No. 15-73819

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP A. DUGGAN,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE ORDER AND ORDER OF DISMISSAL OF THE UNITED STATES TAX COURT

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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GLOSSARY

Am. Br.	The brief filed by the amicus
Appellant-taxpayer	Philip A. Duggan
Appellee-Commissioner	Commissioner of Internal Revenue
Amicus-Matuszak	Amicus curiae, Linda Jean Matuszak petitioner-taxpayer in *Matuszak v. Commissioner* (T.Ct. No. 471-15), on appeal (2d Cir. – No. 16-3034)
Amicus's counsel	Professor T. Keith Fogg, Esquire, and Carlton M. Smith, Esquire
Code or I.R.C.	Internal Revenue Code (26 U.S.C.)
CDP	Collection-due-process
IRS	Internal Revenue Service

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Pursuant to the Court's order dated October 4, 2016, the Commissioner files this supplemental brief responding to the arguments in the brief of the amicus Linda Jean Matuszak.

STATEMENT

The issue in this appeal is whether the Tax Court correctly dismissed, for lack of jurisdiction, the petition filed by Philip A. Duggan (taxpayer) seeking review of two IRS Office of Appeals collection-due-process (CDP) notices of determination because the petition was not

filed within the 30-day period specified in I.R.C. § 6330(d)(1). The facts relevant to this issue are fully set forth in our answering brief (at 5-12).

As taxpayer acknowledges in his opening brief (at 4, 10-11), he did not raise an equitable-tolling issue in the Tax Court. Rather, he opposed the Commissioner's motion to dismiss for lack of jurisdiction on the ground that the notices of determination were deficient in describing the time limit for filing a petition for review in the Tax Court, and on a novel interpretation of Tax Court Rule 25(a). See Opening Br. 10-11.

The amicus, in a different Tax Court case, filed an untimely petition seeking innocent-spouse relief under I.R.C. §6015(e), raising an equitable tolling issue. (Am. Br. 2.) The Tax Court dismissed the late-filed petition on jurisdictional grounds, and the amicus is appealing that adverse decision to the Second Circuit. *Matuszak v. Commissioner*, No. 16-3034 (2d Cir.). The amicus argues that she has an interest in this case because § 6015(e)(1)(A) (containing a 90-day time-limit on innocent-spouse petitions) and § 6330(d)(1) (containing a 30-day time-limit on petitions seeking review of CDP determinations) "contain similar language" (Am. Br. 2), and because taxpayer is "[e]ffectively"

arguing that § 6330(d)(1)'s time limit is "subject to equitable tolling" (*id.* at 3).

At the time that the amicus submitted her brief in the instant case on March 16, 2016, her motion to vacate the Tax Court's dismissal order in her own case was still pending. (Am. Br. 2.) On July 29, 2016, the Tax Court denied that motion.[1] In its *Matuszak* dismissal order, the Tax Court had relied on its prior precedent, *Pollock v. Commissioner*, 132 T.C. 21 (2009), in which it held that satisfaction of the 90-day time limit in § 6015(e)(1)(A) is jurisdictional. In denying the motion to vacate, the court rejected the amicus' arguments asserting that it should overrule *Pollock* based on Supreme Court cases which took a new approach to statutory time limits beginning in 2004.

[1] Because the Tax Court's dismissal order and its order denying the motion in *Matuszak* to vacate are unpublished, we have attached copies of them in an addendum to this supplemental brief.

ARGUMENT

I

The Amicus' equitable-tolling argument should not be considered because an amicus cannot raise an issue that was not raised by the appellant below

Although taxpayer acknowledges in his opening brief (at 4, 10-11) that he was not aware of the concept of equitable tolling and therefore did not make an equitable-tolling argument in the Tax Court, the amicus nonetheless seeks to litigate an equitable-tolling issue that was not raised by the appellant below.

In our answering brief (at 4 n.5, 30-32), we argued that this Court should not entertain the equitable-tolling issue raised by taxpayer for the first time on appeal, and we maintain that position here. Neither taxpayer nor the amicus has attempted to demonstrate that any of the narrow exceptions to the general rule barring new issues on appeal applies. *See Allen v. Ornoski*, 435 F.3d 946 960 (9th Cir. 2006) (noting the exceptions). *See also Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (declining to consider an equitable-tolling argument raised for the first time on appeal because it did not involve a pure question of law). Moreover, taxpayer cannot cure his failure to raise an issue below

through an amicus. "An amicus curiae generally cannot raise new arguments on appeal." *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1171 n.8 (9th Cir. 2009) (citing *United States v. Gementera*, 379 F.3d 596, 607-08 (9th Cir. 2004)). *See also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 n. 22 (1st Cir. 1994) (An amicus "cannot ... introduce ... issues not properly preserved for appeal.").

The amicus argues that taxpayer, "as a *pro se* petitioner, is, in essence, arguing that the time period in which to file a CDP petition is not jurisdictional and is subject to equitable tolling." (Am. Br. 3.) The amicus is unclear as to whether she contends that taxpayer made this argument in the proceedings below, or whether she is referring to taxpayer's opening brief to this Court. At all events, she provides no cites to the Tax Court record that would support an argument that an equitable-tolling argument was "effectively" made below.

To have "effectively" made out a claim for equitable tolling in the Tax Court, taxpayer, at a minimum, would have had to have alleged facts that would show that he could satisfy the standard for equitable tolling. "[A] litigant is entitled to equitable tolling of a statute of

limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S.Ct. 750, 755 (2016) (internal quotation marks and citations omitted). Moreover, "the second prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond [his] control." *Id.* at 756. (Emphasis in original.) Taxpayer's pleadings in the Tax Court (CR 10 (opposition to motion to dismiss) and (CR 12 (motion for reconsideration)) provide no facts or argument from which the Tax Court might have inferred that taxpayer was arguing that the requirements for equitable tolling had been satisfied.

The only evidence in the Tax Court record referenced by the amicus to support her assertion that equitable tolling is appropriate in the instant case is the IRS Office of Appeals' notice of determination providing a statement regarding the time limit for filing a CDP action. (Am. Br. 25-27.) But this evidence is not sufficient to support an equitable-tolling claim and thus would not have alerted the Tax Court that taxpayer was "effectively" making an equitable-tolling claim. As

we pointed out in our answering brief (at 27), the notices warned taxpayer that he "must file a petition with the . . . Tax Court within a 30-day period beginning the day after the date of this letter." The notices largely track the language of Tax Court Rule 25,[2] and provide taxpayer with the correct filing date.[3] Neither a party's misunderstanding of the law, nor his misreading of a document, constitutes an extraordinary circumstance warranting equitable tolling.

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[2] Tax Court Rule 25(a)(1) provides:

> In computing any period of time prescribed or allowed by these Rules or by direction of the Court or by any applicable statute which does not provide otherwise, the day of the act, event, or default from which a designated period of time begins to run shall not be included, and (except as provided in subparagraph (2) [relating to Saturdays, Sundays, and holidays]) the last day of the period so computed shall be included. …

[3] Taxpayer represents in his opening brief (at 7) that "Tax Court 25(a)(1) mislead me about the filing period." But review of the relevant Tax Court Rule should have put him on notice that his reading of the Appeals notice was incorrect, or, at a minimum, questionable. *See Herzog v. Commissioner*, 643 F. App'x 942, 943 (11th Cir. 2016) ("under the plain language of [Tax Court] Rule 25(a)," the date on which the notice is mailed is "not . . . included," and the time for filing the required document begins to run on the day after the day on which the notice is mailed). Taxpayer does not allege that he did any research, or consulted with another person, to determine if his reading of the time provision in the Appeals notice was correct.

See Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1013 n.4 (9th Cir. 2009) ("a pro se petitioner's confusion or ignorance of the law is not, itself, a circumstance warranting equitable tolling"); *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A] pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling.")

In sum, the amicus should not be allowed to make arguments in support of a new issue on appeal. Accordingly, as a threshold matter her arguments should not be entertained.

II

Alternatively, the Tax Court correctly held that the time limit in I.R.C. § 6330(e)(1) is jurisdictional and thus not subject to equitable tolling

A. Introduction

The Tax Court, as an Article I court, is a court of limited jurisdiction and may only exercise jurisdiction to the extent authorized by Congress. *Adkinson v. Commissioner*, 592 F.3d 1050, 1052 (9th Cir. 2010). It is well established that the court "lacks general equitable powers." *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *Estate of Branson v. Commissioner*, 264 F.3d 904, 908 (9th Cir. 2001). Pursuant

to I.R.C. § 7442, the Tax Court has "such jurisdiction as is conferred" on it by the Internal Revenue Code.

The provision of the Code that confers jurisdiction on the Tax Court to review administrative determinations of the IRS Office of Appeals in CDP proceedings[4] is I.R.C. § 6330(d)(1). It provides that "The person [who is the subject of the Appeals determination] may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." Every court of appeals that has addressed whether the time limit in § 6330(d)(1) is jurisdictional, including this Court, has held that it is. *Thompson v. Commissioner*, 486 F. App'x 682, 683 (9th Cir. 2012) (holding that § 6330(d)(1) confers jurisdiction on the "Tax Court for review of a levy or lien notice only after taxpayer files a petition for review within 30 days of receiving a

[4] As explained in our answering brief (at 16), CDP proceedings are authorized under I.R.C. §§ 6320 and 6330 and allow review of certain administrative tax-collection activity, *i.e.*, proposed levies and filed notices of federal tax liens.

determination");[5] *Kaplan v. Commissioner*, 552 F. App'x 77, 78 (2d Cir. 2014) (holding that the "tax court's jurisdiction depends upon the issuance of a valid notice of determination and the filing of a timely petition for review"); *Gray v. Commissioner*, 723 F.3d 790, 793 (7th Cir. 2013) ("Unless a taxpayer fulfills the statutory prerequisites for invoking the Tax Court's jurisdiction, including filing a timely petition under section 6330(d)(1), the court must dismiss a petition for lack of jurisdiction."); *Tschida v. Commissioner*, 57 F. App'x 715, 716 (8th Cir. 2003) (holding that "the untimely filing [of a petition seeking review under § 6330(d)(1)] deprived the tax court of jurisdiction");[6] *see also Boyd v. Commissioner*, 451 F.3d 8, 10 (1st Cir. 2006) (affirming a Tax Court dismissal for lack of jurisdiction in which the Tax Court held, in the alternative, that even if the notice at issue were treated as a CDP

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[5] *See also Trivedi v. Commissioner*, 525 F. App'x 587, 588 (9th Cir. 2013) (§ 6330(d)(1) "establish[es] a 30-day requirement for appealing a notice of determination" to the Tax Court).

[6] In a subsequent published decision, the Eighth Circuit confirmed that the 30-day time limit in § 6330(d)(1) is a "prerequisite[ ] to the tax court's exercise of jurisdiction." *Hauptman v. Commissioner*, 831 F.3d 950, 953 (8th Cir. 2016).

notice reviewable under § 6330(d)(1), it would lack jurisdiction because a petition was not filed within 30-day time limit).

Moreover, two other courts of appeal have recognized (in dicta) that § 6330(d)(1)'s time limit is jurisdictional. *Springer v. Commissioner*, 416 F. App'x 681, 682-83 & n.1 (10th Cir. 2011) (recognizing that "[t]he Tax Court's jurisdiction … is dependent on the issuance of a valid notice of determination and a timely petition for review" and expressly rejecting the amicus' argument that, under recent Supreme Court cases, § 6330 is a non-jurisdictional claims-processing rule (internal quotation marks and citations omitted)); *Tuka v. Commissioner*, 348 F. App'x 819, 820 (3d Cir. 2009) (observing that "[w]hen a taxpayer invokes the protection of IRC § 6330, as Tuka did, the Tax Court's jurisdiction 'depends upon the issuance of a valid notice of determination by the IRS Office of Appeals and the filing of a timely petition for review.'" (citation omitted)).

In addition, the Tax Court has repeatedly, and consistently, held that the time limit in § 6330(d)(1) is jurisdictional. *Guralnik v. Commissioner*, 146 T.C. No. 15, No. 60622, 2016 WL 3165779, at *4 n.6 (June 2, 2016) (gathering cases). In *Guralnik*, the full Tax Court

unanimously reaffirmed its numerous earlier decisions holding that the time limit in § 6330(d)(1) is jurisdictional. *Guralnik*, *supra*. And, in issuing the *Guralnik* decision, the Tax Court was fully apprised of the arguments that the amicus makes here, inasmuch as counsel for the amicus here (Messrs. Fogg and Smith) made an amicus curiae filing in that case as attorneys for the Harvard Federal Tax Clinic. 2016 WL 3165779, at *1.

The amicus does not dispute that every court that has considered the question whether the time limit in § 6330(d)(1) is jurisdictional has recognized that it is. (Am. Br. 4-5.) She instead cites Supreme Court cases involving the jurisdictional nature of time limits and argues that under the "clear statement rule" that has evolved from those cases, this Court should treat the time limit in § 6330(d)(1) as a non-jurisdictional claims-processing rule. As we demonstrate below, the amicus does not fully consider the text, context, and historical treatment of § 6330(d)(1) and incorrectly analyzes various aspects of the statute that she does consider. Under a correct application of the clear statement rule, the time limit in § 6330(d)(1) is plainly jurisdictional. Thus, there is no

reason for this Court to split with its sister circuits or reject the carefully considered unanimous decision of the Tax Court in *Guralnik*.

B. The Supreme Court has established a clear statement rule for determining whether time limits on suits against the Government are jurisdictional

It is well established that time bars contained in statutes authorizing suits against the Government are presumptively subject to equitable tolling. *United States v. Wong*, 135 S.Ct. 1625, 1631 (2015); *Irwin v Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990); *Volpicelli v. United States*, 777 F.3d 1042, 1044 (9th Cir. 2015). This presumption, however, is rebuttable. *Id.* One way to rebut the presumption "is to show that Congress made the time bar at issue jurisdictional." *Wong*, 135 S.Ct. at 1631.

To enable the courts to determine whether such a jurisdictional showing has been made, the Supreme Court has provided a "clear statement rule." *Wong*, 135 S.Ct. at 1632. Under that rule, "procedural rules, including time bars, cabin a court's power 'only if Congress has 'clearly state[d]' as much.'" *Id.* (brackets in original) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S.Ct. 817, 824 (2013) (*Auburn Regional*).

Whether Congress has made the required clear statement turns on the "text, context, and relevant historical treatment" of the provision at issue. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). *Accord Wong*, 135 S.Ct. at 1632. In other words, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Wong*, 135 S.Ct. at 1632.

In analyzing a statute under the clear statement rule, "Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Wong*, 135 S.Ct. at 1633. Further, that a statute uses "language [that] is mandatory" to express its time limit has been consistently found to be "of no consequence." *Id.* at 1632. The clear statement rule, however, does not require that "Congress must incant magic words" in order to speak clearly. *Id.* (quoting *Auburn Regional*, 133 S.Ct. at 824). Rather, the Court looks to whether the statute "define[s] a federal court's jurisdiction." *Id.* at 1633.

Finally, as noted above, the "historical treatment [of a time bar in a statute] as 'jurisdictional' is a factor in the analysis." *Reed Elsevier, Inc.,* 559 U.S. at 169. In an appropriate case, under principles of *stare*

decisis, this treatment may be dispositive. *See Wong*, 135 S.Ct. at 1635-36. Most notably, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008), a litigant argued that the Supreme Court should overrule its prior holding that 28 U.S.C. § 2501, which concerns the time for filing suit in the Court of Federal Claims, is jurisdictional. *See* 552 U.S. at 139. The Court refused to do so, reasoning that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [the Court] ha[s] done.'" *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). The Court in *John R. Sand & Gravel Co.* further reasoned that "re-examin[ing] … well-settled precedent" holding that a limitations period was jurisdictional would "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability." 552 U.S. at 139.

C. Under the clear statement rule, the time limit in § 6330(d)(1) is jurisdictional

The time limit in § 6330(d)(1) satisfies the clear statement rule. The text of the statute, its context, and its historical treatment all clearly show that it is a jurisdictional provision.

1. The text of § 6330(d)(1) establishes that its time limit was designed to define a federal court's jurisdiction. Section 6330(d)(1) is the sole provision in the Internal Revenue Code granting jurisdiction to the Tax Court over CDP appeals. As noted above, the section succinctly states that a taxpayer "may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have *jurisdiction* with respect to such matter)." I.R.C. § 6330(d)(1) (emphasis added). As the Tax Court observed in *Guralnik,* "the filing period and the grant of jurisdiction are set forth in the same sentence of the statute and are explicitly linked." 2016 WL 3165779, at *5. "The plain meaning of these words is that the Tax Court 'shall have jurisdiction' if and only if the condition precedent stated in the first half of the sentence is satisfied—that is, if the taxpayer has filed an appeal to our Court 'within 30 days of a determination under this section." *Id.* In short, the time limit in § 6330(d)(1) "speak[s] in jurisdictional terms," as required by *Wong*, 135 S.Ct. at 1633.

The jurisdictional nature of the time limit in § 6330(d)(1) is also made plain by another provision in § 6330, providing for a suspension of the IRS's power to administratively levy during a CDP proceeding.

Pursuant to I.R.C. § 6330(e)(1), "the levy actions which are the subject of the requested [CDP] hearing … shall be suspended for the period during which such hearing, and appeals therein, are pending." And, the section further provides that "[n]otwithstanding the provisions of section 7421(a) [the Anti-Injunction Act], the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court." Section 6330(e)(1), however, goes on to restrict the Tax Court's jurisdiction to enjoin, providing that "[t]he Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding *unless a timely appeal* has been filed under [§ 6330(d)(1)]." (Emphasis added.) The fact that Congress limited the Tax Court's injunction jurisdiction only to situations where the petition in the CDP case was *timely* demonstrates that Congress imbued the time limit in § 6330(d)(1) with jurisdictional significance. If Congress intended otherwise, it would not have included the word "timely" in the jurisdictional restriction.

2. The context of § 6330(d)(1) also leaves no doubt that its time limit is jurisdictional. Section 6330(d)(1) was not enacted in a vacuum.

When, as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746, Congress enacted § 6330(d), Code § 6213(a), which confers jurisdiction on the Tax Court to review IRS deficiency determinations, had long been in existence. Section 6213(a)'s conferral of jurisdiction over deficiency cases is analogous to § 6330(d)(1)'s conferral of jurisdiction over CDP cases, and it can be assumed that Congress was well aware of both I.R.C. § 6213(a), and the case law interpreting the section, when it enacted § 6330(d)(1). *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law"); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) ("[w]e presume that Congress is aware of the legal context in which it is legislating"); *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) ("Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts.").

Section 6213(a) provides in relevant part that "[w]ithin 90 days … after the notice of deficiency … is mailed …, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency."

I.R.C. § 6213(a). Like § 6330(e)(1), § 6213(a) suspends the Commissioner's ability to assess and administratively collect for a specified period and provides the Tax Court with jurisdiction to enjoin violations of the suspension. And, like § 6330(e)(1), § 6213(a) conditions that jurisdiction upon the timely filing of a petition: "[t]he Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund … *unless a timely petition* for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition." (Emphasis added.)

Since 1924, the Tax Court has repeatedly held that this "statutorily prescribed filing period in deficiency cases is jurisdictional." *Guralnik*, 2016 WL 3165779, at *5. And, by 1998, when § 6330(d)(1) was enacted, the jurisdictional nature of § 6213(a)'s time limit was well established in the courts of appeals. *E.g.*, *Correia v. Commissioner*, 58 F.3d 468, 469 (9th Cir. 1995). Indeed, as early as 1980, one court of appeals observed that "[i]t cannot now be seriously questioned that the timely filing of the petition for redetermination is jurisdictional." *Johnson v. Commissioner*, 611 F.2d 1015, 1018 (5th Cir. 1980). *See also Shipley v. Commissioner*, 572 F.2d 212, 213 (9th Cir. 1977) (holding

that the timely filing of a petition for redetermination is a jurisdictional requirement); *Andrews v. Commissioner*, 563 F.2d 365, 366 (8th Cir. 1977) (holding that "the law is clear that the Tax Court does not have jurisdiction over an untimely petition"); *Fishman v. Commissioner*, 420 F.2d 491 (2d Cir. 1970) (affirming Tax Court's dismissal for lack of jurisdiction because the petition was filed late); *Kennedy v. Commissioner*, 339 F.2d 335, 337 (7th Cir. 1964) (holding Tax Court lacked jurisdiction over claim for new tax year asserted in amended complaint filed after § 6213(a)'s time limit); *Boccuto v. Commissioner*, 277 F.2d 549 (3d Cir. 1960) (affirming Tax Court's dismissal for lack of jurisdiction because the petition was filed late); *Ryan v. Alexander*, 118 F.2d 744, 750 (10th Cir. 1941) (holding that time limit in § 6213(a)'s predecessor was a "jurisdictional requirement").[7]

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[7] Subsequent to the enactment of § 6330 in 1998, the courts of appeals have continued to hold that the time limit in § 6213(a) is jurisdictional. *See, e.g., Herzog*, 643 F. App'x at 943 (holding that timely filing of a petition "is a jurisdictional prerequisite for a suit in the tax court.") (quoting *Pugsley v. Commissioner*, 749 F.2d 691, 692 (11th Cir. 1985)); *Briley v. Commissioner,* 622 F. App'x 305 (4th Cir. 2015) (holding that "[t]he timely filing of a tax court petition is a jurisdictional prerequisite"); *Edwards v. Commissioner*, 791 F.3d 1, 2 (D.C. Cir. 2015) (holding that "[t]he tax court … lacks jurisdiction if the taxpayer's
(continued...)

Section 6330(d)(1) was enacted against the backdrop of § 6213(a), and Congress provided no indication that it intended to provide a scheme in § 6330(d)(1) that materially departed from the one that existed under § 6213(a). Rather, in enacting in § 6330(d)(1), Congress employed a time limit that mirrors the one in § 6213(a). Both § 6330(d)(1) and § 6213(a) provide that a taxpayer "may," within a specified time limit, file a petition in the Tax Court seeking the review of an administrative determination of the IRS. Moreover, in the case of § 6330(d)(1), Congress made it even more clear that the time limit is jurisdictional. Unlike § 6213(a), which does not expressly use the term "jurisdiction," § 6330(d)(1) provides that if a taxpayer files a CDP petition within the statute's 30-day time limit, "the Tax Court shall have *jurisdiction* with respect to such matter." I.R.C § 6330(d)(1) (emphasis added).

Furthermore, at the time Congress enacted § 6330(d)(1) in 1998, recent Supreme Court cases had indicated that time limits relating to

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(… continued)
petition is not timely filed"); *Gainey v. Commissioner*, 540 F. App'x 531 (6th Cir. 2013) (affirming Tax Court's dismissal for lack of jurisdiction because the petition was untimely).

tax litigation were jurisdictional. In 1990, the Supreme Court held that the time limit for filing tax refund claims in I.R.C. § 6511(a) was jurisdictional. *United States v. Dalm*, 494 U.S. 596, 608 (1990). Similarly, in 1996, the Supreme Court held that a failure to satisfy the 2-year look-back period in I.R.C. § 6513(b)(3)(B) deprived the Tax Court of "jurisdiction to award … a refund." *Commissioner v. Lundy*, 516 U.S. 235, 245 (1996). And in 1997 the Supreme Court, in *United States v. Brockamp*, 519 U.S. 347, 349-54 (1997), held that the time limit for filing tax refund claims in I.R.C. § 6511(a) was not subject to equitable tolling. Thus, in 1998, when Congress enacted § 6330, recent Supreme Court jurisprudence indicated that the type of time limit that was provided in § 6330(d)(1) was jurisdictional.

Lastly, a wrong-forum tolling provision that appeared in the original version of § 6330(d)(1) when it was enacted in 1998, but which was eliminated by amendment of the section in 2006, further evidences the jurisdictional nature of the statute. The original version of § 6330(d)(1) provided the Tax Court with jurisdiction to review appeals from certain types of CDP determinations (roughly speaking, proceedings involving income tax collection), and the federal district

courts with jurisdiction to review any other appeals from CDP determinations (for example, proceedings involving collection of employment taxes or responsible officer penalties under I.R.C. § 6672).[8] This version of the statute also provided that if the taxpayer filed in the wrong court, the time for filing in the correct court would be 30 days after the court determined that jurisdiction was lacking in the court in which the action was originally brought.

Congress amended § 6330(d) in 2006 to make the Tax Court the sole venue for CDP appeals. Pension Protection Act of 2006, Pub. L.

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[8] The original (1998) version of § 6330(d)(1) provided as follows:

> (d) Proceeding after Hearing.–
>
> (1) Judicial Review of determination.—The person may, within 30 days of a determination under this section, appeal such determination–
>
> > (A) to the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or
> >
> > (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.
>
> If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

No. 109-280, § 855(a), 170 Stat. 780, 1019. At the same time, it also eliminated the tolling provision in the original version of the statute for taxpayers that had filed in the wrong court. This was, in part, because Congress had become aware that the tolling provision was being abused by taxpayers who sought to delay collection.[9] *See* Staff of the Joint Comm. on Tax'n, Report of the Joint Committee of Taxation Relating to the Internal Revenue Service as Required by the IRS Reform and Restructuring Act of 1998, JCX-53-03, No. 8 at 88 (IRS), 2003 WL 25599126 (2003) ("Some taxpayers intentionally file in the wrong court, which creates a further delay."). Thereafter, Congress eliminated the tolling provision. Given that Congress eliminated the only statutory tolling provision that it provided, in part because tolling created the potential for abuse (and was in fact abused by some taxpayers), it stands to reason that Congress did not at the same time embrace the notion that § 6330(d(1)'s time limit could be "equitably tolled."

3. The historical treatment of § 6330(d)(1) also demonstrates that the time limit in § 6330(d)(1) is jurisdictional. As we explained at pp. 9-

[9] As noted above, Congress in § 6330(e) provided that collection by levy is suspended during the pendency of the CDP case.

11, *supra*, seven different courts of appeals have held (or recognized in dicta) that the time limit is jurisdictional, and no court of appeals has expressed a contrary view. Moreover, as we have also discussed, the Tax Court has issued numerous decisions–one of which was a unanimous decision by the full court–holding that the time limit is jurisdictional. Finally, that Congress has not sought to change judicial pronouncements that § 6330(d)(1) is a jurisdictional statute–despite having opportunities to do so when it amended § 6330(d)(1) in 2006 (pp. 22-24, *supra*) and again in 2015 (Am. Br. 9 n.5)–reinforces the conclusion that the statute is jurisdictional. *See John R. Sand & Gravel Co.*, 552 U.S. at 133.

D. The Amicus' arguments lack merit

1. The amicus correctly points out that time limits in statutes now are rarely jurisdictional because of the Supreme Court's clear statement rule (Am. Br. 5-7), and the amicus provides considerable discussion of several Supreme Court cases and two Ninth Circuit cases which she contends supports her contention that § 6330 is amenable to equitable tolling. But the cases upon which she relies concern statutes whose language, context, and historical treatment are meaningfully

different from that of § 6330(d)(1), the statute here at issue (Am. Br. 9-13), and thus do not support her position.

To begin with, the amicus overlooks the language of the I.R.C. § 6330(e), which restricts the Tax Court's *jurisdiction* to enjoin levies violating the suspension provided by that provision to situations where "a timely appeal has been filed under [§ 6330(d)(1)]." The amicus thus fails to take into account a clear expression by Congress that the time limit in § 6330(d)(1) is intended to be jurisdictional. See discussion pp. 21-24, *supra*.

The amicus nevertheless suggests (Am. Br. 13) that, to satisfy the clear statement rule, Congress would have had to have added to § 6330(d)(1), after the language stating that "Tax Court shall have jurisdiction," the phrase "only if the appeal is brought within such period." The Supreme Court has held, however, that Congress does not need to "'incant magic words'" in order to speak clearly. *Wong*, 135 S.Ct. at 1632 (quoting *Auburn Regional*, 133 S.Ct. at 824.) As the Tax Court correctly held in *Guralnik*, the plain meaning of the words that Congress did use "is that the Tax Court 'shall have jurisdiction' if and only if the condition precedent stated in the first half of the sentence is

satisfied—that is, if the taxpayer has filed an appeal to [the Tax Court] 'within 30 days of a determination under this section.'" 2016 WL 3165779, at *5.

Moreover, there was no reason for Congress to insert the kind of redundant language that the amicus proposes when it enacted § 6330(d)(1) in 1998. As the amicus points out (Am. Br. 3), it was not until 2004 that the Supreme Court "observed that it and other courts had [previously] been too careless in using the word 'jurisdictional.'" And, in 1998, the Supreme Court had recently held, in two cases, that time limits in other tax statutes were jurisdictional. See p. 22, *supra*. Accordingly, it would have been odd for Congress to have drafted a statute like the one that the amicus proposes. At all events, Congress needed to do nothing more than make a clear expression of its intent that the time limit in § 6330(d)(1) be jurisdictional, which it in fact did.

The amicus also argues (Am. Br. 13) that the tolling provision (discussed at pp. 22-24, *supra*) "strongly suggests that Congress did not think the 30-day period [in § 6330(d)(1)] was jurisdictional." In this regard, the amicus contends that filing in the wrong forum is often a ground raised for equitable tolling. The amicus, however, has it exactly

backwards. If equitable tolling applied to § 6330(d)(1), there would have been no need for Congress, in 1998, to have provided an express provision authorizing tolling when the taxpayer filed in the wrong forum. Moreover, as discussed above, Congress' elimination of the tolling provision in 2006 demonstrates that Congress rejected equitable tolling, not that it embraced it.

2. The amicus also relies to a significant extent on this Court's decision in *Volpicelli*, 777 F.3d 1042, which involved the time limit for wrongful levy actions under I.R.C. § 6532(c). (Am. Br. 16, 19-20, 23.) That decision, however, does not speak to the jurisdictional nature of the time limit in § 6330(d)(1), the provision here at issue. In *Volpicelli*, 777 F.3d at 1044, this Court held that "Congress signaled the non-jurisdictional nature of § 6532(c) by placing it in a subtitle of the Internal Revenue Code labeled 'Procedure and Administration,' while at the same time enacting a separate jurisdiction-conferring provision (28 U.S.C. § 1346(e)) and placing that sentence in a chapter entitled "District Courts; Jurisdiction." Here, as the Tax Court observed in *Guralnik*, "the filing period and the grant of jurisdiction are set forth in the same sentence of the statute and are explicitly linked." 2016 WL

3165779, at *5. Moreover, in *Volpicelli*, there was prior precedent of this Circuit in which the Court had held that § 6532(c) was subject to equitable tolling. 777 F.3d at 1043-44. Thus, the historical treatment of the statute at issue in *Volpicelli* was far different from the one here at issue. As discussed above, all courts, including this Court, have consistently recognized that § 6330(d)(1)'s time limit is jurisdictional.

Similarly, the amicus' discussion of *Mangum v. Collection Services, Inc.*, 575 F.3d 935 (9th Cir. 2009), involving the one year statute of limitations in the Fair Debt Collection Practice Act (FDCPA), 15 U.S.C. § 1692k(d) (Am. Br. 12-13), is not instructive here. In *Mangum*, the Court was faced with the question whether commencement of the FDCPA limitations period was delayed by its "usual discovery rule," *i.e.*, "when the plaintiff knows or has reason to know of the injury which is the basis of the action." 575 F.3d at 940. In concluding that Mangum's suit was not time-barred, the Court held that its discovery rule applied to the FDCPA, because "[n]othing in the structure of [§ 1692k(d)] tells us that the time limitation was also a jurisdictional limitation." 575 F.3d at 940. Here, however, as we have explained at pp. 15-24, the plain language of the statute clearly

expresses Congress' intent that the statute's time limit is jurisdictional, and the statute's context and historical treatment reinforce what the text of the statute makes plain.

3. The amicus misapprehends why Congress chose to impose a "short deadline of 30-days" in § 6330(d)(1). (Am. Br. 22.) As noted above, Congress in § 6330(e) suspended administrative collection by levy during the pendency of a CDP proceeding and related appeals. To ensure that administrative collection would not be unduly delayed, it imposed a short 30-day deadline for the filing of suit. *Cf.* I.R.C. § 6213(a) (providing a longer 90-day deadline for filing a petition challenging a pre-assessment notice of deficiency). As discussed above, Congress provided no indication that it intended to prolong CDP proceedings by allowing equitable tolling. In fact, it indicated just the opposite–that it wanted proceedings to be resolved expeditiously–by imposing a short 30-day deadline. Moreover, Congress was well aware that 28 U.S.C. § 1346(a) granted the district courts and the Court of Federal Claims jurisdiction to entertain tax refund suits. Thus, a taxpayer who missed the 30-day deadline was not left without a post-collection remedy.

4. There are, moreover, significant practical problems with the approach suggested by the amicus. Without equitable tolling, there is a clear "end date" for the period during which the IRS is prohibited from collecting by levy: it ends once the 30-day filing period in § 6330(d)(1) expires. The IRS can then proceed to collect by levy. If equitable tolling were allowed, a delinquent taxpayer could prolong the suspension period by belatedly filing a petition in the Tax Court and making an equitable tolling claim. In that event, the IRS apparently would have to "undo" the levies that it executed after the 30-day filing period expired. And, the IRS would not know with certainty when it could safely begin to collect.

Furthermore, contrary to what the amicus argues (Am. Br. 21-22), the administrative problem created by equitable tolling is not a small one. There is significant tax revenue lost because of tax noncompliance. *See* IRS Statement on the Tax Gap Update, available at https://www.irs.gov/uac/the-tax-gap (estimating the average annual tax gap for 2008-2010 to be $458 billion). In carrying out its tax collection responsibilities, the IRS issues over a million levies every year. *See* 2015 IRS Data Book at 43 (1,995,987 levies were requested in 2014 and

1,464,026 levies were requested in 2015). The amicus' proposed tolling rule would afford delinquent taxpayers a means to further delay the collection of their unpaid tax liabilities. Thus, the administrative problems that would potentially result if the amicus' proposed equitable-tolling rule were applied to § 6330(d)(1) provide an additional indication that Congress rejected it. *See United States v. Brockamp*, 519 U.S. 347, 352-53 (1997) (stating with respect to I.R.C. § 6511 time limit for tax refund claims: "[t]he nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system").

5. Making the assumption that equitable tolling applies to § 6330(d)(1), the amicus argues that courts would ordinarily impose equitable tolling in the circumstances of this case. (Am. Br. 25-28.) This argument also has no merit. As we demonstrated in Argument I, *supra*, there is no basis in the record upon which the Tax Court could have concluded that taxpayer was "effectively" making an

equitable-tolling argument. In this regard, we pointed out that both taxpayer and the amicus have ignored the standard that actually governs equitable-tolling and have not pointed to any evidence indicating that the standard was satisfied. For this reason, the amicus' final argument fails.

The amicus cites only one case, *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959), in support of her argument that courts would "ordinarily" impose equitable tolling. In *Glus*, the Supreme Court held that an equitable estoppel claim (as opposed to an equitable tolling claim)[10] in a suit between two private parties should not have been summarily dismissed. Equitable estoppel claims against the Government, however, are subject to a different standard. *Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011). Neither taxpayer nor the amicus have attempted to show that the requirements for equitable estoppel against the Government have been satisfied, and we

[10] The equitable estoppel claim in *Glus* asserted that the respondent should be estopped from invoking a statute of limitations because the respondent made false statements about the time in which the petitioner could sue and the petitioner justifiably relied on the representation.

submit that none of them have been satisfied. For example, the first requirement requires a showing that the Government engaged in affirmative misconduct going beyond mere negligence. *Baccei*, 632 F.3d at 1147. The amicus' argument is based solely upon standard language in a notice of determination from the IRS Office of Appeals. There is not even an allegation, let alone evidence, of affirmative misconduct. Like all the other claims the amicus makes, this one, too, has no merit.

CONCLUSION

The Tax Court's order and order of dismissal is correct and should be affirmed.

Respectfully submitted,

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NOVEMBER 2016

STATEMENT OF RELATED CASES

The Commissioner is aware of the following related cases in this Court:

Philip A. Duggan v. Commissioner of Internal Revenue (9th Cir. – No. 14-71645) (In a letter, dated May 11, 2016, pursuant to Circuit Advisory Committee Note to Rule 25-2, the Commissioner notified the Court that briefing was completed on February 23, 2015, and that the parties had not received any notice from the Court regarding oral argument or submission on the briefs.)

Statutory Addendum

STATUTORY ADDENDUM

Internal Revenue Code (I.R.C.):

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITIONS TO TAX COURT.

(a) Time for filing petition and restriction on assessment.–Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861, no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. * * *

* * * *

SEC. 6330. NOTICE AND OPPORTUNITY FOR HEARING BEFORE LEVY.

(a) Requirement of notice before levy.–

(1) In general.–No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) Time and method for notice.–The notice required under paragraph (1) shall be–

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail, return receipt requested, to such person's last known address,

not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice.–The notice required under paragraph (1) shall include in simple and nontechnical terms–

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth–

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing.–

(1) In general.–If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period.–A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer.–The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing.–In the case of any hearing conducted under this section–

(1) Requirement of investigation.–The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing.–

(A) In general.–The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including–

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability.–The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination.–The determination by an appeals officer under this subsection shall take into consideration–

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded.–An issue may not be raised at the hearing if–

(A)(i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding; or

(B) the issue meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A). This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) Proceeding after hearing.–

(1) Judicial review of determination.–The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(2) Jurisdiction retained at IRS Office of Appeals.–The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding–

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

(e) Suspension of collections and statute of limitations.–

(1) In general.–Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of

any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

(2) Levy upon appeal.–Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy.

* * * *

CASE ADDENDUM

CMS

UNITED STATES TAX COURT
WASHINGTON, DC 20217

LINDA JEAN MATUSZAK,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 471-15
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	
	)	

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On January 7, 2015, petitioner petitioned this Court for review of a Final Appeals Determination dated October 7, 2014 (notice of determination) that denies petitioner's request for innocent spouse relief from joint and several liability under Internal Revenue Code (I.R.C.) section 6015(b), (c), and (f) for taxable year 2007. On November 10, 2015, respondent filed a Motion to Dismiss for Lack of Jurisdiction on the ground that the petition was not timely filed. On December 3, 2015, petitioner filed (1) a Response to Motion to Dismiss for Lack of Jurisdiction and (2) a Motion for Continuance.

In respondent's Motion to Dismiss for Lack of Jurisdiction, respondent moves the Court to dismiss this case on the ground that the petition was not timely filed within the statutory period prescribed by sections 6015(e)(1)(A)(ii) or 7502 of the I.R.C. Respondent attached to the motion a copy of a certified mail list, as evidence of the fact that a notice of determination concerning relief from joint and several liability was sent to petitioner by certified mail on October 7, 2014. Petitioner's petition arrived at the Court in an UPS Next Day Air envelope bearing a notation that the petition was mailed on January 6, 2015, and it was filed with the Court on January 7, 2015. Petitioner signed and dated the petition as of "January 6, 2015".

The Tax Court is a court of limited jurisdiction and may exercise jurisdiction only to the extent expressly provided by statute. Breman v. Commissioner, 66

SERVED Dec 29 2015

T.C. 61, 66 (1976). In a case arising from a notice of determination that disallows a request for relief from joint and several liability on a joint return, the jurisdiction of the Court depends, in part, on the timely filing of a petition by the taxpayer. Sec. 6015(e); Rule 320(b), Tax Court Rules of Practice and Procedure. In this regard, section 6015(e)(1) specifically provides that the petition must be filed with the Tax Court within 90 days of the date of the notice of determination. The Court has no authority to extend this 90-day period. However, if the conditions of section 7502 are satisfied, a petition that is timely mailed may be treated as having been timely filed.

Petitioner was served with a copy of respondent's motion to dismiss on November 10, 2015, and on December 3, 2015, petitioner filed her Response to Motion to Dismiss for Lack of Jurisdiction. In her response, petitioner alleges that the notice of determination was not actually received by her on October 7, 2014, and that she did not receive it until October 14, 2014. Respondent attached to the motion to dismiss for lack of jurisdiction a copy of the USPS Product & Tracking Information which shows that the notice of determination was mailed on October 7, 2014, which date is reflected on the notice of determination. The USPS Product & Tracking Information, attached to respondent's motion, reflects that no authorized recipient was available to receive the notice of determination on Saturday, October 11, 2014, and that a notice of attempted delivery was left at petitioner's address. The USPS Product & Tracking Information further shows that the next attempted delivery date is Tuesday, October 14, 2014, which is the date that the notice of determination was delivered and received by petitioner.[1]

Petitioner also alleges that "two sources–agents from the Internal Revenue Service" verbally informed her that the 90-day period for timely filing a petition with the Tax Court expired at the "end of business on January 7, 2015". However, the notice of determination states that, "[i]f you disagree with our decision, you can file a petition with the United States Tax Court to review our denial. You must file your petition within 90 days from the date of this letter. If you intend to file a petition, you should do so promptly. PLEASE NOTE: The law sets the time you are allowed to file your petition; the IRS cannot change the time period." The notice of determination also states that if the taxpayer disagrees with the notice of determination the taxpayer should "[s]end * * * [her] petition and a copy of this letter within 90 days from the date of this letter".

[1] Monday, October 13, 2014, was Columbus Day, a Federal holiday.

Moreover, even if petitioner received erroneous information concerning the 90-day period expiration date from an IRS employee as she alleges, the erroneous legal advice cannot eliminate, by estoppel or otherwise, the jurisdictional requirement for a timely filed petition. See Elgart v. Commissioner, T.C. Memo. 1996-379 (and cases cited therein).

Petitioner's additional argument is that respondent has had ample time, since January 7, 2015, and before November 10, 2015, to move for dismissal for lack of jurisdiction on the ground that the petition was not timely filed. Petitioner's argument is unavailing. This Court's jurisdiction is predicated on a timely filed petition and petitioner did not timely file her petition. In this case, the 90-day period for filing a timely petition with the Court under section 6213(a) expired on January 5, 2015. The record reflects that Ms. Matuszak's petition was mailed on January 6, 2015, which is one day after the expiration of the 90-day period for filing a petition with this Court.

While the Court is sympathetic to petitioner's situation, petitioner did not file her petition by the deadline and we are obliged to dismiss this case for lack of jurisdiction.

The premises considered, it is

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction is granted, and this case is dismissed for lack of jurisdiction. It is further

ORDERED that petitioner's Motion for Continuance is denied as moot.

(Signed) L. Paige Marvel
Judge

ENTERED **DEC 29 2015**

UNITED STATES TAX COURT
WASHINGTON, DC 20217

LINDA JEAN MATUSZAK,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 471-15
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	
	)	

ORDER

This case is before the Court on petitioner's Motion to Vacate Order of Dismissal for Lack of Jurisdiction pursuant to Rule 162[1] filed on January 22, 2016, with attached exhibits. For the reasons summarized below, we will deny petitioner's motion.

On January 7, 2015, petitioner petitioned this Court for review of a final appeals determination dated October 7, 2014, that denies petitioner's request for section 6015 relief for taxable year 2007. On November 10, 2015, respondent filed a Motion to Dismiss for Lack of Jurisdiction alleging that the petition was not timely filed. Petitioner filed a response to respondent's motion on December 3, 2015.

This Court has jurisdiction to review a final appeals determination that denies section 6015 relief when a taxpayer files a petition within 90 days of the date of the final appeals determination. Sec. 6015(e). Because petitioner did not file a petition within 90 days from the date of the final appeals determination, we

[1]Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

granted respondent's motion on December 29, 2015, and dismissed petitioner's case for lack of jurisdiction. Petitioner now requests that we vacate our decision.

The disposition of a motion to vacate lies within the sound discretion of the Court. Vaughn v. Commissioner, 87 T.C. 164, 166-167 (1986). The Court generally does not grant a motion to vacate absent a showing of unusual circumstances or substantial error, e.g., mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other reason justifying relief. See, e.g., Fed. R. Civ. P. 60(b); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999 (1978).

Petitioner contends that the 90-day period in section 6015(e)(1)(A) for filing a petition for review of a final appeals determination denying section 6015 relief is not jurisdictional and is subject to equitable tolling. Therefore, petitioner contends that this Court has jurisdiction of petitioner's case but the statute of limitations has expired and equitable tolling could allow the Court to extend the statute of limitations. Petitioner contends that because of recent developments in jurisdictional jurisprudence our decision in Pollock v. Commissioner, 132 T.C. 21 (2009), in which the Court held that section 6015(e) is jurisdictional and is not subject to equitable tolling, should be overruled.

Recently in Guralnik v. Commissioner, 146 T.C. ___, ___ (slip op. at 8-13) (June 2, 2016), we considered whether the 30-day period under section 6330(d)(1) in which to file a petition for review of a notice of determination arising under section 6320 and/or 6330 is jurisdictional and is subject to equitable tolling. The taxpayer in Guralnik argued that, although the Court had previously held that section 6330(d)(1) was jurisdictional, recent developments in jurisprudence required us to reconsider our previous holding. Id. We rejected the taxpayer's argument and held that the 30-day period under section 6330(d)(1) is jurisdictional and is not subject to equitable tolling. Id.

Petitioner's arguments are substantially similar to the taxpayer's arguments in Guralnik. As petitioner acknowledges, sections 6330(d)(1) and 6015(e)(1)(A) use similar language and were enacted in the same legislation. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, secs. 3201, 3401, 112 Stat. at 738, 749. Petitioner also acknowledges that sections 6330(d)(1) and 6015(e)(1)(A) must be interpreted similarly. Because section 6015(e) is substantially similar to section 6330(d)(1), we apply our holding in Guralnik to section 6015(e)(1)(A) and we reject petitioner's argument for the reasons stated in Guralnik.

In short, for the reasons articulated in Guralnik the Court declines to overrule Pollock and rejects petitioner's arguments that recent developments in jurisprudence compel a different result. Section 6015(e)(1)(A) is jurisdictional and equitable tolling does not apply. Accordingly, the Court is unable to conclude that any unusual circumstances or substantial error warrants granting petitioners' motion.

Upon due consideration, it is

ORDERED that, petitioner's Motion to Vacate Order of Dismissal for Lack of Jurisdiction, filed January 22, 2016, is denied.

(Signed) L. Paige Marvel
Chief Judge

Dated: Washington, D.C.
July 29, 2016

CERTIFICATE OF COMPLIANCE
WITH TYPE VOLUME LIMITATION

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 6,821 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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/s/ JANET A. BRADLEY

Attorney for Commissioner of Internal Revenue

Dated: November 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day November, 2016, I electronically filed the foregoing supplemental brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. A copy of the electronically filed supplemental brief was served on counsel for the amicus by the Notice of Docket Activity transmitted by the CM/ECF system. I further certify that I have served a copy of the supplemental brief on the appellant, appearing *pro se*, by sending two copies to him via First-Class mail in an envelope correctly addressed to him as follows:

Mr. Philip A. Duggan
Post Office Box 3033
Deer Park, Washington 99006

/s/ JANET A. BRADLEY
JANET A. BRADLEY