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Since 1953, Congress has enacted at least forty-eight retroactive amendments to the revenue laws,[1] thirty-nine of which have provided for substantive remedial change.[2] While nine of these thirty-nine amendments have contained specific provisions for extending the limitations period,[3] sixteen have retroactively amended substantive law applicable to years normally barred by the statute of limitations but have not contained a provision extending the limitations period.[4] The question is thus raised whether a provision, silent as to its procedural effect, implicitly repeals or modifies the applicable statute of limitations on claims for refunds brought under the retroactive change in the law.

Because of the number of retroactive amendments which do not specifically provide for a change in the limitations period and because many taxpayers have been affected by these amendments, the problem of construing their procedural effect has been a recurring one. This interpretative problem resulted in conflicting decisions in the federal courts. In *Tobin v. United States*,[5] the Court of Appeals for the Fifth Circuit held that a retroactive remedial amendment[6] was simply a codification of the existing law and, therefore, taxpayer's refund claim was barred by the statute of limitations even though

1. Brief for Petitioner, p. 15, United States v. Zacks, 375 U.S. 59 (1963).

2. The nine that made no change in substantive law extended, for varying periods up to a year from date of enactment, the time for filing a claim or suit for refund, *e.g.*, Technical Changes Act of 1953, ch. 512, § 211, 67 Stat. 625; Act of August 1, 1956, ch. 857, 70 Stat. 917; Technical Amendments Act of 1958, 72 Stat. 1657, 26 U.S.C. § 2011(c); Technical Amendments Act of 1958, §§ 96, 98, 72 Stat. 1672, 1673. See also note 39 *infra*.

3. Revenue Act of 1962, §§ 26-27, 76 Stat. 1067; Act of September 14, 1960, § 5, 74 Stat. 1013; Technical Amendments Act of 1958, 72 Stat. 1611, 26 U.S.C. § 172; Technical Amendments Act of 1958, §§ 92, 93, 100, 72 Stat. 1667, 1668, 1673; Technical Changes Act of 1953, ch. 512, § 207, 67 Stat. 623, all extending the period for filing refund claims for 6 months or 1 year after date of enactment. See also note 40 *infra*. Act of February 15, 1956, ch. 36, 70 Stat. 15, provided for a 7-year limitations extension. *Cf.* note 67 *infra* and accompanying text.

4. Revenue Act of 1962, § 30, 76 Stat. 1069; Act of June 27, 1961, §§ 1, 4, 75 Stat. 120; Act of September 14, 1960, § 5, 74 Stat. 1019; Technical Amendments Act of 1958, § 103, 72 Stat. 1675; Act of February 11, 1958, 72 Stat. 3; Act of February 11, 1958, 72 Stat. 4; Act of June 29, 1956, ch. 464, § 3, 70 Stat. 404; Act of February 20, 1956, ch. 66, 70 Stat. 26; Act of February 20, 1956, ch. 63, § 1, 70 Stat. 23; Act of January 28, 1956, 70 Stat. 8, 26 U.S.C. § 37; Act of August 11, 1955, ch. 808, 69 Stat. 693; Act of August 9, 1955, § 1, 69 Stat. 625; Technical Changes Act of 1953, ch. 512, § 209, 67 Stat. 624; Act of August 7, 1953, ch. 346, § 3, 67 Stat. 471. See also note 12 *infra*.

Other retroactive amendments provided for taxpayer elections which would determine tax treatment for certain specific past years.

5. 264 F.2d 845 (5th Cir. 1959).

6. Int. Rev. Code of 1939, § 117(q), added by ch. 464, § 1, 70 Stat. 404 (1956). Section 117(q) is set out at note 19 *infra*.

the legislation had been enacted after the applicable limitations period on his refund claim had run.[7] The Sixth Circuit in *United States v. Dempster*,[8] construing the same remedial amendment, also ruled against the taxpayer, citing *Tobin*. In both of these cases, the taxpayers had argued that the remedial amendment created a claim against the government, thereby taking the suits out of the normally applicable three-year limitation period and entitling them to the six-year limitation period which is applicable to general claims against the government[9] or, alternatively, that the provision impliedly extended the applicable limitation period for refund claims grounded upon the retroactive change in the law. On the other hand, in *Hollander v. United States*[10] and *Zacks v. United States*,[11] decisions were rendered in the taxpayers' favor. The Second Circuit, in *Hollander*, held that the remedial legislation[12] was so obviously for the benefit of all taxpayers qualifying under its substantive provisions that it impliedly suspended the normal limitations period.[13] Similarly, in *Zacks*, the Court of Claims found for the taxpayer on the ground that otherwise most of the claims brought under the retroactive provision[14] would have been barred by the applicable three-year statute of limitations.[15]

7. Int. Rev. Code of 1939, § 322(b), 53 Stat. 91, provides in pertinent part that allowable claims for refund must be filed within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of the periods expires later; and if no return is filed, no refund will be allowed unless claim is filed within 2 years from the time the tax was paid.

8. 265 F.2d 666 (6th Cir.), *cert. denied*, 361 U.S. 819 (1959) (also dealing with § 117(q)). See Tobin v. Tomlinson, 310 F.2d 648 (5th Cir. 1962); Vaughn v. United States, 181 F. Supp. 386 (S.D. Cal. 1959).

9. 28 U.S.C. § 2401(a) (1958) provides: "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . ." The argument is that retroactive remedial legislation creates a claim against the government for taxes paid under the provision prior to amendment which are in excess of those which would have been owed if the retroactive amendment had been effective at the time the taxes were paid.

10. 248 F.2d 247 (2d Cir. 1957).

11. 150 Ct. Cl. 814, 280 F.2d 829 (1960), *rev'd*, United States v. Zacks, 375 U.S. 59 (1963).

12. Revenue Act of 1951, § 607, 65 Stat. 567, a retroactive amendment providing relief for the estates of certain decedents dying between 1937 and 1939.

13. Hollander v. United States, 248 F.2d 247, 250-51 (2d Cir. 1957). This reasoning is typically used by courts that have taken the general position that all substantive retroactive legislation is by its nature remedial, *i.e.*, for the benefit of all taxpayers who qualify for refund, and have consequently refused to treat as controlling the fact that some claims for refund are barred by the statute of limitations on the date of enactment or shortly thereafter.

14. Note 6 *supra*.

15. Zacks v. United States, 150 Ct. Cl. 814, 280 F.2d 829 (1960). See Smith v. United States, 304 F.2d 267 (3d Cir. 1962), *cert. denied*, 375 U.S. 929 (1963) (by implication) (refund of income tax under § 117(q)); Lorenz v. United States, 155 Ct. Cl. 751, 296 F.2d 746 (1961) (refund of income tax under § 117(q)); Eastman Kodak Co. v. United States, 155 Ct. Cl. 256, 292 F.2d 901 (1961) (refund of excise taxes); Verckler v.

In a recent opinion, the Supreme Court reviewed the Court of Claims decision in *Zacks* and examined at length the reasoning underlying the conflicting decisions of the lower federal courts.[16] In *Zacks*, taxpayer had received royalties of about thirty-seven thousand dollars in 1952 on patents, all substantial rights to which had been transferred to a manufacturing corporation. As required by the then prevailing administrative position, the royalties were reported as ordinary income[17] in the 1952 joint federal income tax return filed by taxpayer and her husband. Because the last payment of this tax was made in 1953, the statute of limitations would normally have barred any claims for refund concerning the year in question that were asserted after 1956.[18] In 1958, taxpayer filed a claim for a pro tanto refund of the 1952 tax under section 117(q) of the Internal Revenue Code of 1939.[19] This section of the Code was added in 1956 to provide for retroactive relief by allowing long-term capital gains treatment of amounts received in any taxable year beginning after May 31, 1950, for the transfer of qualifying patent rights, regardless of the year in which the transfer occurred. The Commissioner took no action on the claim, so taxpayer brought a refund suit in the Court of Claims. After granting taxpayer's motion to strike the United States' asserted defense that the claim was barred by the statute of limitations,[20] the Court of Claims entered judgment on the

United States, 145 Ct. Cl. 252, 170 F. Supp. 802 (1959) (refund of estate tax), all holding that the applicable retroactive relief statute gave rise to a constructive "payment" of the tax upon the date of enactment and that the normal limitations period would begin to run from the time of this constructive payment. *Cf.* note 7 *supra*.

16. United States v. Zacks, 375 U.S. 59 (1963).

17. Although during this period court decisions distinguished between "amateur" and "professional" inventors with regard to tax treatment of royalties received for patent transfers, it would appear that the taxpayer was a "professional" inventor and, under the then prevailing administrative position and case law, had properly reported the royalties as ordinary income. See note 29 *infra*.

18. Int. Rev. Code of 1939, § 322(b), 53 Stat. 91. See note 7 *supra*.

19. Ch. 464, § 1, 70 Stat. 404 (1956). Section 117(q) provides:

"(q) TRANSFER OF PATENT RIGHTS—

"(1) *General Rule.*—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

"(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

"(B) contingent on the productivity, use or disposition of the property transferred.

. . . . . .

(4) *Applicability.*—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred."

20. This defense was based on INT. REV. CODE OF 1954, § 7422(a) which, by providing that "no suit or proceeding shall be maintained in any court . . . until a claim for refund or credit has been duly filed . . . , according to the provisions of

merits for taxpayer.[21] On certiorari, the Supreme Court reversed,[22] holding that Congress, in enacting section 117(q), intended only to terminate litigation then pending and taxpayer's claim for refund was barred by limitations. The result of this decision is that only four groups of taxpayers are entitled to the remedial benefits of section 117(q):[23] (1) those who filed no returns at all for the years involved; (2) those who filed returns, but failed to pay their taxes; (3) those who filed returns contrary to law (if they were in a "trade or business"[24]) or contrary to the prevailing treasury viewpoint (if they were "non-professional" patent-holders[25]); and (4) those whose returns remained open by implied or express agreement, such as waiver or extension. The great majority of taxpayers who would otherwise qualify for the remedial benefits of this substantive retroactive amendment are, therefore, barred by the statute of limitations because they have not kept these tax years open.

There is no language in section 117(q) that specifically provides for the application of the statute of limitations to refund claims already barred when it was enacted into law.[26] Moreover, the administrative and legislative backgrounds of section 117(q) also are silent as to the effect of this section on the statute of limitations.[27] However, the Supreme Court did not draw conclusive presumptions from this lack of legislative and administrative comment or the failure to provide for a specific limitations period, but rather, the Court first examined the purpose behind the enactment. In 1946, the Commissioner of Internal Revenue announced his acquiescence in *Edward C. Myers*,[28] a Tax Court case which held that, as to an "ama-

law in that regard," arguably incorporated the limitation period of § 322(b) of the 1939 Code for the filing of refund claims under § 117(q).

21. Zacks v. United States, 150 Ct. Cl. 814, 280 F.2d 829 (1960). The Government argued that § 117(q) was enacted only to terminate then pending litigation, *i.e.*, claims not barred on the date of its enactment. But the court held that the amendment was not so limited in purpose on its face and to hold taxpayer barred by limitations would be to attribute an "idle gesture" to Congress since the act applies to years as far back as 1950. 280 F.2d at 831. The parties stipulated the remaining issues, with the Government reserving the right to appeal the overruling of its motion.

22. Mr. Justice Black dissented, agreeing with the court below, and Mr. Justice Douglas did not participate in the decision.

23. These four groups of taxpayers are able to use § 117(q) because, through the various methods mentioned in the text, they have managed to keep open tax years that would otherwise be closed by the statute of limitations. *Cf.* United States v. Zacks, 375 U.S. 59 (1963). "[T]he amending provisions of § 117(q) are fully effective with respect to years and claims not barred." *Id.* at 70. See generally Walter, *Tax Refund Problems for Patent Owners*, 40 J. PAT. OFF. SOC'Y 674, 676 (1958).

24. See text accompanying note 44 *infra*.

25. See text accompanying note 31 *infra*.

26. See note 19 *supra*.

27. See S. REP. No. 1941, 85th Cong., 2d Sess. 4-5 (1956); H.R. REP. No. 1607, 84th Cong., 1st Sess. 1-2 (1956).

28. 6 T.C. 258 (1946).

teur" inventor,[29] the transfer by exclusive license of all substantial rights under a patent was a sale or exchange of a capital asset and could be treated as capital gain, even though consideration for the license took the form of conditional royalties based on a percentage of the sale and was to be paid annually.[30] However, the Commissioner withdrew this acquiescence in 1950, declaring that after May 31, 1950, royalties measured or paid in installments as in *Myers* would be taxed as ordinary income.[31] The Commissioner adhered to this position, despite its subsequent rejection by several courts.[32] While the enactment of the 1954 Code *prospectively* settled the issue in favor of the taxpayer by declaring such income to be a capital gain,[33] in 1955 the Commissioner issued a further ruling declaring that he would adhere to his 1950 position for those tax years beginning after May 31, 1950, when his acquiescence in the *Myers* decision was withdrawn, and prior to the enactment of section 1235 in 1954.[34] Thus, the Commissioner's position covering this period was inconsistent with the application of the law as judicially and administratively enunciated by the *Myers* case and the Commissioner's acquiescence in 1946. The enactment of section 117(q) was intended to cure this inconsistency[35] by providing relief, retroactive to 1950, which was similar to that prospectively established in the 1954 Code. However, this history, by itself, does not reveal whether Congress intended to provide relief for *everyone* who, between 1950 and 1954, followed the Commissioner rather than the *Myers* decision, or just for the taxpayers who kept those tax years open through one of the devices mentioned earlier.[36]

29. An amateur inventor is one not engaged in holding patent rights primarily for sale to customers in the ordinary course of his trade or business, as distinguished from a professional inventor who is so engaged. Edward C. Myers, 6 T.C. 258, 266 (1946).

30. 1946-1 CUM. BULL. 3. Prior to 1946 several courts had taken this position, *e.g.*, Comm'r v. Celanese Corp., 140 F.2d 339 (D.C. Cir. 1944); Comm'r v. Hopkinson, 126 F.2d 406 (2d Cir. 1942).

31. Mimeo 6490, 1950-1 CUM. BULL. 9.

32. *E.g.*, Allen v. Werner, 190 F.2d 840 (5th Cir. 1951); Kronner v. United States, 150 Ct. Cl. 817, 110 F. Supp. 730 (1953). *Contra*, Bloch v. United States, 200 F.2d 63 (2d Cir. 1952).

33. INT. REV. CODE OF 1954, § 1235.

34. Rev. Rul. 55-58, 1955-1 CUM. BULL. 97.

35. See note 27 *supra*.

36. See notes 23-25 *supra* and accompanying text. A statement on the floor of the House by Representative Cooper, then Chairman of the House Ways and Means Committee, indicated that "as a result of . . . the announced policy of the Internal Revenue Service to continue its insistence on its position . . . taxpayers are still confronted with litigation for taxable years falling in this period in order to secure the rights to which the courts, with practical unanimity, have held they are entitled." 101 CONG. REC. 12708-09 (1956). This statement appears to be the only reference in the history of § 117(q) concerning the purpose of the amendment insofar as it was intended to terminate litigation rather than to provide relief for all taxpayers who had reported qualifying royalties as ordinary income.

The Supreme Court also considered the fact that Congress frequently has provided for lifting the normal limitations bar in substantive retroactive remedial tax legislation,[37] specifically referring to section 14 of the Technical Amendments Act of 1958,[38] the Act of August 9, 1955,[39] and section 2 of the Act of June 29, 1956.[40] The last of these is another provision of the same act which was in dispute in the *Zacks* case. It went to the Conference Committee, along with the section 117(q) amendment, without reference to the applicable statute of limitations and was there amended to provide for a special limitations period.[41] The Court considered this "striking evidence . . . all but conclusive" that, had Congress intended to affect the limitations period governing section 117(q), it would have expressly done so.[42]

In *Zacks*, the taxpayer argued that section 117(q) was intended to establish two other rights in addition to overturning the Commissioner's inconsistent position for the years 1950 through 1954 and a refusal to grant an exemption from the existing statute of limitations to claims based upon those rights would render them nugatory. The basis of taxpayer's contention was that section 117(q) retroactively gave so-called "professional" inventors, for the first time,[43] the right to treat qualifying patent royalties as long-term capital gain.[44] In addition, the provision eliminated any necessary holding period to qualify for this treatment.[45] In construing the statute, the Supreme Court concluded that Congress did not intend to establish these two retroactive rights; rather, the broad scope of section 117(q) resulted because Congress merely iterated the language used in section 1235 of the 1954 Code.[46] Thus, the Court held that the sole

37. See note 3 *supra*.

38. 72 Stat. 1611, 26 U.S.C. §§ 172(f)(3)-(4), (g)(3) (1958). This provided a 6-month limitations period during which otherwise barred claims could be asserted under new rules for computing net operating loss deductions promulgated in the same act. The limitations provision was added to the House bill by the Senate. S. REP. No. 1983, 85th Cong., 2d Sess. 24 (1958).

39. 67 Stat. 607 (1953). This act provided a 1-year limitation period for filing otherwise barred claims based on § 345 of the Revenue Act of 1951, 65 Stat. 517, a substantive retroactive relief measure. See note 2 *supra*. The limitation period was enacted to correct legislative "oversight." H.R. REP. No. 1438, 84th Cong., 1st Sess. 1-2 (1955).

40. Ch. 464, 70 Stat. 404 (1956), relating to taxation of certain payments received prior to 1950 from the United States for construction of Armed Forces facilities, expressly provides for a 1-year special limitations provision.

41. United States v. Zacks, 375 U.S. 59, 67 (1963).

42. *Ibid.*

43. When patents had been held for sale in the ordinary course of trade or business, the Commissioner's position had remained constant that they were not capital assets as defined by INT. REV. CODE OF 1954, § 1221 and that consideration for their sale or exchange constituted ordinary income.

44. See notes 17, 19 *supra*.

45. See note 19 *supra*.

46. H.R. REP. No. 1607, 84th Cong., 1st Sess. 1-2 (1956).

function of section 117(q) was to overturn the Commissioner's position; it felt this was indicated not only by the affirmative evidence revealed in the administrative and legislative history (including the selection of May 31, 1950, as the operative date of the act[47]), but also by the lack of any evidence to indicate that Congress intended other than to settle the large volume of pending litigation that arose because of the Commissioner's inconsistent ruling.[48]

Arguably, Supreme Court precedent relating to general principles of statutory construction might have required an opposite result: remedial provisions should be liberally construed to give the relief intended;[49] specific legislation should prevail over general;[50] subsequent legislation should prevail over earlier statutes;[51] and statutes are to be construed so as to give effect to all provisions when possible.[52] The Court brushed aside the first three of these rules on the ground that they were inapplicable to a statute of such "evident" limited purpose. As to the fourth, the Court stated that it was a "general principle . . . meant to guide courts in furthering the intent of the legislature, not in overriding it. When rigid adherence to the general rule would require disregard of *clear* indications to the contrary, the rule must yield."[53]

Furthermore, the Court rejected taxpayer's argument that a decision subjecting claims that arise from section 117(q) to the normal statute of limitations would place a premium on taxpayer opposition to administrative rulings in order to keep old tax years open. The Court, while admitting the force of this argument in some contexts, declared that the argument was severely limited in this setting because most courts were willing to reverse the Commissioner even before passage of section 117(q) and because "acceptance of the taxpayer's argument would lead to automatic waiver of the statute

47. "The date selected has no relevance either to the status of professional inventors or to the period for which patent rights must be held." United States v. Zacks, 375 U.S. 59, 69 (1963). See text accompanying note 31 *supra*.

48. United States v. Zacks, 375 U.S. 59, 69 (1963). The existence of a substantial amount of such litigation was not an issue in the case. *Id.* at 69 n.10. A good deal of such litigation was pending when § 117(q) was enacted, part of which was subsequently settled by payment of full refund, *e.g.*, Goff v. United States, No. 252-56, Ct. Cl.; Ozai-Durrani v. United States, No. 125-37, Ct. Cl.; A. M. Junt v. United States, No. 33687, N.D. Ohio; Hassler v. United States, No. 7359, N.D. Cal.; Schlenz v. United States, No. 57-C-264, N.D. Ill., or by dismissal of governmental appeals, *e.g.*, Beeth v. United States, No. 8399, S.D. Tex.; Comm'r v. Hudson, No. 58726, T.C.; King v. United States, No. 8316, S.D. Tex.; Waterson v. United States, No. 308, N.D. Tex.

49. Bonwit Teller v. United States, 283 U.S. 258, 263 (1931).

50. Missouri v. Ross, 299 U.S. 72, 76 (1936). *Cf.* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5204 (2d ed. 1943).

51. Oates v. First Nat'l Bank, 100 U.S. 239, 244 (1879). *Cf.* 2 SUTHERLAND, *op. cit. supra* note 50, § 5201 n.8.

52. United States v. Menasche, 348 U.S. 528, 538-39 (1955); Markham v. Cabell, 326 U.S. 404, 411 (1945).

53. United States v. Zacks, 375 U.S. 59, 69 (1963) (Emphasis added).

of limitations in every case. Whether or not this should be done is a matter for Congress to decide."[54]

United States v. Zacks indicates that congressional failure to provide for a special limitations period in substantive retroactive remedial tax legislation does not automatically create an exemption from the applicable statute of limitations for refund claims based on that legislation; on the other hand, such failure does not, of itself, indicate that the normally applicable limitations period is always to apply since, in two particulars, the Court attempted to limit its decision to the facts. First, the Court stated generally that congressional failure to provide expressly for a special limitations period does not raise the presumption that the relevant statute of limitations is to apply, but rather each case is to be judged *ad hoc* "as with all questions of statutory construction."[55] Second, the Court indicated that there may be some efficacy in the argument that Congress intends an implied repealer whenever the retroactive legislation creates a "new" right, as opposed to codifying a pre-existing right. In this regard, taxpayer had maintained that she was a "professional" inventor and section 117(q) thereby created a new right for her.[56] She claimed that, prior to the enactment of section 117(q), there existed no right which she could have allowed to lapse, and consequently, in all equity, the statute of limitations should not now bar her from asserting rights created for the first time by that section.[57] However, the Supreme Court said the distinction between creation of new rights and clarification of existing rights was not controlling under the facts in *Zacks* because Congress had evidenced its intent too directly to require resort to other interpretative devices.[58] Thus, it may be that in other contexts this argument would provide sufficient indication of congressional intent to convince the courts that they should recognize an implied exemption from the existing limitations period. This would appear to be especially true when there are not present reasons for avoiding implied waiver as plausible as those evidenced in *Zacks*.

Nevertheless, several additional considerations appear to place a heavy burden upon any barred taxpayer who attempts to take advantage of substantive retroactive legislation containing no provision for opening barred years. No presumption is created in favor of the

54. *Id.* at 70.

55. *Id.* at 66 n.8.

56. *Cf.* note 44 *supra* and accompanying text.

57. Brief for Respondent, *passim*, United States v. Zacks, 375 U.S. 59 (1963). This argument is, of course, inconsistent with the position that the taxpayer had been prejudiced by reliance on the Commissioner's ruling. *Id.* at 9. *Cf.* text accompanying note 54 *supra*.

58. United States v. Zacks, 375 U.S. 59, 68 n.9 (1963). The Court of Claims made no finding as to whether taxpayer was an amateur or professional inventor. *Ibid.* *But cf.* Lorenz v. United States, 155 Ct. Cl. 751, 296 F.2d 746 (1961).

taxpayer, even though the legislation is intended to be remedial. The intent of Congress is to control,[59] and Congress has repeatedly demonstrated that it is aware of the limitations problem in this context and is capable of lifting the bar when it deems it necessary to effectuate the purposes of the amendment.[60] In addition, Congress itself has, upon occasion, corrected the inadvertent omission of an additional limitations period in a remedial retroactive statute by enacting supplementary legislation.[61] Furthermore, allowing retroactive legislation that is silent as to its procedural effect to extend claims already barred could create an anomalous situation where an additional grace period included in the amendment could actually operate to shorten the time that would otherwise be available for claiming a refund. Such a situation would arise whenever an amendment included a special limitations provision providing for a shorter period for claiming refunds than would otherwise have been implied had the statute not expressly incorporated a limitations period. Thus, taxpayers for whom Congress makes no provision for extending the statute of limitations may be treated more favorably than those for whom provision is expressly made. While such a result is not entirely implausible, it is patently inconsistent with the Supreme Court's stated position that Congress and not the courts should determine limitation periods.[62] Finally, congressional silence in this area does not invite judicial gap-filling, since finding an implied waiver of the statute of limitations may well raise more problems than the retroactive enactment itself was intended to solve. If the legislation is held impliedly to repeal the usual limitations period, what period of limitations should apply: the six-year limitations period governing claims against the government,[63] the two-year period allowed for constructive "payment" of tax,[64] the three-year maximum allowed under section 322(b) after filing the return,[65] or even the six-month or one-year grace period customarily granted by Congress when it expressly reopens barred years?[66] There would also be the question of whether the new period applied to all claims covered by the substantive terms of the retroactive amendment or only to those claims and tax years barred as of the date of enactment.

Of the above factors, only the first—congressional intent as evidenced by frequent enactment of retroactive tax amendments that specifically provide for a special limitations period—was expressly

59. See text accompanying note 54 *supra*.
60. Notes 3, 38, 39, 40 *supra*.
61. See, *e.g.*, note 39 *supra*.
62. See text accompanying note 54 *supra*.
63. 28 U.S.C. § 2401(a) (1958).
64. INT. REV. CODE OF 1954, § 6511(a); Int. Rev. Code of 1939, § 322(b), 53 Stat. 91.
65. Int. Rev. Code of 1939, § 322(b), 53 Stat. 91.
66. See note 3 *supra*.

considered in *United States v. Zacks*. However, by holding that the existing indications of congressional intent dictated the decision, courts in the future will be initially, if not entirely, constrained from finding an implied repeal of existing statutes of limitations simply from the fact that Congress in the past has expressly provided for extending limitations periods. Moreover, if Congress mentions and rejects in committee a special limitations provision, the courts will certainly recognize the rejection as proscribing an implied exemption from the normally applicable limitations period. Alternatively, congressional failure to mention a provision extending the limitations period, coupled with the frequently unique reasons for retroactive legislation,[67] would seem to provide clear enough indication of congressional purpose to override both traditional rules of statutory construction and the apparent equities of taxpayer's refund claim.

67. For explications to the effect that much, if not most, remedial tax legislation is enacted for the benefit of a single taxpayer or a small group of taxpayers, see Cary, *Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws*, 68 HARV. L. REV. 745 (1955); Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957). Under this view, Hollander v. United States, 248 F.2d 247 (2d Cir. 1957), could have easily been decided for the Government, since the remedial legislation there in question was enacted for the benefit of a single taxpayer, who had a timely refund claim filed on the date of enactment. Brief for Plaintiff, pp. 8, 9, Rice v. Broderick, Civil No. 632 (D.R.I. 1952). Apparently the Second Circuit was not made aware of these facts. Brief for Petitioner, pp. 37-39, United States v. Zacks, 375 U.S. 59 (1963).