Cir. 1995)).

282. *See Administrative Enters.*, 46 F.3d at 673 (discussing whether doctrine of laches can be invoked against government).

283. *Id.*

284. *See supra* Part VI.B.1 (dismissing securities analogy); *supra* Part VI.B.2 (criticizing sovereign rights approach).

sions provide some indication as to when courts should and should not permit a claimant to invoke the doctrine.²⁸⁵

In its broadest sense, the doctrine of equitable tolling simply means that, through no fault of either party, a claimant lacked sufficient knowledge to assert his rights within the limitations period.²⁸⁶ Implicit in this definition is the requirement that a claimant wishing to invoke the doctrine must have exercised due diligence and not have been negligent in the assertion of his claim.²⁸⁷ Thus, a taxpayer's failure to exercise due diligence will outweigh any equitable considerations in the taxpayer's favor.²⁸⁸ However, in the context of tax refund suits, a claimant might not be permitted to invoke the doctrine of equitable tolling even in some cases in which these minimum criteria have been satisfied.

In particular, an analysis of the provisions within 26 U.S.C. § 6511(d) reveals several situations in which a taxpayer cannot invoke the doctrine of equitable tolling in tax refund suits.²⁸⁹ These provisions, enacted prior to *Irwin* and thus under the presumption that § 6511(a) and § 6511(b)(2) cannot be equitably tolled, extend the limitations period for taxpayers in certain cases.²⁹⁰ For example, in § 6511(d)(1), Congress created a special statute of limitations of seven years for bad debts deductions.²⁹¹ Section 6511(d)(1)

285. See Stein, *supra* note 212, at 374 (discussing when courts should apply equitable tolling in tax refund cases).

286. See *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 721 (7th Cir. 1993) (discussing doctrine of equitable tolling).

287. See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990) (discussing equitable tolling). In *Cada*, then Judge Posner stated: "When we are speaking not of equitable estoppel but of equitable tolling, we are (to repeat) dealing with two innocent parties and in these circumstances the negligence of the party invoking the doctrine can tip the balance against its application — as it did, for example, in the *Irwin* case cited earlier." *Id.*

288. See Stein, *supra* note 212, at 374 (discussing requirement that taxpayer exercise due diligence).

289. See 26 U.S.C. § 6511(d) (1994) (providing exceptions to general statute of limitations in § 6511(a)).

290. See *id.* § 6511(d)(1) (providing special statute of limitations for bad debts and worthless securities deductions).

291. See *id.* (providing special statute of limitations for bad debt deductions). Section 6511(d)(1) provides:

Seven-year period of limitation with respect to bad debts and worthless securities
If the claim for credit or refund relates to an overpayment of tax imposed by
subtitle A on account of—
(A) The deductibility by the taxpayer, under section 166 or section 832(c), of a
debt as a debt which became worthless, or, under section 165(g), of a loss from
worthlessness of a security, or

applies to cases in which a taxpayer's right to a refund results from the discovery of evidence several years after the taxes originally were paid.²⁹² Under traditional principles of equitable tolling, such circumstances should permit a taxpayer to toll the statute of limitations.²⁹³ Nonetheless, applying the doctrine of equitable tolling to cases involving bad debts would render § 6511(d)(1) meaningless. Consequently, in order to give effect to the special exceptions detailed in § 6511(d), courts should not permit taxpayers to invoke the doctrine of equitable tolling in such cases.

(B) The effect that the deductibility of a debt or loss described in subparagraph (A) has on the application to the taxpayer of a carryover, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be 7 years from the date prescribed by law for filing the return for the year with respect to which the claim is made. If the claim for credit or refund relates to an overpayment on account of the effect that the deductibility of such a debt or loss has on the application to the taxpayer of a carryback, the period shall be either 7 years from the date prescribed by law for filing the return for the year of the net operating loss which results in such carryback or the period prescribed in paragraph (2) of this subsection, whichever expires the later. In the case of a claim described in this paragraph the amount of the credit or refund may exceed the portion of the tax paid within the period prescribed in subsection (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to the deductibility of items described in this paragraph.

Id. Significantly, in § 6511(d)(1), Congress extended the limitations of both § 6511(a) and § 6511(b)(2) in order to provide relief to taxpayers.

292. See H.R. REP. NO. 77-2333, at 44-45 (1942) (discussing reasons for enacting special statute of limitations for bad debts deductions). The House report states:

Under existing law, the taxpayer may be whipsawed out of a deduction for a bad debt because of the uncertainty as to the time at which the debt becomes worthless. Later evidence often discloses that present decisions as to the year in which a debt becomes worthless are erroneous. For example, the taxpayer concludes that a debt has become bad and takes the deduction in that year, only to discover by later evidence that the debt actually became worthless 3 years previously. The statute of limitations having run on such previous year, this deduction is lost forever to the taxpayer. Conversely, where the debt actually became worthless in a year later than the year chosen by the taxpayer, the 3-year statute of limitations may operate against the Government.

To relieve this inequitable situation, the bill replaces the present 3-year statute of limitations in such cases with a 7-year statute, giving a considerably greater flexibility to the allowance of bad debt deductions in the proper year.

Id.; see also *Armstrong v. United States*, 681 F.2d 774, 775-78 (Ct. Cl. 1982) (discussing congressional intent in enacting § 6511(d)(1) and finding that section did not apply in case); *Indiana Nat'l Corp. v. United States*, 980 F.2d 1098, 1100-02 (7th Cir. 1992) (citing and approving *Armstrong's* analysis of congressional intent with respect to § 6511(d)(1)).

293. See *supra* notes 56-64 and accompanying text (discussing doctrine of equitable tolling).

These statutory constraints, however, should have no impact on the use of equitable tolling under other compelling circumstances. For example, fraud that conceals a taxpayer's right to a refund should toll the statute of limitations, even in cases in which the defendant is not responsible for the fraud. Thus, courts should permit taxpayers to invoke the doctrine of equitable tolling in a case like *Webb*, in which taxes were paid fraudulently and the taxpayer was physically prevented from learning of these payments.²⁹⁴

Courts should also permit claimants to invoke the doctrine of equitable tolling in cases in which a taxpayer suffers from a debilitating mental illness.²⁹⁵ Thus, a taxpayer suffering from severe senile dementia should not be penalized for failing to assert a refund claim within the statute of limitations when that taxpayer lacked the cognitive ability to do so.²⁹⁶ Likewise, severe alcoholism or schizophrenia may justify the use of equitable tolling when the taxpayer is proved to be incompetent.²⁹⁷

Although the facts set forth in *Webb*, *Brockamp*, and other previously discussed cases are extremely compelling, the range of cases in which equitable tolling should be permitted defies enumeration. In those situations in which the doctrine should apply, any burden imposed on the government by allowing the statute of limitations to be equitably tolled will likely pale in comparison to the harm a taxpayer will suffer if not permitted to assert a claim for refund.²⁹⁸ Consequently, courts should be free to invoke the

294. See *Webb v. United States*, 66 F.3d 691, 692-93 (1995) (discussing situation in which taxpayer was victimized by fraud), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 23, 1996) (No. 95-1360).

295. See Stein, *supra* note 212, at 374 (arguing for application of equitable tolling in cases involving mental illness).

296. See *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995) (tolling statute of limitations in tax refund suit due to taxpayer's senility), *cert. granted*, 116 S. Ct. 1875 (1996); see also *First Interstate Bank of Nevada v. United States*, 874 F. Supp. 286, 288-90 (D. Nev. 1994) (same); *Johnsen v. United States*, 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991) (same).

297. See *Scott v. United States*, 847 F. Supp. 1499, 1504-08 (D. Haw. 1993) (finding taxpayer's severe alcoholism equitably tolled statute of limitations), *aff'd*, 70 F.3d 120 (9th Cir. 1995), *cert. granted sub nom. United States v. Brockamp*, 116 S. Ct. 1875 (1996); *Wiltgen v. United States*, 813 F. Supp. 1387, 1389-96 (N.D. Iowa 1992) (tolling statute of limitations due to taxpayer's schizophrenia).

298. See *Webb*, 66 F.3d at 702-03 (Russell, J., dissenting) (noting disparate positions of taxpayers and government). In his dissent in *Webb*, Judge Russell noted:

The government can certainly afford to do the honorable thing in this case. To the government, which deals with budgets of trillions of dollars, four million dollars is just a drop in the bucket. Requiring the government to return the money improperly collected from Parsons would not impose any burden on it.

doctrine of equitable tolling in those cases that present persuasive equitable considerations and that are not addressed by an enumerated statutory exception.

VII. Conclusion

Prior to 1990, an individual asserting a time-barred claim for a tax refund had little hope of ever obtaining relief, no matter how sympathetic a court may have been to that individual's particular situation.²⁹⁹ However, since the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*,³⁰⁰ several courts have abandoned the traditional rejection of equitable tolling in tax refund suits and have applied the doctrine to provide relief to individuals demonstrating persuasive equitable considerations.³⁰¹ Although other courts have resisted this trend and have developed elaborate legal theories to justify their position, these theories fail to address properly both the legal arguments and the policy considerations supporting the use of equitable tolling in tax refund suits.³⁰² Consequently, when the Supreme Court considers this issue, the Court should adopt the Ninth Circuit's general approach in *Brockamp* that permits a claimant to invoke the doctrine of equitable tolling when circumstances justify such a step. Admittedly, those circumstances are limited, not only in order to give effect to the statutory exceptions discussed above, but also because the statutes of limitations in tax refund suits further several important policy considerations. Nevertheless, courts must be able to protect the rights of taxpayers who, through no fault of their own, lack the ability to protect their own rights. The doctrine of equitable tolling is an essential tool in helping courts fulfill this important task.

Such an unbudgeted loss of revenues would destroy many corporations, but the government would hardly be affected.

Id. at 703 (Russell, J., dissenting). The Ninth Circuit expressed a similar sentiment in *Brockamp* and stated:

We think that the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases. In this instance, it would be unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 93 year-old man's senility.

Brockamp, 67 F.3d at 263 (criticizing First Circuit's analysis in *Oropallo*).

299. See *supra* Part IV.A.

300. 498 U.S. 89 (1990).

301. See *supra* Part V.D.

302. See *supra* Part VI.B.