

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN F. HINCK, ET UX., :

4 Petitioners :

5 v. : No. 06-376

6 UNITED STATES. :

7 - - - - - x

8 Washington, D.C.

9 Monday, April 23, 2007

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 1:00 p.m.

14 APPEARANCES:

15 THOMAS E. REDDING, ESQ., Houston, Tex; on behalf of the

16 Petitioner.

17 JONATHAN L. MARCUS, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on

19 behalf of the Respondent.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in case 06-376, Hinck vs. United States.

5 Mr. Redding.

6 ORAL ARGUMENT OF THOMAS E. REDDING

7 ON BEHALF OF THE PETITIONERS

8 MR. REDDING: Mr. Chief Justice, and may it
9 please the Court:

10 The Federal Circuit's opinion is simply
11 wrong. Enactment of Section 6404(h) did not repeal
12 district court and Court of Federal Claims refund
13 jurisdiction over interest by the Internal Revenue
14 Service. Both circuits have found that there was
15 pre-existing jurisdiction prior to the enactment of
16 Section 6406(h). Nothing in Section 6404(h) expressly
17 repeals that jurisdiction, and there are many instances
18 in the code where Congress when it does intend to
19 expressly limit jurisdiction, will state that in the
20 enabling statute. Reference to the tax court, specific
21 reference to the tax court in 6404(h) was mandated
22 unnecessary by Section 7442 and the nature of the tax
23 court. The tax court is only given jurisdiction over
24 those matters where it is specifically set out in the
25 tax code.

1 And the established framework of pay and sue
2 jurisdiction in the district courts and prepayment
3 jurisdiction in the tax court is a well established
4 framework for tax litigation. That has been accepted
5 and enunciated by this Court as far back as the Flora
6 opinions. It's a well established pattern of duality of
7 jurisdiction in the two forums.

8 CHIEF JUSTICE ROBERTS: But not with respect
9 to abatement of interest in particular.

10 MR. REDDING: Not with respect to abatement
11 of interest, Your Honor, but as a general basis. The
12 availability of a prepayment forum that was originally
13 enacted to be complementary to the ability to pay and
14 sue in order to protect smaller taxpayers, and avoid the
15 hardships faced by having to pay in full before having
16 access to refund jurisdiction, and in fact perhaps to
17 avoid bankruptcy. That is completely consistent with
18 the way this section is enacted. Section 6404(h) even
19 includes the limitation that only taxpayers with a net
20 worth below \$2 million or corporations below \$7 million
21 have prepayment access to the tax court. And abatement
22 by itself is generally a prepayment remedy.

23 JUSTICE GINSBURG: That's a -- on that
24 point, Mr. Redding, it seems odd that given this
25 tripartite system, Congress would want only the tax

1 court to be restricted in the people who could claim the
2 abatement, the net worth test applicable in the tax
3 court on your theory, if there is authority in the
4 claims court and in the district courts, they're not
5 limited to the net worth restrictions.

6 MR. REDDING: That is correct, Your Honor,
7 but I do believe that it is consistent with the intent
8 of the formation of the tax court to provide a
9 prepayment forum to especially avoid hardship and the
10 potential even of bankruptcy. It's very consistent with
11 that pattern to say that the larger taxpayer can afford
12 to pay the tax and sue, whereas the smaller taxpayer may
13 be in greater need of a prepayment forum. It's also
14 consistent with imposing the very short limitation
15 period for bringing an action in the tax court, because
16 there the government has a very vested interest in being
17 able to proceed with collection of the tax.

18 CHIEF JUSTICE ROBERTS: But why would you
19 not want some -- a larger taxpayer to be able to proceed
20 in the tax court if you can also proceed in the claims
21 court?

22 MR. REDDING: Your Honor, I can't speak to
23 Congress's reasoning behind that but I can understand
24 the logic behind saying we're going to create a special
25 prepayment remedy that allows the smaller taxpayer an

1 expedited means of resolving these issues without having
2 to first pay it and sue, whereas the larger taxpayer is
3 not put into a hardship position, is not inconvenienced
4 as bad by having to follow the old well established
5 procedures of pay and sue.

6 And I will note that 6404(h) does not apply
7 only to 6404(e)(1), which is the subsection we're coming
8 under. 6404(h) applies to all of the abatement grounds
9 under Section 6404. And if we were to repeal
10 jurisdiction in the district court and the Court of
11 Federal Claims over all of those provisions, then we
12 would be completely taking away a remedy that has been
13 there all along to the larger taxpayers. But to create
14 a new remedy that is consistent with the pattern that
15 allows a small taxpayer access to a prepayment forum, I
16 think is completely consistent with the entire history
17 of this court. This court meaning the tax court. And
18 its purpose.

19 In evaluating two statutes that appear to
20 either conflict or overlap, I think it is, in reviewing
21 whatever doctrine you call it, whatever canon you call
22 it of interpretation, it appears to me that what this
23 Court has always done is to look to see if the two
24 statutes can be harmonized rather than seeing if one
25 supersedes the other. And here considering the

1 extension of prepayment jurisdiction to the tax court
2 merely an additional form of prepayment jurisdiction
3 being granted to the tax court is completely consistent
4 with the long-standing pattern of pay and sue
5 jurisdiction in the district courts, prepayment
6 jurisdiction in the tax court --

7 CHIEF JUSTICE ROBERTS: But you have no
8 basis for an abatement of interest action apart from
9 6404(h), correct? That is the only place you get the
10 actual cause of action to sue for abatement of interest?

11 MR. REDDING: Abatement as a prepayment
12 remedy, yes, Your Honor. Once the IRS has failed to
13 abate the interest and you make payment then you have
14 the normal refund, refund provisions available.

15 CHIEF JUSTICE ROBERTS: But what would you
16 cite to, in response to the prior cases that said you
17 had no cause of action for abatement of interest?

18 MR. REDDING: Actually Your Honor I don't
19 believe that's what the cases said. They said you had
20 no cause of action that could be pursued under
21 6404(e)(1) but even the seminal cases, Horton -- or
22 Selman and Horton Homes compared a Section 6404(e)(1)
23 action to a Section 6404(e)(2) action and basically said
24 you could have brought a refund claim. If you qualified
25 under (e)(2) there would have been no impediment to

1 bringing that as a refund action because there was a
2 clearly established standard. The (e)(2) provision is a
3 must standard.

4 Now, under 6404(h) if it is exclusive over
5 abatement jurisdiction, then any taxpayer who would have
6 had access to the courts, for example for an (e)(2)
7 abatement case, unless they are a small taxpayer they
8 will be completely denied any remedy whatsoever.

9 JUSTICE SCALIA: Where is (e)(2)? Is it
10 produced in these materials. I got (e)(1); I don't have
11 (e)(2). I don't really like talking about a section I
12 don't have in front of me.

13 MR. REDDING: I believe all of 6404 was in
14 the appendix but I don't have it in front of me.

15 Yeah. It's -- it's immediate, in the code section
16 it's immediately below (e)(1).

17 JUSTICE SCALIA: Ah.

18 MR. REDDING: But I mean -- I'm sorry, Your
19 Honor. That doesn't help you --

20 (Laughter.)

21 MR. REDDING: -- where it is in the
22 materials.

23 JUSTICE SCALIA: That's one thing about this
24 case I'm sure about.

25 (Laughter.)

1 MR. REDDING: I apologize, Your Honor, but I
2 do not have that. It is in the appendix to the
3 petition, the entire code section is set out.

4 JUSTICE KENNEDY: Is that the one that says
5 interest abated with respect to erroneous refund check?
6 Or am I reading wrong?

7 MR. REDDING: Yes, Sir, it is.

8 CHIEF JUSTICE ROBERTS: But the one I'm
9 looking at just has (e)(1). Did you have a page number?

10 JUSTICE SOUTER: At page 42 of the appendix,
11 all -- all there is is a subsection 1.

12 JUSTICE SCALIA: That's right.

13 MR. REDDING: Well, Your Honor, I have the
14 code section in front of me now but I still do not have
15 the reference in the appendix. I apologize but I simply
16 don't have it, Your Honor.

17 JUSTICE GINSBURG: Can I go back to
18 something you just said, that I thought you said that
19 the people would have no remedy if the tax court -- were
20 the only forum for abatement claims? And it would be
21 the exclusive forum but nobody -- it wouldn't deny
22 access to anyone.

23 MR. REDDING: Your Honor --

24 JUSTICE GINSBURG: Abatement claim, if you
25 read this as the Government does, is one place where you

1 go, and the tax court but everyone who has an abatement
2 claim could go there. So who's being cut out?

3 MR. REDDING: Well no, Your Honor, everyone
4 cannot go there. You can only go there if you're a
5 taxpayer, an individual taxpayer with a net worth of
6 less than \$2 million.

7 JUSTICE GINSBURG: Oh, yes. But -- yes.
8 And I had asked you before well doesn't it seem, it
9 seems strange that Congress would want to limit the
10 authority of the, of the court where most people go and
11 have no limit for the wealthier taxpayers.

12 MR. REDDING: Your Honor, again, my, my view
13 of that is the Congress intended to limit the special
14 relief of prepayment jurisdiction to the smaller
15 taxpayers. But the availability of a pay and sue remedy
16 was already in existence and continues in existence and
17 those wealthier taxpayers generally can afford to pay
18 the liability in full and sue.

19 A prepayment forum which delays the
20 collection of the tax to the Government, you know, the
21 Government has a special interest there in restricting
22 access to that relief so that it can proceed with
23 collection. And again, it just makes logical sense that
24 as to a larger taxpayer the ability to pay and sue
25 should be a sufficient remedy. Generally speaking --

1 JUSTICE GINSBURG: I thought Congress was
2 operating on the assumption that no court could hear an
3 abatement claim?

4 MR. REDDING: Your Honor, that comes largely
5 from the legislative history, the House Committee report
6 addressing interestingly, subsection (h). And
7 subsection (h) since it applies only to prepayment
8 abatement claims specifically, I think then you, then
9 that legislative history makes sense. Because in that
10 same page in the legislative history --

11 JUSTICE GINSBURG: Well, give me a decision
12 of the claims court or a district court that said courts
13 have authority to abate the interest before Congress
14 enacted this legislation?

15 MR. REDDING: I don't believe there is a
16 specific case out there that I can cite to you where it
17 has happened. It is, it is reflected in both Horton
18 Homes and Selman that that availability existed with
19 respect to (e) (2) to --

20 JUSTICE KENNEDY: Is it fair to say that
21 Congress acted on the assumption that there was no right
22 to the abatement with, and to the payment unless it
23 enacted the statutes?

24 MR. REDDING: Your Honor, I don't believe
25 so. Again, because that legislative history that's

1 referred to is restricted, the House Committee report is
2 restricted only to the subsection creating the tax court
3 prepayment jurisdiction. It is not relevant to the rest
4 of the amendments to Section 6404. And I note that in
5 doing so Congress also did not make the restriction on
6 the \$2 million/\$7 million net worth relative to the
7 rights being granted under the other provisions of 6404.

8 JUSTICE SCALIA: It's easy to see why the
9 only cases you have relate to (e)(2) rather than (e)(1).
10 (E)(2) which we don't have in the materials, but I have
11 gotten a copy of it.

12 And (e)(1) says that the Secretary "may"
13 abate the assessment of all or any part. And those
14 cases that denied it said this is discretionary; he
15 doesn't have to. (E)(2) on the other hand, interest
16 abated with respect to erroneous refund check, says the
17 Secretary "shall" abate the assessment. So really,
18 (e)(2) doesn't -- doesn't do you any good at all with
19 respect to whether there was a cause of action before
20 (h) was adopted.

21 MR. REDDING: Well -- Your Honor, I
22 respectfully disagree because 6404(h) applies to (e)(2)
23 as much as it does to (e)(1). And any taxpayer that
24 would have met the net worth requirements or whether or
25 not they met the net worth requirements that are now in

1 H, could have brought a refund suit under (e) (2)
2 previously.

3 CHIEF JUSTICE ROBERTS: Well, sure. But --
4 but that's just saying, if -- you used to have the
5 entitlement under (e) (2) and you're saying well, you
6 could bring cases under (e) (2). But 6404(h) allows you
7 to bring cases under (e) (1). It would follow a fortiori
8 that you could bring them for (e) (2) as well, but that
9 doesn't prove that you could prove them under (e) (1) in
10 the claims court or the district court.

11 MR. REDDING: No it does not, Your Honor.
12 What I'm trying to address is the intent to repeal the
13 pre-existing jurisdiction, again because 6404(h) does
14 not apply just to (e) (1), where there might be a question
15 about whether or not they could have brought the case
16 previously, although jurisdiction existed. Clearly they
17 could have brought their case under (e) (2).

18 JUSTICE SCALIA: I see. What you're saying is
19 that cases that used to be bringable under (e) (2) would
20 now be bringable only under (h) which would in effect be
21 an implicit repeal of (e) (2).

22 MR. REDDING: Of (e) (2) --

23 JUSTICE SCALIA: At least as far as suits
24 elsewhere than in the tax court.

25 MR. REDDING: That's correct. And

1 additionally limit it solely to the small taxpayer. The
2 larger taxpayer who had a prior remedy would have none.

3 JUSTICE BREYER: It seems to apply just to
4 abuse of discretion.

5 MR. REDDING: I'm sorry, Your Honor?

6 JUSTICE BREYER:: Doesn't the new statute
7 just apply to abuse of discretion?

8 MR. REDDING: No, Your Honor, it does not.
9 It creates the standard under which the tax court may
10 review any interest abatement claim under Section --

11 JUSTICE BREYER: It says you have
12 jurisdiction to determine whether it's an abusive
13 discretion. Maybe I'm reading the wrong place. 6404 --

14 MR. REDDING: Yes, Your Honor, that is the
15 standard it applies to.

16 JUSTICE BREYER: Right. Well that standard
17 doesn't apply to the (e)(2). It has nothing to do with
18 it; (e)(2) says if it's a refund, abate, if not, not.
19 It's not a question of abuse of discretion or not.

20 MR. REDDING: Well I think it's the standard
21 on which they are to review the Government's action.
22 And I believe I cannot cite the case but there are cases
23 that hold that a violation of law is a per se abuse of
24 discretion. There are also other subsections --
25 subsections under 6404 which are made provisions in

1 other 6404 subsections, which are must provisions.
2 There are about five different subsections under 6404
3 that provide for interest abatement.

4 Again, I come back to the long-established
5 pattern of having prepayment jurisdiction in the tax
6 court and postpayment refund jurisdiction in the
7 district courts and Court of Federal Claims. It's a
8 well established system, and adding a new prepayment
9 form of relief into the tax court in no way should be
10 implied to be a repeal of the long established refund --
11 pay and sue refund jurisdiction that normally exists.

12 CHIEF JUSTICE ROBERTS: But if you went into
13 the district court and claimed that the failure to abate
14 interest was an abuse of discretion, what would you rely
15 on for the -- for the cause of action?

16 MR. REDDING: If the failure to abate
17 interest was an abuse of discretion under (e)(1) you
18 would rely on (e)(1) for the cause of action. The right
19 is created by the other subsections of (h) of 6404.

20 CHIEF JUSTICE ROBERTS: I thought the prior
21 cases consistently, consistently said that there was no
22 judicial review because it was "may abate" and that it
23 was only with the arrival of 6404(h)(1) that there was a
24 cause of action for abuse of discretion?

25 MR. REDDING: Yes, Your Honor, but I believe

1 what they actually said is that there was jurisdiction
2 to hear it but there was not a justiciable standard that
3 could be applied with regard to (e)(1). However, once
4 Congress came in and says to the tax court you're going
5 to apply this standard, there is a standard of review.
6 That now indicates Congress did not intend it to be
7 solely discretionary, and that the district court or
8 Court of Federal Claims would look to the general common
9 law; it would look to precedents, such as the APAA abuse
10 of discretion standard is consistently used throughout
11 the court systems in --

12 CHIEF JUSTICE ROBERTS: So you want to look
13 at 6404(h)(1) saying now we have a standard, but you
14 don't want the other stuff that goes along with
15 6404(h)(1), which is it's in the tax court; you got to
16 have less than ten million, blah, blah, blah?

17 MR. REDDING: That is correct, Your Honor.
18 The abuse of discretion standard is a common law
19 standard which has been carried over into -- into this
20 statute. But to create a --

21 JUSTICE GINSBURG: And it didn't exist
22 before this statute? I mean, the lower courts as I
23 understand it said, routinely, yes, you can have
24 jurisdiction, but have you no claim for relief because
25 there is no, no law to apply. This is a totally

1 discretionary matter of the Commissioner's grace. So
2 Congress perhaps didn't grasp the subtle distinction
3 between no jurisdiction, and you can walk in the door
4 but you go out the next door, because there is no
5 justiciable claim. And it provided peculiarly in the
6 tax court for relief that was not available anyplace
7 before?

8 MR. REDDING: I understand and that's
9 basically the Fifth Circuit's view, Your Honor. I do
10 not agree with that view. I think that the Congress was
11 merely expanding the existing structure of prepayment
12 jurisdiction for the tax court --

13 JUSTICE GINSBURG: The Fifth Circuit -- I
14 thought the Fifth Circuit went your way.

15 MR. REDDING: Pardon?

16 JUSTICE GINSBURG: I thought the Fifth
17 Circuit went your way.

18 MR. REDDING: It did, Your Honor. I'm
19 sorry. The Federal Circuit analyzed it as you have. I
20 do not believe that that is the correct analysis. I
21 think the Fifth Circuit has this one right. What you
22 have is a grant of jurisdiction to the United States Tax
23 Court for a prepayment forum of relief which is
24 consistent with the existing pattern, and in no other
25 instance where that has been done has there been an

1 implied repeal.

2 JUSTICE SCALIA: Mr. -- Mr. Redding, let me
3 come back to the phantom (e)(2) which we have finally
4 traced down.

5 MR. REDDING: I apologize, Your Honor.

6 JUSTICE SCALIA: I am not sure that (h)
7 would impliedly repeal (e)(2), because (e)(2) is
8 mandatory. There isn't any question under (e)(2)
9 whether there has been an abuse of discretion. There is
10 no discretion. It is mandatory to the extent that the
11 Administrative Procedure Act would govern (e)(2), it
12 would be for a violation of law not for abuse of
13 discretion.

14 So when (h) says the tax court shall have
15 jurisdiction to determine whether the Secretary's
16 failure to abate interest was an abuse of discretion, I
17 would take that to apply only to (e)(1), which says the
18 Secretary may abate and not to (e)(2) which says the
19 Secretary shall abate. There is no question of -- of
20 discretion in (e)(2) at all.

21 MR. REDDING: I understand that argument,
22 Your Honor. And --

23 JUSTICE SCALIA: It was a pretty good
24 argument, I thought.

25 (Laughter.)

1 MR. REDDING: I agree, Your Honor. I would
2 note to the Court, though, that 6404(d) is also a
3 may-abate provision which is in the code. 6404(a) is
4 also a permissive abatement provision, and those
5 provisions would clearly be covered by it. I, when it
6 says it may, may review a failure to abate interest
7 under 6404, I read that as encompassing all of 6404 and
8 creating their standard for review. I do not review
9 that as a new standard that applies.

10 JUSTICE SCALIA: What about those other
11 sections, (c) and (d), which say the Secretary is
12 authorized? Have there been cases which, which said
13 that you could sue for, for his failure to make use of
14 that?

15 MR. REDDING: Your Honor, I've been able to
16 find no case --

17 JUSTICE SCALIA: It's the same as with (e)?

18 MR. REDDING: Yes Your Honor.

19 JUSTICE SCALIA: As with (e)(1).

20 MR. REDDING: Yes, Your Honor. There's no
21 clearly history of cases.

22 I would also submit, Your Honor, that
23 because of the established pattern of pay and sue versus
24 prepayment jurisdiction and the necessity to make a
25 specific reference to the tax court in any grant of

1 jurisdiction in the tax code in order to enable the tax
2 court to have jurisdiction, that if this is the ruling
3 of this Court with regard to 6404(h), it is going to
4 raise a question every time prepayment jurisdiction is
5 extended to the tax court over any matter as to whether
6 that somehow now becomes exclusive of the conventional
7 pay and sue remedy.

8 CHIEF JUSTICE ROBERTS: Of course, there's a
9 fundamental difference on this particular question
10 between pay and sue and sue --

11 MR. REDDING: Prepay.

12 CHIEF JUSTICE ROBERTS: -- prepay, because
13 if you -- in the district court if you're paying and
14 suing you're not really subject to the accrual of
15 interest, right?

16 MR. REDDING: No, Your Honor, that is not
17 correct.

18 CHIEF JUSTICE ROBERTS: If I owe the IRS,
19 1,000 dollars and they send me a bill and I paid the
20 1,000 dollars, they've got the money, I don't. So I
21 don't owe interest on that, do I?

22 MR. REDDING: Your Honor, may I reflect it
23 back to the facts in this case. The time period with
24 respect to which abatement is requested occurs many
25 years before the IRS ever sent the taxpayer a bill. The

1 errors and delays complained of in this case occurred
2 during the course of the partnership level examination
3 and proceedings. The taxpayer at that time doesn't even
4 have a notice of what the adjustments are going to be,
5 let alone what his tax liability is. In a partnership
6 case, the partnership level determinations are made at
7 the partnership level. The Government then, without any
8 further notice to the taxpayer, is free to make the
9 computation of the taxpayer's liability and send him a
10 bill.

11 During the pendency of the proceedings at
12 the partnership level, there is virtually no way to
13 tell, except as to what the outside maximum liability
14 might be if the Government prevails, what your liability
15 is going to be. And if --

16 CHIEF JUSTICE ROBERTS: The initial bill
17 includes the interest?

18 MR. REDDING: Absolutely, Your Honor, that's
19 being asked to be relieved of in this case.

20 CHIEF JUSTICE ROBERTS: But still, in the
21 tax court situation it's still accruing?

22 MR. REDDING: Well, yes. It's accruing
23 during the course of the tax court proceeding. And
24 again, even there for an individual if the time period
25 involved was prior to the assessment the pay, the being

1 able to pay it and cut off the interest really wouldn't
2 make sense.

3 Basically, Your Honor, I believe that, I
4 believe that this case really rests on what I think the
5 Fifth Circuit summarized quite well when it says that it
6 makes more sense in this case to simply believe the
7 Congress, quote, "simply intended" -- "simply chose to
8 extend concurrent jurisdiction to the tax court over a
9 certain class of claims." And that's all it really has
10 done here. It has implemented and expanded the
11 conventional jurisdiction of the tax court as a
12 prepayment forum before you do have to pay the liability
13 to resolve a dispute with the Internal Revenue Service.

14 There is no reason, I don't believe, to see
15 this as a major departure from the existing structure of
16 pay and sue jurisdiction versus prepayment jurisdiction.
17 This is just a well established plan that's been in the
18 code for many, many years.

19 Mr. Chief Justice, if the Court has no other
20 questions I would reserve my remaining time for
21 rebuttal.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Redding.

24 Mr. Marcus.

25 ORAL ARGUMENT OF JONATHAN L. MARCUS

1 ON BEHALF OF THE RESPONDENT

2 MR. MARCUS: Thank you, Mr. Chief Justice,
3 and may it please the Court:

4 The court of appeals correctly held that the
5 tax court has exclusive jurisdiction over actions
6 challenging interest abatement determinations under
7 Section 6404(e)(1). The language, structure and history
8 of the interest abatement review statute supports the
9 court of appeals' decision as to principles of sovereign
10 immunity. Under Petitioner's theory the specific
11 restrictions on the remedy that Congress created may be
12 avoided by the simple expedient of filing a challenge in
13 another forum. Nothing in the interest abatement review
14 statute or this Court's precedent permits that result.

15 The place to start is the language of the
16 interest abatement review statute. Section 6404(h)
17 provides the tax court shall have jurisdiction over an
18 interest abatement action brought by taxpayers who meet
19 the net worth limitations set out in another part of the
20 code and who file their claim within 180 days of the
21 Secretary's mailing of a final determination not to
22 abate interest.

23 JUSTICE KENNEDY: If, if the history of this
24 issue had been such that before the enactment of this
25 section the courts of appeals were divided or the courts

1 were divided as to whether or not there was jurisdiction
2 in the Court of Claims and in the district court, would
3 your position be different?

4 MR. MARCUS: No, our position would be the
5 same. We would first look to the statutory language of
6 Section 6404(e)(1) and that provision provides that the
7 Secretary may abate interest when there is an error or
8 delay committed by an IRS employee in the performance of
9 a ministerial act, and that "may" language contrasts
10 with other provisions that have mandatory language that
11 requires the Secretary to abate. In addition, if you
12 look at the nature of the --

13 JUSTICE KENNEDY: So it's, so it's only (h)
14 that gives any court any jurisdiction at all?

15 MR. MARCUS: That's correct.

16 JUSTICE KENNEDY: Even though in our
17 hypothetical world some courts of general jurisdiction
18 thought that they did have jurisdiction?

19 MR. MARCUS: That's correct, Justice
20 Kennedy. Up until 1986 the IRS didn't even have ability
21 to abate in these circumstances.

22 JUSTICE SCALIA: Did (h) apply to (e)(2) as
23 well as to (e)(1)? Does it apply only to discretionary
24 abatement provisions?

25 MR. MARCUS: No, it's our position it

1 applies only to discretionary abatement determinations
2 by the Secretary. The language -- typically when abuse
3 of discretion standard is imposed, it presupposes that
4 the decision being reviewed involves an exercise of
5 discretion.

6 JUSTICE SCALIA: So what happens with
7 (e)(2)? You use the pay and sue provisions?

8 MR. MARCUS: Yes, you could use it, although
9 it typically comes up when the Government has filed an
10 action to recover an erroneous refund. It's usually
11 raised as a defense. But you could bring it that way.

12 JUSTICE KENNEDY: Well, isn't it an abuse --
13 isn't it an abuse of discretion for the Secretary to
14 fail to do what the statute tells him he absolutely
15 must?

16 MR. MARCUS: I think as a technical matter,
17 Justice Kennedy, that's correct. But I don't think
18 that's the natural way to read the statute, and when the
19 Congress imposed that abuse of discretion standard it
20 assumed that the decisions that were being -- that were
21 subject to review involved the exercise of a discretion.

22 JUSTICE SCALIA: I don't, I don't even think
23 it's technically correct. How is it an abuse of
24 discretion? He has no discretion. He must do it. How
25 could you say he has abused his discretion? What

1 discretion?

2 MR. MARCUS: Well I think some cases --
3 there is some case law that has said that when there is
4 an error of law committed by a lower court that can
5 constitute an abuse of discretion. But in our view
6 again it's not the natural reading of the standard that
7 Congress put in. And also, if you look at the
8 legislative history, Justice Kennedy, you'll see that
9 Congress was focused on the absence of a judicial remedy
10 with respect to determinations by the Secretary that
11 involved an exercise in discretion.

12 CHIEF JUSTICE ROBERTS: But what the cases
13 said prior to 6404(h) when they asked for interest
14 abatement was not that we don't have jurisdiction to
15 consider that claim. They would just say there's no
16 standard to apply, so it's committed to agency
17 discretion by law. Then all of a sudden 6404(h) comes
18 along and gives you a standard, so that removes that
19 objection. What's wrong with that?

20 MR. MARCUS: I think that's -- with respect,
21 I think the Fifth Circuit's reasoning is too clever by
22 half. The Fifth Circuit basically extracted one piece
23 of Section 6404(h)'s integrated whole and held that
24 there now is a refund cause of action that's not subject
25 to the specific restrictions.

1 CHIEF JUSTICE ROBERTS: Well, that's because
2 of the way that Congress enacted the language. It
3 doesn't say that the tax court and only the tax court
4 shall have jurisdiction. It says the tax court shall
5 have jurisdiction. That is a, in many respects a
6 preferred forum and they're saying you can bring it
7 there as well, but it doesn't take away the jurisdiction
8 that the prior courts had recognized.

9 MR. MARCUS: Well, I think you need to look
10 at what the state of the law was when Congress enacted
11 this provision and think about what Congress would have
12 wanted to do. If Congress would have wanted to reverse
13 those decisions that had said there's no cause, no
14 refund cause of action for interest abatement, they
15 could have easily referenced the refund statute and said
16 there is a refund action available. They also could
17 have specified that the Court of Federal Claims or the
18 district courts can exercise jurisdiction over interest
19 abatement issues.

20 CHIEF JUSTICE ROBERTS: Don't you think it's
21 kind of strange, though, if you have the interest
22 abatement is available only for a particular category of
23 taxpayer and not others?

24 MR. MARCUS: No.

25 CHIEF JUSTICE ROBERTS: If you have a net

1 worth of two million and one dollar you can't get any
2 interest abatement, but if it's \$2 million you can.

3 MR. MARCUS: I don't think, I don't think
4 it's anomalous. I think if you consider the concept of
5 interest under the tax code, the way it works under the
6 tax code is interest accrues on an unpaid tax liability
7 from the time the tax is due until the time the tax is
8 paid. So the amount of underpayment is the amount of
9 taxpayer is borrowing from the Government. The interest
10 that accrues on that underpayment is not a penalty; it's
11 just a charge basically for the time value of money.

12 CHIEF JUSTICE ROBERTS: Right, but you abate
13 it in some cases, but you don't abate it in the others.

14 MR. MARCUS: Right. But I think, I think
15 the idea was that Congress was concerned that some
16 taxpayers, taxpayers that fall within the net worth
17 limitations, might be in positions where they are less
18 positioned to pay the full tax liability up front.

19 CHIEF JUSTICE ROBERTS: That's what I
20 thought, too. But then your friend explained that in
21 the initial bill is where the interest is contained in a
22 lot of these cases and in this case in particular. So
23 it's not as if you have the opportunity to pay it in
24 advance to stop the accrual of interest. Just you get
25 the bill and you find out, you know, you owe a 1,000

1 dollars and 300 of it is interest.

2 MR. MARCUS: I don't think that's correct,
3 Your Honor. The way this is -- the interest that's
4 abatable is, a taxpayer is in full control of whether
5 that interest runs or not. If the taxpayer pays his
6 full tax liability on time, interest doesn't accrue, so
7 there's no interest to abate.

8 JUSTICE SCALIA: But he doesn't even know
9 what his tax liability is, especially in a partnership
10 situation.

11 MR. MARCUS: Well, the taxpayer --

12 JUSTICE SCALIA : He makes the
13 partnership calculation, it goes to the IRS, and then
14 they figure out what the tax is. And meanwhile, you
15 know, the interest is running.

16 MR. MARCUS: Well, Justice Scalia, first of
17 all, the taxpayer is in the best position to know what
18 the tax liability is. If a taxpayer is going to make
19 certain investments, they should understand what the tax
20 consequences are.

21 JUSTICE SCALIA: This is quite a different
22 argument. You're saying, you know, he should have paid
23 the full tax in the first place, not he could have paid
24 the interest that he knew was accruing.

25 MR. MARCUS: Right. But he could have

1 prevented that, the abatable interest, from accruing.
2 This abatable interest doesn't accrue until the taxpayer
3 receives notice from the IRS that there is a problem
4 with the return. So the -- in other words, that first
5 period from the time the underpayment is made until the
6 IRS notifies the taxpayer, that, that interest is not
7 subject to abatement. That automatically accrues and
8 there is no remedy. Congress has created no remedy for
9 that period, and there's just a period, there's a
10 provision in section --

11 JUSTICE SCALIA: Excuse me. I didn't
12 understand that. Say that again? There's no abatement
13 for the interest that accrues until you're notified of
14 what the --

15 MR. MARCUS: Until you're notified, until
16 the IRS notifies you that they are looking further at
17 your return. They might not at that point tell you
18 precisely how much you owe, but you're on notice that
19 the IRS is looking into your return further and that you
20 can at that point make a payment or put down a deposit
21 that doesn't compromise your ability as a taxpayer to go
22 into the tax court, but it does stop the accrual of
23 abatable interest.

24 JUSTICE SOUTER: But you don't know how much
25 to pay, do you? I mean, when they send you the notice

1 they don't send a notice that says, we're looking into
2 this and we think you're going to end up owing \$5,000,
3 do they? They don't give you a figure.

4 MR. MARCUS: Again, they don't necessarily
5 tell you exactly how much you owe, but it's the
6 taxpayers' --

7 JUSTICE SOUTER: Do they name a figure at
8 all --

9 MR. MARCUS: They sometimes do.

10 JUSTICE SOUTER: -- when they give you the
11 initial notice?

12 MR. MARCUS: They sometimes do, and then at
13 18 months, at 18 months under subsection (g), under 18
14 months under a provision that was acted in 1998, the IRS
15 has to at 18 months tell you how much you owe;
16 otherwise, the interest cannot continue to accrue after
17 that 18-month period. But you should -- but it is the
18 taxpayer's responsibility to know what their tax
19 liability is.

20 JUSTICE SOUTER: That's true. That's true.
21 But you can make that argument. That argument, if you
22 accepted it, would be an argument for having no
23 amendment to subsection (h) at all.

24 MR. MARCUS: Right, but that's the idea.
25 Until 18 -- until 1986 there was no authority at all for

1 the Secretary to abate, and then Congress gave the
2 Secretary that authority as a matter of grace in 1986,
3 to extend this relief to forgive the accrual of
4 interest. I mean, after this is money --

5 JUSTICE SOUTER: And the question is, why is
6 the grace confined to some taxpayers and not to others?

7 MR. MARCUS: The short answer is because
8 Congress has said that, said that, and the Congress
9 decided to impose the net worth limitation.

10 JUSTICE SOUTER: They've said it if we
11 accept your view of the exclusivity of the amendment to
12 (h).

13 MR. MARCUS: Right. And typically when
14 Congress imposes restrictions on a remedy this Court
15 reads that, reads that as an intentional --

16 JUSTICE BREYER: Yeah, but is there any
17 other instance in the law? I suppose there probably is,
18 but what surprised me about that is this: Imagine we
19 have two citizens and they are identical in every
20 respect in terms of their claim, they each believe the
21 government owes them \$50,000. They each have
22 identically strong claims. And Congress passes a law
23 and says one of you can come into court and the other
24 can't. Now suppose it said the poor person can't come
25 into court. Do you think there wouldn't be a

1 constitutional problem there? Remember, they have the
2 same claim for the same amount, with the same precise
3 strength of their argument. But we say rich people can
4 go in, and we'd say why did you do that? We say poor
5 people don't have as much stake in society. They don't
6 have -- now suppose you heard such an argument. How
7 long would it take you to feel there's a constitutional
8 problem?

9 MR. MARCUS: Well, I think there has to be a
10 rational basis for --

11 JUSTICE BREYER: No. No. No. The rational
12 basis is that the poor person doesn't have the stake in
13 society that a rich one does.

14 MR. MARCUS: Well, I --

15 JUSTICE SOUTER: It's worthless. Okay. Now
16 I guess, if you can't keep the poor person out for such
17 a reason then you can't keep the rich person out for
18 that reason. So you tell me what the rationale is in
19 keeping the rich person out any more than the poor
20 person. They have the same claim, same amount, same
21 cause. The cause, by the way, was that some bureaucrat
22 in the IRS forgot to send a notice so nobody knew what
23 was happening. That was the cause. And the reason it
24 didn't get abated is because a different bureaucrat got
25 mixed up, okay? Same claims.

1 MR. MARCUS: Keep in mind, this is -- what
2 you're talking about is, this is interest that's running
3 on money that the taxpayer is borrowing from the
4 Government. This is money that the Government is
5 legally entitled to as of the date it was originally
6 due.

7 JUSTICE BREYER: Yeah.

8 MR. MARCUS: And so this is money that the
9 taxpayer is borrowing. A large net, high net worth
10 taxpayer can invest that money elsewhere and may well
11 even make out even better.

12 JUSTICE BREYER: But at the end of the day,
13 the claim happens to be interest worth \$5,000. The IRS
14 abused its discretion under the statute in failing to
15 write a check for \$5,000 to both. What we do is we
16 allow one of them to bring a lawsuit to get the 5,000,
17 and we say to the other one, you can't bring the lawsuit
18 to get the 5,000.

19 Now my question is, what's the basis for
20 that distinction?

21 MR. MARCUS: And the rational basis is that
22 Congress believed that taxpayers of a high net worth,
23 there would be no hardship, but -- in them not having a
24 cause of action.

25 JUSTICE BREYER: Why would there be no

1 hardship?

2 MR. MARCUS: Because they can use the money,
3 invest the money.

4 JUSTICE BREYER: And so can a poor person.

5 MR. MARCUS: Well, but they're not as well
6 positioned as the wealthy taxpayer, so --

7 JUSTICE SCALIA: The next thing you know,
8 they will enact a progressive income tax.

9 (Laughter.)

10 JUSTICE BREYER: By the way, this has
11 nothing to do with the progressive income tax. What I
12 have not seen anywhere is the use of wealth, totally
13 different from the dollar value of a claim, to shut the
14 courthouse door. I'm just saying, is there such a case
15 anywhere, and if there is no such case, then I'd say I
16 wonder about this assumption. The assumption that the
17 reason that you cannot keep the courthouse door open to
18 everyone is because what?

19 MR. MARCUS: Well, first of all, there are
20 other examples. There's --

21 JUSTICE BREYER: What.

22 MR. MARCUS: This is derived from,
23 ultimately derived from the Equal Access to Justice Act,
24 there are attorneys' fees provisions, but also
25 assistance to taxpayers, and those net worth limitations

1 apply to --

2 JUSTICE BREYER: We know, attorneys' fees
3 you give to poor people more than to rich people. That
4 makes sense. That has nothing to do with having a
5 formal rule saying you cannot enter the courthouse.

6 JUSTICE SCALIA: Is there a you cannot enter
7 the courthouse provision here, or is it -- as I
8 understand your case, it is that it remains
9 discretionary with the Secretary with respect to people
10 who have more money, but it is not discretionary with
11 respect to people who have less money.

12 MR. MARCUS: That's correct.

13 JUSTICE BREYER: I don't understand.

14 JUSTICE SCALIA: So one has a cause of
15 action and the other doesn't have a cause of action.
16 And the difference you're making between the two is
17 you're permitting the Secretary to waive the interest
18 with respect to the rich. You're requiring him to do it
19 with respect to the poor. Isn't that the difference?

20 MR. MARCUS: That's correct. There is an
21 administrative claim that --

22 JUSTICE BREYER: Wait. That might be the
23 answer.

24 JUSTICE KENNEDY: The poor do not have the
25 incentive or even the ability to defer paying a tax,

1 where the people that have large bank accounts may, and
2 investments, may well profit by just paying the interest
3 to the Government.

4 MR. MARCUS: That's exactly right. And
5 Justice Breyer, if you want, if you --

6 JUSTICE BREYER: Wait. Wait. There are two
7 separate things. I want to understand this. In other
8 words, the Secretary does not have the power to abate
9 the interest in respect to the rich person?

10 MR. MARCUS: No. He does have the
11 authority.

12 JUSTICE BREYER: Oh.

13 JUSTICE SCALIA: But it's permissive, not
14 mandatory.

15 MR. MARCUS: Yeah, the Secretary has the
16 authority to waive interest.

17 JUSTICE SCALIA: But he doesn't have --

18 JUSTICE BREYER: He can do it -- in the
19 first case with the rich person, he can abuse his
20 discretion.

21 MR. MARCUS: With respect to taxpayers who
22 meet the net worth limitations.

23 JUSTICE BREYER: In other words, in the one
24 case Congress has passed a law saying with a poor person
25 you cannot abuse your discretion, but with a rich person

1 you can abuse your discretion. That's what the
2 underlying substantive statute says.

3 MR. MARCUS: And there's another --

4 JUSTICE SCALIA: Wait a minute. They are
5 not really saying that. They're saying it's totally
6 within your discretion. You can't possibly abuse your
7 discretion when you have total discretion. They're just
8 saying, you know, do it if you want to do it.

9 MR. MARCUS: That's right. It's a matter of
10 administrative grace for the Federal taxpayers who
11 are --

12 JUSTICE SOUTER: No. The standard of
13 discretion is the same for the poor and the rich, isn't
14 it? The only difference is that the poor can get into
15 court and the rich cannot.

16 MR. MARCUS: They have an enforceable right.

17 JUSTICE SOUTER: So it's a question of
18 remedy, not standing.

19 MR. MARCUS: Right. There's a judicial
20 remedy in one case and only an administrative remedy in
21 the other.

22 JUSTICE ALITO: Is that the poverty line?

23 MR. MARCUS: And there's another provision
24 in the tax -- I'm sorry, Justice Alito.

25 JUSTICE ALITO: Is the net worth of \$2

1 million the poverty line now?

2 (Laughter.)

3 MR. MARCUS: Not that I'm aware of.

4 JUSTICE ALITO: So what is -- so what's the
5 rationale? This isn't treating the rich and the poor
6 differently, is it?

7 MR. MARCUS: It's treating exceedingly high
8 net worth individuals and corporations differently from
9 everyone else.

10 JUSTICE ALITO: Someone with a net worth of
11 \$1.5 million couldn't invest the money in the interim?

12 MR. MARCUS: They could. Congress chose to
13 draw the line where it used this provision that was
14 already in place under the Equal Access to Justice Act.
15 It referred to that provision --

16 JUSTICE GINSBURG: This was for purposes of
17 attorneys' fees?

18 MR. MARCUS: Right, the provision that
19 applies to attorneys' fees. Congress has also imposed
20 this provision in a burden shifting provision in the tax
21 code, Section 7491. If the Court wants to get a better
22 idea of what Congress's concern for what it called the
23 average taxpayer, or the smaller taxpayers, it can look
24 at the legislative history. There was a hearing in
25 March of 1995 that's cited on page 98 of the

1 supplemental appendix to the cert petition, and that was
2 the Court of Federal Claims decision. It's footnote 19.
3 It refers to a hearing in March 1995. And if you read
4 through that, you can see where that concern for the --
5 for average taxpayers and lower net worth taxpayers came
6 from.

7 Nothing in Section 6404(h) gives rise to an
8 inference that Congress intended to establish additional
9 remedies in the district court and Court of Federal
10 Claims. To the contrary, this Court has consistently
11 applied the rule that when Congress creates a specific
12 remedy, it intends that remedy to be exclusive. That
13 rule is fully applicable here. Otherwise, the specific
14 restrictions Congress imposed on the remedy could be
15 defeated by bringing the claim in a different forum.

16 JUSTICE GINSBURG: Wouldn't it have been
17 simpler if Congress just said the tax court shall have
18 exclusive jurisdiction, instead of just saying
19 jurisdiction?

20 MR. MARCUS: That might have made it
21 simpler, Justice Ginsburg, but it accomplished the same
22 result by imposing the specific restrictions that it
23 did. And again, it would have -- there's another --
24 there are two other provisions in the tax code where
25 Congress -- where the tax court effectively has -- one

1 of the provisions where the tax court has exclusive
2 jurisdiction under Section 6330(d), where also it
3 doesn't specify that -- the Congress didn't specify the
4 tax court has exclusive jurisdiction but it does. And
5 there's another case where there's an administrative
6 determination, it doesn't go to the underlying
7 substantive tax liability.

8 CHIEF JUSTICE ROBERTS: The difference --
9 the difference is that the district court, the claims
10 court already has jurisdiction for pay and sue claims,
11 if you pay the IRS you can sue to get a refund. And so
12 this isn't as if we're looking at something that says
13 the tax court has jurisdiction and trying to use that as
14 a wedge to get other jurisdiction. There's already a
15 grant of jurisdiction. The problem was, there was no
16 standard of review for these may abate claims, and all
17 of a sudden we find in this provision there is a
18 standard of review, it's abuse of discretion, and that
19 fills the void. Why can't they just use that?

20 MR. MARCUS: Well, again, Mr. Chief Justice,
21 I don't think it was just a matter of not being a
22 standard of review. I think it was a matter of just
23 being, of intent by Congress to have this just be a
24 matter of administrative grace. And again, if you
25 contrast the language of the different --

1 CHIEF JUSTICE ROBERTS: But I thought what
2 you had argued before when people would try to seek this
3 release was that there's no standard of review to hold
4 the Secretary's exercise of discretion up against.

5 MR. MARCUS: I think that was one of the
6 reasons that the Government cited, but I think there was
7 others as well.

8 CHIEF JUSTICE ROBERTS: But one thing you
9 never said was that there was no jurisdiction, because
10 there is jurisdiction in the district court. If you've
11 paid money to the IRS and you want it back, you can
12 bring a refund action.

13 MR. MARCUS: If you have a legal entitlement
14 to it, and the point is you didn't have a legal
15 entitlement to it before. That's what the courts held,
16 and Congress responded to that, not by saying you do
17 have a legally entitlement to this through a refund
18 action, which they easily could have said if they wanted
19 to reject those prior decisions, but instead they
20 created a limited remedy in the tax court. I don't see
21 how you can read that limited remedy in the tax court to
22 give rise to a broader remedy that doesn't have those
23 restrictions that Congress imposed on the tax court
24 remedy.

25 So it should be -- I think 6404(h) should be

1 read as an integrated whole and you can't just extract
2 one piece and then bring that over, as the Fifth Circuit
3 said, to apply to a refund action. I don't think that's
4 the proper way to interpret the.

5 JUSTICE BREYER: I now think maybe I don't
6 agree on this point that there are different standards,
7 because it does say in this abuse of discretion. And
8 indeed that's a normal administrative standard, and so
9 as you read this you would think that the IRS does not
10 have any legal power substantively to abuse its
11 discretion in refusing to bring an abasement in refusing
12 to bring an abatement -- excuse me, to abate the
13 interest. So far do you agree?

14 MR. MARCUS: I'm sorry, Justice Breyer?
15 That Congress --

16 JUSTICE BREYER: Once they make clear that
17 the standard is abuse of discretion, it only makes clear
18 what's there in the law anyway, that administrative
19 authorities do not have the authority to abuse their
20 discretion. Now, sometimes we don't review that in the
21 courts. That doesn't make it legal. It just means you
22 can't catch them out in court.

23 MR. MARCUS: Right.

24 JUSTICE BREYER: So there's a standard that
25 applies to everybody. Then all that this does, to go

1 back to it is it closes the courthouse door. Now I want
2 to know what your rationale was for doing that? It had
3 nothing to do with the standards that applied. It has
4 to have something to do with why one class of people by
5 wealth are kept out of court. I think if it were the
6 other way around it wouldn't last for three seconds, and
7 the only reason maybe I don't think about it as hard
8 this way because I think, well, privilege is involved,
9 etcetera. But when you force me to think about it, I
10 want to know what the reason so.

11 MR. MARCUS: Well, I don't think it's right
12 to characterize it as the closing of the courthouse
13 door. Congress opened the courthouse door in a limited
14 fashioning in 1996. That's what happened. There was no
15 courthouse door opened in --

16 JUSTICE BREYER: I'll accept that
17 characterization. Now you give me the reason why we've
18 opened the courthouse door to individuals who are alike
19 in every respect but for their net worth? Now give me
20 that, the same reason? I always want to know what the
21 specific reason is, the specific rationale and. I'm not
22 saying there isn't one. I just want to know what it is.

23 MR. MARCUS: Justice Breyer, I don't know if
24 I can give you a better one than I gave before. But
25 it's that high net worth taxpayers are better positioned

1 to pay their full tax liability up front and to handle
2 the accumulation of interest in the event that there is
3 some delay in the processing of their return.

4 JUSTICE KENNEDY: They're exactly alike but
5 for their ability to earn interest in different ways.

6 MR. MARCUS: Yes.

7 JUSTICE SCALIA: And I would not concede, as
8 you seem to have, that the consequence of (h) is simply
9 to open the door. I think the category of decisions
10 that are committed to agency discretion by law within
11 the meaning of the APA are agency decisions as to which
12 the term "abuse of discretion" makes no sense. There's
13 no such thing. It is totally committed to agency
14 discretion. It's only other decisions that are not
15 committed to agency discretion by law where you -- where
16 the discretion can be abused. If you look at it that
17 way, it isn't a matter of closing the door to one
18 category and opening it to another; it's a matter of
19 different substantive laws applying to the two, to the
20 two classes. Anyway, I choose to look at it that way.
21 You can talk --

22 MR. MARCUS: That's a fine way of looking at
23 it, Justice Scalia. The other, the other anomaly the
24 Fifth Circuit identified was the taxpayer, the taxpayer
25 seeking a refund having to split off his claims. This

1 too is not a significant anomaly. The vast majority of
2 taxpayers seek redetermination of their tax liability in
3 the tax court and those taxpayers must split their
4 claims because the interest abatement claim doesn't
5 ripen until the taxpayer's underlying liability has been
6 assessed. Moreover, the interest abatement question is
7 distinct from the taxpayer's underlying liability.

8 CHIEF JUSTICE ROBERTS: Can they bring it as
9 additional claim after they get the final determination?
10 They start a whole separate action for interest
11 abatement?

12 MR. MARCUS: That's -- if they, if they, if
13 they got relief on their refund claim, if they prevail
14 on their refund claim there would be no need to do that.
15 The interest would automatically abate. But if they
16 were unsuccessful they could still pursue an interest
17 abatement on the grounds that the IRS committed an error
18 in delay in performing a material act.

19 CHIEF JUSTICE ROBERTS: Is it part of the
20 same proceeding or is it a separate proceeding?

21 MR. MARCUS: Well, it would be, it would be
22 a proceeding that would follow the proceeding on the
23 underlying liability.

24 CHIEF JUSTICE ROBERTS: You're making the
25 claim that it's no big deal that you have to go to the

1 district court to get your refund and then go to the tax
2 court to get the interest abatement, which does seem
3 like a big deal to me. And you say, well, in the tax
4 court you have to do it separately, too.

5 MR. MARCUS: It's not as inconvenient --
6 well, it, it may be inconvenient but it's a necessary
7 consequence of the exclusive review scheme the Congress
8 set up. And there is no reason -- to take that policy
9 concern and have that trump the statutory language and
10 the regime that Congress clearly established.

11 JUSTICE GINSBURG: And there is no linkage
12 between the two, with, it's one thing to split a claim
13 when they have common elements, but the interest
14 abatement has nothing to do with the substantive
15 underlying -- substantive liability?

16 MR. MARCUS: That's correct, Justice
17 Ginsburg. It involves questions about administrative
18 problems that might arise during the processing of the
19 taxpayer's case. A ministerial act, the failure to
20 transfer a file when a taxpayer moves from one
21 jurisdiction to another, or after, or notice of
22 deficiency if the agent just delays in issuing the
23 notice because he forgot about it and it just sat on his
24 desk for a couple of days. Those are the kinds of
25 issues that, that come up in interest abatement

1 actions.

2 If the Court has no further questions the
3 court of appeals should be affirmed. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you
5 Mr. Marcus.

6 Mr. Redding, you have four minutes
7 remaining.

8 REBUTTAL ARGUMENT OF THOMAS E. REDDING,
9 ON BEHALF OF PETITIONERS

10 MR. REDDING: If I may, there are a couple
11 of brief points I would like to make. In the
12 legislative history of the 6404(h) it concludes with the
13 statement that no inference should be made from that
14 legislation as to other courts' jurisdiction. I think
15 that should be taken very seriously. As to the claims
16 court --

17 JUSTICE SCALIA: Who said that?

18 MR. REDDING: That's in a House committee
19 report, Your Honor. As to claim splitting, it is
20 actually a horrendous problem when you're talking
21 especially about partnership-related cases. I will note
22 that there are several hundred cases below waiting the
23 outcome of this case. As in the Cramer and Weiner
24 opinions that came out of the Fifth Circuit, the Court
25 can note that there are claims for interest abatement,

1 abatement not under 6404, but that interest was
2 overcharged by applying the penalty rate of interest.
3 There is a refund claim for the penalty portion of the
4 interest.

5 There is also a refund claim that the tax
6 was assessed outside the statute of limitations; that's
7 clearly a refund claim. None of those claims would be
8 encompassed under 6404(h). These taxpayers would have
9 had to have completely split their claims, asked for an
10 interest abatement in the tax court for abuse of
11 discretion on 6404(e)(1).

12 JUSTICE GINSBURG: But the point that
13 Mr. Marcus just made, that the issue is discrete on
14 interest abatement, and it involves mishandling within
15 the Internal Revenue processing, and it's not like other
16 questions that have to do with the -- with the
17 intricacies of the Internal Revenue Code --

18 MR. REDDING: That's only relatively true to
19 6404(e)(1), Your Honor. But I will note that under
20 6404(a), where cases are now coming out of the tax court
21 for the first time, because it now has jurisdiction
22 under (h), it provides authority for the Commissioner to
23 abate interest where the IRS has erroneously or
24 illegally assessed the tax liability after the statute
25 of limitations runs or whether it's simply an erroneous

1 assessment. Those claims have nothing to do with
2 discretion, and they are not really just ancillary to
3 the tax liability; they arise out of the substantive
4 challenge to the liability itself. The Woodrall case
5 that has come out, which is the, I think is the first of
6 the 6404(a) cases, was an assertion that the
7 interest had been charged after the tax had been paid.
8 Now that's not a discretionary abatement; that's an
9 illegal assessment of interest and that's a 6404(h)
10 claim now.

11 Previously it would have been strictly a
12 refund claim under 16 -- under 1346.

13 I would also note that in terms of the being
14 able to pay it to cut off the interest accrual, that in
15 these cases, these cases that are before the Court, the
16 F quality -- the document the Government first sent out
17 proposing adjustments to the partnership level, if you
18 had computed the liability based on what the
19 Government's position was, the ultimate tax liability
20 including interest to any point in time would have been
21 at least three times the amount that results from the
22 tax court decision.

23 It's just ludicrous to say that the taxpayer
24 should be expected to take whatever the Government's
25 proposed adjustments are, compute what his maximum

1 liability may be, and pay it in advance or post a bond
2 in advance in order to cut off the interest accrual.
3 That argument just doesn't -- in my mind does not fly,
4 Your Honor.

5 This, this Court in Bob Jones University did
6 address the pay and sue versus prepayment jurisdiction
7 issue in terms of constitutionality and due process.
8 And, and basically said that as long as there is a pay
9 and sue remedy available, the taxpayer has no due
10 process rights to a prepayment remedy, but that the
11 Court might have come down differently had there been no
12 remedy available in terms of pay and sue.

13 I would also note that both the tax court,
14 the district courts, the Court of Federal Claims and the
15 appellate courts have long reviewed other discretionary
16 acts within the tax code by the Commissioner where no
17 standard is set forth on an abuse of discretion
18 standard, such as the authorization of the Commissioner
19 to abate certain penalties where the taxpayer has sought
20 an independent appraisal on the overvaluation penalty
21 under 6659. Those cases have been reviewed for years by
22 the tax court and by the district courts in refund cases
23 on an abuse of discretion standard. It is the Federal
24 common law standard for reviewing an abuse of
25 discretion.

1 The determinations in Horton and Selman
2 Holmes are unique in holding that it's totally
3 discretionary.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
6 The case is submitted.

7 (Whereupon, at 1:56 p.m., the case in the
8 above-titled matter was submitted.)

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