

Third Circuit Holds the Ninety-Day Period for Petitioning the Tax Court for Redetermination Is Not Jurisdictional

by Robert S. Horwitz and Philipp Behrendt

For more than 85 years the Tax Court, its predecessor, the Board of Tax Appeals, and those courts of appeal that addressed the issue, held that the statute of limitations for filing a petition for redetermination was jurisdictional. When a prerequisite for a lawsuit is jurisdictional, it means that if the prerequisite has not been met, the court has no power to hear the case. It was required to dismiss the case for lack of jurisdiction. In the wake of *Boechler v. Commissioner*, 596 U.S. ___, 142 S.Ct. 1493 (2022), that the period for filing a petition with the Tax Court in a collection due process case, was not jurisdictional, a number of commentators predicted that it would result in the courts ruling that the 90-day period for filing a petition with the United States Tax Court contained in 26 U.S.C. §6213(a). See previous Blogs by Robert Horwitz from [June 24, 2022 “Boechler v. Commissioner Begins a New Era in Tax Court Litigation”](#) and from [December 5, 2022 “No Equitable Tolling for Deficiency Cases”](#) While the Tax Court continued to play the same tune, the Third Circuit in *Culp v Commissioner*, reversed an order of the [Tax Court](#) and held that the 90-day period was not jurisdictional and could be equitably tolled. This represents a major modulation that could have a wide-reaching impact on tax administration and procedure. But first, some background.

Prior to 1990, the courts had consistently held that statutes of limitation for filing a lawsuit against the United States were viewed as jurisdictional. As a result, a court had no power to entertain a case against the United States filed beyond the statute of limitation. The United States could not waive the statute of limitations and, since it was a condition set by Congress for suing the United States, it could not be extended or tolled. That view began to change after the Supreme Court’s issued its decision in *Irwin v. Department of Veteran Affairs*, 498 U.S. 89 (1990). There, the Court held that the statute of limitation on suits against the Department of Veteran Affairs was not jurisdictional. As a result (i) there was a rebuttable presumption that deadlines to sue the government could be equitably tolled, (ii) the deadline for suing the Department was subject to equitable tolling, but (iii) equitable relief, such as equitable tolling, was to be applied sparingly.

Subsequently, the Supreme Court began addressing whether other statutes setting time limits for suits against the United States and its agencies were jurisdictional. The Court fashioned a rule that statutes of limitation for suits against the United States are presumed to be non-jurisdictional and are subject to equitable tolling unless Congress has clearly stated that the deadline is jurisdictional; absent such a clear statement, the courts are to treat a statutory deadline as non-jurisdictional. See, *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015); *Sibelius v. Auburn Regional Med. Center*, 568 U.S. 145, 153 (2012).

Despite the Supreme Court’s holdings, the Tax Court and those Courts of Appeal that addressed the issue rejected the argument that the 90-day deadline for filing a petition with the United States Tax Court contained in §6213(a) was jurisdictional. *Organic Cannabis Foundation, LLC v. Commissioner*, 962 F.3d 1082 (9th Cir. 2020); *Guralnik v. Commissioner*, 146 T.C. 230

(2016). Possibly due to the lingering effects of “tax exceptionalism,” the Tax Court continued to play leitmotif that the §6213(a) time limit was a jurisdictional bar that could not be waived even after the Supreme Court’s decision in *Boechler*. *Hallmark Research Cooperative v. Commissioner*, 159 T.C. No. 6 (2022). The facts as recited by the Third Circuit were that Isobel and David Culp received letters from the IRS claiming they failed to properly report \$8,826.30 each had received in 2015 from a lawsuit.

The IRS sent the Culpes two notices of deficiency, one in 2017 alleging an underpayment of \$3,363, and the other in 2018 alleging an underpayment of \$2,087 in tax asserting penalties for 2015. The notices stated the Culpes had 90 days from each notice to file a petition in the Tax Court if they disagreed with the IRS’s determinations. The Culpes failed to respond to either notice within the required time. Upset after the IRS levied on their Social Security payments and tax refund and collected around \$1,800, the Culpes filed a petition in the Tax Court seeking, among other things, a refund. The Tax Court dismissed their petition for lack of jurisdiction, finding that the Culpes had filed years after the 90-day deadline from the second notice of deficiency in 2018. The Culpes appealed the Tax Court’s dismissal, arguing that the deadline should be subject to equitable tolling. The Third Circuit first considered the Culpes’ claim that the IRS never sent them the notice of deficiency or, if sent, they never received it. The record below contained a copy of the notice of deficiency and a Postal Service Form showing it was mailed to the Culpes. Since there was no evidence to the contrary, this established that the notice was sent. Whether the Culpes received it was irrelevant.

It then turned to the central question in the case: was the 90-day statute of limitations in §6213(a) jurisdictional. To answer this question required the Third Circuit to “examine the ‘text, context, and relevant historical treatment.’” It would “treat a procedural requirement as jurisdictional only if Congress clearly states that it is.” Similar to the statute in *Boechler*, §6213(a) was subject to several plausible interpretations, which suggested that it did not “mandate the jurisdictional reading.” It noted that other contemporaneously enacted tax provisions more clearly linked the jurisdictional grant with a filing deadline. To establish that the §6213(a) filing period was jurisdictional, the Government has argued that a subsequent sentence in that provision, stripping the court of jurisdiction to enjoin any action or order a refund absent the filing of a timely petition. According to the Third Circuit this did not help the Government’s position. It undermined it since it showed that Congress knew how to limit the Tax Court’s jurisdiction, which it didn’t clearly do with respect to the filing requirement.

The Third Circuit was unimpressed by the Government’s argument based on the statutory scheme, including that under §7459(d) a dismissal on grounds other than lack of jurisdiction would preclude the filing of a refund suit, noting that taxpayers whose petition was dismissed for lack of jurisdiction for failing to timely file a petition seldom if ever happens. The theoretical possibility of this happening “does not move the needle.” Nor did the historical treatment of §6213(a) as jurisdictional persuade the Court.

Having determined that the §6213(a) filing deadline was not jurisdictional, the Third Circuit addressed the next question: can it be equitably tolled? Before getting to that question, the Third Circuit rejected the Government’s claim that the Culpes failed to raise the issue below. The

reason was that, since the IRS moved to dismiss the petition for lack of jurisdiction, the Culps had no reason to claim equitable tolling.

Given that equitable tolling of a statute of limitations “is a traditional feature of American jurisprudence” and non-jurisdictional periods of limitation are presumed to be subject to equitable tolling, the answer to this question turned on whether Congress intended for equitable tolling not to apply. The Third Circuit found that there was insufficient evidence that this was Congress’ intent. Thus, the §6213(a) filing period could be equitably tolled.

The Third Circuit also rejected the Government’s argument that allowing equitable tolling would create an administrative nightmare. The IRS issued around 2 million notices of deficiency in 2021, but only 34,049 redetermination petitions were filed. Very few of these were filed outside the statutory period. Thus, allowing equitable tolling would affect only a limited number of cases and it was doubtful that allowing equitable tolling would encourage more taxpayers to file untimely petitions.

The IRS’s argued the §6213(a) filing deadline could not be equitably tolled, relying on *United States v. Brockamp*, 519 U.S. 347, 350 (1997), and *Arellano, v. McDonough*, 143 S. Ct. 543, 548 (2023), both of which held that certain tax deadlines were not subject to equitable tolling. The court noted that §6213(a)’s deadline is not emphasized or set out in a technical manner like the deadlines in *Brockamp* and *Arellano*. While §6213(a) provides for some equitable exceptions, the court found that those exceptions were not as many or as explicitly stated as in *Brockamp* and *Arellano*, and §6213(a) lacks language suggesting its exceptions are exhaustive. Based on these distinctions, the court determined that the text and context of §6213(a) do not demonstrate Congress intended to preclude equitable tolling of the filing deadline.

The Third Circuit’s decision is, in my view, the logical outcome of the Supreme Court’s jurisprudence on this issue. It also could affect how courts view other provisions in the Internal Revenue Code allowing suits against the Government. As we pointed out in a previous blog on *Boechler*, the period for filing a refund of tax under §7422 and for wrongful levy under §7426 are contained in §6532, which does not mention jurisdiction. Sections 6234 (judicial review of BBA partnership adjustments), 7428 (declaratory judgment action to determine status as an exempt organization), 7429 (judicial review of jeopardy and termination assessments), 7431 (action for illegal disclosure or return information), and 7436 (proceeding to determine employment status) and former §6226 (judicial review of TEFRA partnership adjustments), could all be affected.

Additionally, the ability of a taxpayer to challenge the underlying liability in a collection due process proceeding could be implicated. Currently, a taxpayer who did not receive a notice of deficiency, and thus was not afforded an opportunity to challenge a deficiency in Tax Court, can do so in a collection due process proceeding. While the collection due process proceeding is pending, the IRS cannot take enforced collection action. Will the IRS now argue that if the taxpayer did not receive the notice, he or she can file a petition for redetermination since the time period for doing so would be equitably tolled?

Another question is what happens if the Tax Court determines equitable tolling applies? Will it have the power to enjoin collection action while the case is pending (since if equitable tolling applies the petition could be considered timely) or will it not have jurisdiction to do so?

It is probable that the Government will move for reconsideration in *Culp* and, if it still fails to prevail, petition for certiorari to the Supreme Court due to the split with the Ninth Circuit. But then again, the Government could acquiesce in the *Culp* decision. Stranger things have happened.

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