IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMANDA N. VU,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 17-9007
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent-Appellee.	)	

APPELLANT'S RESPONSE TO COURT'S ORDER DATED OCTOBER 26, 2017 CONCERNING APPELLATE JURISDICTION

This response is submitted by Amanda Vu to the Court's October 26, 2017 order in which it sought her explanation of why this Court has appellate jurisdiction. Since it is hard to argue this issue in the abstract, Ms. Vu begins with the facts of the case:

FACTS

Ms. Vu filed a joint income tax return with her then-husband for the taxable year 2011. The IRS audited that return. In a letter mailed to both spouses by regular mail on June 12, 2014, the IRS issued a preliminary determination that the couple had underreported Schedule C income, leading to a proposed deficiency in tax of $29,445 and an accuracy-related penalty

under § 6662(a)[1] of $5,889. *IRS Letter to Vu* dated 6/12/14, attached as Exhibit A to the *Vu Affidavit* filed 2/8/17, document number 34.[2] (When the IRS issued a joint notice of deficiency on December 16, 2014, it reduced the proposed deficiency in tax to $18,672 and the proposed penalty to $3,734.40. *Opinion* dated 11/8/16, document number 13, at 5 n.5.)

Prior to June 12, 2014, Ms. Vu had become aware of the audit and sought relief from any amount asserted therefrom through the provisions of § 6015. Section 6015 relieves a requesting taxpayer from joint and several liability under conditions set out in one or more of subsection (b), (c), or (f) (so-called "innocent spouse" relief). Ms. Vu prepared an innocent spouse relief request on Form 8857 and signed the form, dating her signature February 28, 2014. For reasons not clear, the IRS stamped the Form 8857 as received on March 24, 2014, 24 days after Ms. Vu signed the form. *Opinion* dated 11/8/16, at 6. The June 12, 2014 IRS letter proposed to deny her innocent spouse relief under all three subsections. *Id*. at 3-4.

On September 12, 2014, Ms. Vu, acting pro se, filed a petition under § 6015(e)(1)(A) asking the Tax Court to determine the relief available to her

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code, Title 26.

[2] All references to "document number" are to the document number as shown on the Tax Court's docket sheet.

under §6015 from this deficiency, and she requested that the case proceed under the small tax case procedures of § 7463. *Id*. at 1-2.

On October 9, 2014, the IRS sent, by certified mail, a final determination denying Ms. Vu innocent spouse relief. *Notice of Determination* attached as Exhibit A to *Answer* filed 11/3/14, document number 3. This commenced a 90-day period in which Ms. Vu had to file a Tax Court petition under § 6015(e)(1)(A)(ii), if she wanted review and had not already timely filed a Tax Court petition.

On November 3, 2014, the IRS filed an answer to the Tax Court petition Ms. Vu filed on September 12, 2014, in which it did not argue that the petition was in any way untimely or notify the taxpayer that a 90-day period under § 6015(e)(1)(A)(ii) had been running since October 9, 2014. *Answer* filed 11/3/14, document number 3.

On January 7, 2015, the 90-day period for petitioning the Tax Court, based on the October 9, 2014 Notice of Determination denying her request for innocent spouse relief, expired.

On January 14, 2015, the Tax Court notified the parties that the case was set for trial in Albuquerque in June 2015. *Notice of Trial* dated 1/14/15, document 5.

On January 27, 2015, the IRS moved to dismiss Ms. Vu's case for lack of jurisdiction on the ground that the petition was not timely filed. In the motion, the IRS argued that the petition had been filed prematurely, since it had been filed 27 days prior to the issuance of the notice of determination. *Motion to Dismiss* dated 1/27/15, document number 6.

On June 1, 2015, Tax Court Judge Tamara W. Ashford held a hearing on the motion in Albuquerque. At the hearing, the IRS introduced a copy of the Form 8857, showing the date received stamp of an IRS office in Cincinnati of March 24, 2014. *Hearing Exhibit*, document number 10. Now, for the first time – almost 9 months after Ms. Vu filed her petition – the IRS argued that the petition was also filed too early under the rule that, in the absence of a final determination sent to her by certified mail, she must wait to file a Tax Court petition until 6 months after the Form 8857 is "filed" or "made". *Transcript of Hearing* on 6/1/15, document number 11, at 5. At the hearing, Judge Ashford inquired as to why the IRS did not alert Ms. Vu that her petition was untimely at a time when she could have easily cured the defect by filing a new, timely petition; *id*. at 24-30; calling the situation "a little bit unfair". *Id*. at 25.

Judge Ashford took no further filings from the parties, and on November 8, 2016, issued an opinion (T.C. Summary Op. 2016-75) in which

she noted that the Tax Court in *Pollock v. Commissioner*, 132 T.C. 21, 30-32 (2009), had held that the filing time limits in § 6015(e)(1)(A) are jurisdictional requirements. *Opinion* dated 11/8/16, document number 13, at 8. She held that the case must be dismissed for lack of jurisdiction because the petition was filed prior to the expiration of the 6-month period in § 6015(e)(1)(A)(i)(II) and prior to the beginning of the 90-day period in § 6015(e)(1)(A)(i)(I). *Id*. at 15. She wrote: "While we acknowledge that this is an inequitable result, as petitioner filed her petition believing in good faith that it was timely and her opportunity to file another petition has now expired, we are unfortunately constrained by the statute . . . ." *Id*. Two days later, the judge entered an order dismissing the petition for lack of jurisdiction. *Order* dated 11/20/14, document number 14.

Within 30 days of the opinion and order of dismissal, the undersigned counsel filed entries of appearance in Ms. Vu's case; *Entries of Appearance for Carlton M. Smith and T. Keith Fogg* dated 11/29/16, docket numbers 15 and 16; and filed three motions. Two motions were to reconsider the opinion and to vacate the order. Those two motions were timely filed. Tax Court Rules 161 and 162. The grounds for those motions were: *Pollock*'s reasoning had been undermined by Supreme Court opinions issued after 2009; *Henderson v. Shinseki*, 562 U.S. 428 (2011); ***Sebelius v. Auburn***

Regional Medical Center, 568 U.S. 145 (2013); *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015); and *Musacchio v. United States*, 136 S. Ct. 709 (2016); that further narrowed the rare instances where a filing deadline is now considered jurisdictional. Under those opinions, counsel argued, the time periods in § 6015(e)(1)(A) are nonjurisdictional statutes of limitations. *Motion for Reconsideration of the Opinion* dated 12/1/16, document number 17, at 5-9; *Motion to Vacate the Decision* dated 12/1/16, document number 19, at 4-7. In the *Motion for Reconsideration of the Opinion*, at 9-12, counsel also argued that the IRS waited too long to raise the issue of non-compliance with those statutes of limitations, such that the IRS forfeited the right to raise the untimeliness issue.

The third motion was one to remove the small tax case designation on the ground that the case presented a significant legal issue on which the Tenth Circuit had no precedent. The motion pointed out that the issue of whether the filing deadlines in § 6015(e)(1)(A) were jurisdictional was one of first impression in any of the appellate courts, but was currently being litigated in the Second and Third Circuits. *Motion to Remove Small Tax Case Designation* dated 12/1/16, document number 18, at 4-5.

The IRS objected to the granting of the first two motions. *Notice of Objection to Motion for Reconsideration of the Opinion* dated 1/26/17,

document number 29; *Notice of Objection to Motion to Vacate the Decision* dated 1/26/17, document number 30. Of the third motion, the IRS wrote "that consideration of whether to remove the small tax case status is premature until and if the Tax Court vacates the decision entered in this case", but did not otherwise object to the granting of the motion. Notably, the IRS also did not argue that Ms. Vu had waited too late in the case to make her motion to remove the small tax case designation. *Response to Motion to Remove Small Tax Case Designation* dated 1/26/17, document number 27, at 2.

Judge Ashford delayed ruling on all three motions until the Second and Third Circuits ruled on the issue of the jurisdictional nature of 6015. Decisions from those two circuits came out in the Spring of 2017. Thereafter, on July 25, 2017, Judge Ashford denied all three motions filed by Ms. Vu, citing *Pollock*, *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017), and *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017), as supporting the holding that the time periods in § 6015(e)(1)(A) are jurisdictional under current Supreme Court case law. *Order* dated 7/25/17, docket number 35, at 4-5. For additional support, she cited case law interpreting as jurisdictional an analogous filing deadline in§ 6330(d)(1) for Tax Court Collection Due Process petitions. *Id*. at 4. In her order, she also

denied the motion to remove the small tax case designation, finding that the timing of the making of the motion violated the spirit of the Tax Court's small tax case rules and citing the above-mentioned precedent that, she felt, sufficiently determined the jurisdictional issue adversely to Ms. Vu. *Id*. at 5-6.

The appeal in this case was timely filed within 90 days of the entry of Judge Ashford's July 25, 2017 order. Notice of Appeal filed 9/11/27, document number 36.

I. The Prohibition in § 7463(b) on Appellate Review of Decisions of the Tax Court in Small Tax Cases Does Not Extend to Review of Certain Procedural Rulings, Including, as in this Case, the Issue of Whether the Tax Court Properly Dismissed the Petition for Lack of Jurisdiction.

Section 7463(f) provides that, in § 6015(e) cases, "[a]t the option of the taxpayer concurred in by the Tax Court . . . before the hearing of the case, proceedings may be conducted under this section . . . if the amount of relief sought does not exceed $50,000". Section 7463(b) states, in part: "A decision [[3]] entered in any case in which the proceedings are conducted

[3] Section 7459(c) effectively treats orders dismissing deficiency cases that are not small tax cases as reviewable decisions of the Tax Court. No one would argue that there should be a different rule for appealing "stand-alone innocent spouse cases" brought under § 6015(e)(1)(A) that are dismissed for lack of jurisdiction. And, indeed, the appellate courts have reviewed orders of dismissal of stand-alone innocent spouse for lack of jurisdiction in regular cases. *See, e.g., Terrell v. Commissioner*, 625 F.3d 254 (5th Cir. 2010).

under this section shall not be reviewed in any other court . . . ." The prohibition on appellate review does not apply in this case, since Ms. Vu is not seeking merits review, but review of an erroneous procedural ruling of the Tax Court that precluded the Tax Court from deciding the case on the merits (i.e., a ruling that it lacked jurisdiction).

Courts have no right to decline jurisdiction that is given to them. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

In precedential opinions, three other Circuits have cited § 7463(b) in declining to engage in merits review of Tax Court rulings in small tax cases. *Dexter v. Commissioner*, 409 F.3d 877 (7th Cir. 2005); *Cole v. Commissioner*, 958 F.2d 288 (9th Cir. 1992); *Ballard v. Commissioner*, 639 F.2d 486 (9th Cir. 1980); *Kahle v. Commissioner*, 566 F.2d 581 (6th Cir. 1977).

This Court has no precedential rulings on the application of § 7463(b) to preclude review of small tax case decisions. However, in a nonprecedential, unpublished order that this Court recently issued in *Miller v. Commissioner*, Tenth Cir. Docket No. 17-9005 (order dated September 27, 2017), this Court precluded merits review a small tax case decision. And

in dicta in a nonprecedential opinion, this Court also stated that § 7463(b) precludes review of small tax case decisions. *Greene v. Commissioner*, 1999 U.S. App. LEXIS 30752, 201 F.3d 447 (10th Cir. 1999) (table).

No precedential opinions exist regarding the ability to appeal the decision in a small tax case regarding a non-merits procedural ruling regarding the jurisdiction of the Tax Court over the case. It would be a grave injustice to interpret § 7463(b) to preclude review of small tax case non-merits procedural rulings, such as erroneous rulings by the Tax Court that it lacked jurisdiction.

There is good ground for thinking that § 7463(b)'s prohibition should not extend to every ruling of the Tax Court in a small tax case. For example, in its most recent, albeit nonprecedential, ruling that § 7463(b) precluded review of a Tax Court small tax case decision, the Ninth Circuit noted a possible caveat that it might have jurisdiction over a Due Process claim concerning the Tax Court suit. *Risley v. Commissioner*, 472 Fed. Appx. 557 (9th Cir. 2012) ("We need not consider whether we would have jurisdiction over a due process claim because the Risleys' claim here is based on the assertion that the rules governing small tax cases do not allow for summary judgment, which is incorrect."), relating to T.C. Summary Op. 2009-172 (granting a motion for summary judgment in a deficiency jurisdiction case).

Moreover, a number of courts have already recognized a procedural exception to a similar provision precluding appellate review of another kind of tax case. In response to the ruling in *Commissioner v. Shapiro*, 424 U.S. 614 (1976) (finding a judicial equitable exception to the anti-injunction act of § 7421(a) for an injunctive suit against a jeopardy assessment), Congress in 1976 enacted § 7429, allowing for expedited administrative and judicial review of such an assessment wherein the issues would be limited to whether (1) the assessment "is reasonable under the circumstances", (2) the amount assessed "is appropriate under the circumstances", and/or (3) the levy of any amount so assessed "is reasonable under the circumstances". The provision authorizes district court suits (and, starting in 1988, in rare cases, Tax Court suits) involving determinations only on these three issues. § 7429(b)(2). Section 7429(f) (similar to § 7463(b)) provides: "Any determination made by a court under this section shall be final and conclusive and shall not be reviewed by any other court."

A number of appellate courts in precedential opinions have held that § 7429(f) does not preclude appellate review of district court rulings that are not on the merits – i.e., not on the three issues that the district court or Tax Court, by statute, is to consider. *Wapnick v. United States*, 112 F.3d 74 (2d Cir. 1997) ("Following other circuits, we hold that this limitation applies

only to decisions on the merits regarding the jeopardy assessment in question. A dismissal of a Section 7429 proceeding for lack of subject matter jurisdiction is, therefore, appealable."; citations omitted); *Morgan v. United States*, 958 F.2d 950, 951-952 (9th Cir. 1992); *Hall v. Commissioner*, 805 F.2d 1511, 1512-1513 (11th Cir. 1986). *Cf*. this Court's nonprecedential ruling in *Neece v. United States*, 1992 U.S. App. LEXIS 25219, 968 F.2d 20 (10th Cir. 1992) (table) (noting that Circuits disagree about whether procedural rulings under § 7429 are subject to appellate review, but declining to review **the government's appeal (!)** because the district court ruled on the merits that the jeopardy assessment was unreasonable).

For similar reasons, the prohibition on appellate review in § 7463(b) should be read not to apply to procedural dismissals like the instant one – i.e., where the taxpayer argues that the Tax Court erroneously dismissed for lack of jurisdiction.

Ms. Vu recognizes that there are three unpublished opinions in which courts of appeals, citing § 7463(b), refused to review the Tax Court's dismissals of small tax cases for lack of jurisdiction. *Rayle v. Commissioner*, 594 Fed. Appx. 305 (7th Cir. 2014); *Edge v. Commissioner*, 552 Fed. Appx. 255 (4th Cir. 2014); *Parks v. Commissioner*, 201 Fed. Appx. 553 (9th Cir. 2006). However, in none of these opinions was there any

discussion of a possible argument that dismissals of small tax cases for lack of jurisdiction might be reviewable, while merits rulings in them could not be. Accordingly, these three opinions are not persuasive.

II. The Tax Court's Denial of a Timely Motion to Remove the Small Tax Case Designation is Subject to Appellate Review, and Judge Ashford Abused Her Discretion in Denying Such a Motion.

Section 7463(d) provides, in part: "At any time before a decision entered in a case in which the proceedings are conducted under this section becomes final, the taxpayer or the Secretary may request that further proceedings under this section in such case be discontinued."

Ms. Vu can locate no authority concerning whether an appellate court can review the Tax Court's denial of a motion to remove the small tax case designation. But, she has found two items suggesting that such a denial might be reviewable:

In its opening brief in *Parks v. Commissioner*, *supra*, the government, when arguing that review there was prohibited, observed that "neither party asked the Tax Court to remove the 'small tax case' designation from the instant case, and the Tax Court never entered an order doing so." 2006 WL 2362065 (C.A.9) (Appellate Brief), at 15-16.

In *Cole v. Commissioner*, *supra*, 958 F.2d at 290, before ruling that it lacked appellate jurisdiction, the Ninth Circuit observed that "neither party

made a motion and the Tax Court never entered an order to remove the 'small tax case' designation from the case".

Judge Ashford denied Ms. Vu's motion to remove the small tax case designation for essentially two reasons:

First, although admitting the motion was technically timely, she said that the motion violated the spirit of the Tax Court rules because it was filed about three weeks after entry of the summary opinion and order of dismissal. *Order* dated 7/25/17, document number 35, at 6.

Second, she thought Ms. Vu was likely to lose the jurisdictional argument on the merits, writing:

> [T]he issue [of whether the filing rules of § 6015(e)(1)(A) are jurisdictional] . . . is not one of first impression for our Court and our existing jurisprudence on the issue has been reaffirmed by two recent appellate court decisions, albeit not from the Court of Appeals for the Tenth Circuit. As further discussed *supra id*., the Court of Appeals for the Tenth Circuit, as well as several other Courts of Appeals, however, have interpreted the substantially similar section 6330(d)(1) as jurisdictional.

Id.

Addressing the timeliness issue first, § 7481(b) provides: "The decision of the Tax Court in a proceeding conducted under section 7436(c) or 7463 shall become final upon the expiration of 90 days after the decision is entered."

Tax Court Rule 172(d) states: "The Court, on its own motion or on the motion of a party to the case, may, at any time before the trial commences, issue an order directing that the small tax case designation be removed and that the proceedings not be conducted as a small tax case."

The first sentence of § 7463(d) clearly demonstrates that Congress authorized and expected the Tax Court sometimes to remove small tax case designations even after the Tax Court had ruled on a matter. That sentence authorizes removal before the Tax Court decision becomes final. The existence of a non-final decision requires the Tax Court already to have ruled on some issue. Although, when the motion to remove the small tax case designation was filed, the Tax Court had already issued an opinion and order in this case dismissing the case for lack of jurisdiction, those rulings had not become final under the express words of § 7463(d). Moreover, the motion was made at a pre-trial stage. It is clearly wrong to think that a timely motion under both § 7463(d) and Tax Court Rule 172(d) somehow defeats the purpose of § 7463(d), and, notably, Judge Ashford cites no authority for her so ruling.

Logic also undermines Judge Ashford as to her conception of the proper time for making a motion to remove a small tax case designation. There are no significant differences between small tax cases and regular tax

cases prior to the trial. Tax Court Rule 170 provides, in part: "Except as otherwise provided in these Small Tax Case Rules [i.e., Rules 170 to 174], the other Rules of practice of this Court are applicable to such cases."

The main differences between small tax cases and regular cases are in what takes place at or around the trial. "Trials of small tax cases will be conducted as informally as possible consistent with orderly procedure, and any evidence deemed by the Court to have probative value shall be admissible." Tax Court Rule 174(b). By contrast, regular Tax Court cases are conducted "in accordance with the Federal Rules of Evidence". § 7453. In contrast to Tax Court Rule 151 directing the filing of post-trial briefs in regular cases, Tax Court Rule 172(c) provides: "Neither briefs nor oral arguments will be required in small tax cases unless the Court otherwise directs." It is obvious that, if a trial had been conducted informally as a small tax case – even accepting in, say, hearsay – the case would have to be retried under the Federal Rules of Evidence if the small tax case designation were removable after the trial started. But, in a case like Ms. Vu's, where there was no trial (just an evidentiary hearing that would have been conducted the same way whether this was a small tax case or not), the Tax Court would not have to redo any work in order to convert a small tax case to a regular case. For that reason, to prevent duplicative work, it is only

important that a small tax case removal motion not be made after the trial has commenced. Sometimes, it does not become obvious that a case presents an important, novel legal issue until after the Tax Court has ruled on that or a related issue.

Although the second sentence of § 7463(d) describes one instance where the Tax Court may discontinue small tax case proceedings (i.e., when it is discovered that the amount involved exceeds the jurisdictional threshold),[4] the legislative history of both the 1969 enactment of § 7463 and its 1978 amendment indicates Congress anticipated that other instances might justify discontinuing small tax case status. For example, in 1978, when Congress increased the small tax case threshold from $1,500 to $5,000, the Conference Committee report explained:

> In view of the proposed increase in the small tax case jurisdictional amount to $5,000 it is contemplated that, the Tax Court will give careful consideration to a request by the Commissioner of Internal Revenue [5] to remove a case from the small tax case procedures when the orderly conduct of the work of the Court or the

[4] From the facts recited above, it is clear that the Ms. Vu's case is not one exceeding the jurisdictional threshold for stand-alone innocent spouse cases. *Petrane v. Commissioner*, 129 T.C. 1 (2007) ($50,000 limit is aggregate of tax, interest and penalties for which relief is sought on the date the petition was filed).

[5] Like the 1978 Conference Committee report, the Senate Finance Committee report from 1969 makes clear that that Congress presumed that only the IRS would make motions to remove small tax case designation. S. Rep. 91-552 at 303-304 ("(presumably on request of the Internal Revenue Service)"). The statute, however, permits either party to make such motions.

> administration of the tax laws would be better served by a regular trial of the case. . . . [R]emoval of the case from the small tax case category may be appropriate *where a decision in the case will provide a precedent for the disposition of a substantial number of other cases or where an appellate court decision is needed on a significant issue*.

H. Rept. 95-1800 at 277-278 (emphasis added).

The Tax Court has its own precedent. *Lawrence v. Commissioner*, 27 T.C. 713, 716-720 (1957). However, since appeals go from the Tax Court to potentially all the regional courts of appeal under § 7482(b)(1), the Tax Court has adopted the so-called *Golsen* rule – i.e., that it will follow the precedent of a court of appeals to which a case is appealable, notwithstanding the Tax Court's contrary precedent. *Golsen v. Commissioner*, 54 T.C. 742, 756-758 (1970), *affd. on other grounds*, 445 F.2d 985 (10th Cir. 1971). Thus, to apply its *Golsen* rule, it is critical for the Tax Court to know what the precedent of a court of appeals is on given questions as to which the Tax Court already has precedent. Congress understood this when it mentioned in the above quote that small tax case status is not appropriate "where an appellate court decision is needed on a significant issue." H. Rept. 95-1800 at 278. Citing *Golsen*, the Tax Court, in at least one other case, has refused to allow a case to proceed as a small tax case where there was no precedent on an issue from the appellate court to which the case would otherwise be appealable. *Hubbard v.*

Commissioner, T.C. Memo. 1987-575, at *7-*9, *revd. and remanded on other issue*, 872 F.2d 183 (6th Cir. 1989) (Tax Court explained that it granted the IRS' motion to remove the small tax case designation because the substantive issue involved was on appeal to the Sixth and Ninth Circuits, and, although the case would also otherwise be appealable to the Sixth Circuit, there was a chance that the Sixth Circuit might not reach the issue in the case that was currently on appeal). Thus, it was an abuse of discretion for Judge Ashford to have denied the motion to remove the small tax case designation when she knew that the Tenth Circuit had no precedent on whether the filing deadlines in § 6015(e)(1)(A) are jurisdictional.

Moreover, there is no doubt that this case presents a "significant issue" within the meaning of the legislative history.

The § 6015(e)(1)(A) deadlines jurisdictional issue came up recently in two courts of appeals, both of which issued published opinions on it because it was significant: *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017), and *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017).

In addition to in the instant case, this jurisdictional issue is now being litigated by the undersigned counsel in the Fourth Circuit in Nauflett v. Commissioner, Fourth Circuit Docket No. 17-1986, reviewing an unpublished order denying a motion to vacate an order of dismissal for lack

of jurisdiction at Tax Court Docket No. 22427-15 (order dated May 25, 2017)

(https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=7120712). Briefing in Nauflett is was completed on November 13, 2017.

Further, this issue has come up on three prior occasions in courts of appeals, though it was not ruled on in those cases:

Pollock was appealed to the Eleventh Circuit. (*See* Tax Court Docket Sheet for Docket No. 17755-07, document number 13). Before the appeal could be decided, the government abandoned pursuing Mrs. Pollock for the taxes. *United States v. Pollock*, 2009 U.S. Dist. LEXIS 124835 (S.D. Fla. 2009). Accordingly, the appeal was abandoned as moot. (*See* Tax Court Docket Sheet for Docket No. 17755-07, document number 16).

A similar thing happened in the case of *Gormeley v. Commissioner*, T.C. Memo. 2009-252, where the Tax Court, relying on *Pollock*, held the filing deadline jurisdictional and not subject to equitable tolling, so the IRS could proceed to seek payment of a joint 2004 tax deficiency from Ms. Gormeley. Ms. Gormeley appealed that ruling to the Third Circuit. (*See* Tax Court Docket Sheet for Docket No. 26814-08, document number 27, and Third Circuit Docket No. 10-1574). Before the appeal could be decided, Ms. Gormeley filed a second petition in the Tax Court – this one a

deficiency petition –in which she argued that this second case should be dismissed for lack of jurisdiction because the IRS did not send a notice of deficiency to her at her last known address for the 2004 deficiency. In this second case, the IRS eventually agreed that it never sent the notice of deficiency and so asked for the Tax Court to dismiss the case for lack of jurisdiction, which the Tax Court did at Docket No. 29079-29 in an unpublished order dated March 16, 2010 (https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=5220233). As a result, the IRS had to abate the assessment of the deficiency against Ms. Gormeley, so it could no longer seek to collect the deficiency, and the innocent spouse appeal became moot. On October 12, 2010, the Third Circuit dismissed the appeal on the agreement of the parties, without having decided whether the filing deadlines in § 6015(e)(1)(A) are jurisdictional.

Third, Pamela Terrell filed a stand-alone innocent spouse case in the Tax Court, and the Tax Court dismissed her case for lack of jurisdiction as untimely in an unpublished order at Tax Court Docket No. 15894-07 (dated July 30, 2009) (https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=5070053). Ms. Terrell appealed this ruling to the Fifth Circuit, where she

argued that the notice of determination was not sent to her at her last known address, but if it was, the 90-day filing deadline was not jurisdictional and should be equitably tolled or subject to estoppel. In *Terrell v. Commissioner*, 625 F.3d 254 (5th Cir. 2010), the Fifth Circuit held the filing timely because the notice had not been sent to the last known address. This made it unnecessary for the court to decide whether the filing deadline was nonjurisdictional and subject to equitable tolling or estoppel. In a footnote, the court wrote: "Terrell also advances several alternative arguments in favor of jurisdiction in the event that this Court finds her petition to the Tax Court was untimely, including equitable estoppel, equitable tolling, and due process. Because we find jurisdiction on the basis that her petition was timely filed within the statutory period, we need not address these arguments." *Id*. at 258 n.1.

That the issue of whether the filing deadlines in § 6015(e)(1)(A) are jurisdictional has reached the courts of appeal seven times since 2009 shows the significance of the issue presented in this case.

Further, though this issue is not presented in every stand-alone innocent spouse case, it is important to know whether the filing periods in such cases are jurisdictional, so many more cases do not end up in the appellate courts. The Tax Court does not publish annual statistics on the

number of § 6015(e) stand-alone innocent spouse cases that are filed each year. However, employees at the court informed Prof. Scott Schumacher "that for the fiscal year ending September 30, 2009, the Tax Court received 544 petitions involving section 6015 issues, 426 of which were filed *pro se*". Scott Schumacher, "Innocent Spouse, Administrative Process: Time for Reform", Tax Notes Today, 2011 TNT 3-3 (Jan. 5, 2011), at n. 24. Doubtless, some significant percentage of the 500 annual innocent spouse cases are filed by residents of the Tenth Circuit.

Judge Ashford makes no serious attempt to deny that the Tax Court jurisdictional issue raised in this case is significant. Rather, it appears that Judge Ashford's position is that, given (1) the Tax Court's ruling in *Pollock*, (2) the Second and Third Circuits' recent rulings in *Matuszak* and *Rube*l, and (3) statements or holdings in other appellate opinions that the § 6330(d)(1) Tax Court filing period is jurisdictional, Ms. Vu is likely to lose any appeal in this Circuit, so why bother to let her appeal? But, there is no basis for evaluating removing the small tax case designation based on the chances of a party winning a significant issue on appeal. Having, in effect, applied an invalid criterion, Judge Ashford abused her discretion by denying Ms. Vu's motion to remove the small tax case designation.

In its order in the instant case, the Court directed Ms. Vu to "file a written response addressing only this court's jurisdiction over her appeal." If chances of success on the merits is a proper criterion for whether small tax case designations should be removed, then this order puts Ms. Vu in an uncomfortable position. The Court is, in effect, ordering her not to argue the merits, while Judge Ashford has relied on merits rulings as support for not removing the small tax case designation.

So as not to violate this Court's order, Ms. Vu will not include here the roughly 20-30 pages of argument that she could present for why *Pollock*, *Rubel*, and *Matuszak* are incompatible with the Supreme Court's current case law that only rarely makes filing deadlines jurisdictional.

Regarding the statements or holdings in other appellate opinions that the § 6330(d)(1) Tax Court "Collection Due Process" (CDP) filing deadline is jurisdictional, Ms. Vu will only point out that all but one of the opinions cited by Judge Ashford does not even purport to analyze the issue under the Supreme Court's recent case law on jurisdiction. *Gray v. Commissioner*, 723 F.3d 790 (7th Cir. 2013); *Boyd v. Commissioner*, 451 F.3d 8 (1st Cir. 2006); *Kaplan v. Commissioner*, 552 Fed. Appx 77, 78 (2d Cir. 2014); *Trivedi v. Commissioner*, 525 Fed. Appx 587, 588 (9th Cir. 2013). So, such case law can in no way be persuasive.

The only CDP opinion that Judge Ashford cites that does apply any current Supreme Court case law on jurisdiction is this Court's nonprecedential opinion in *Springer v. Commissioner*, *supra*, 416 F.3d at 683 n.1. This Court should not follow *Springer* by analogy, however. The *Springer* Court heard no oral argument, raised the jurisdictional issue *sua sponte*, and stated the CDP filing deadline is jurisdictional in a footnote, only 13 days after the Supreme Court's opinion in *Henderson v. Shinseki*, 562 U.S. 428 (2011) (filing deadline for Article I Court of Appeals for Veterans Claims held not jurisdictional), was issued. Further, the statement in the case is dicta, since the issue in the case was the lack of a predicate notice of determination, not the timely filing of the Tax Court petition after issuance of such notice. Most importantly, though, the Court in *Springer* did not have the benefit of the Supreme Court's later opinion in *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), where the Supreme Court held that a filing deadline contained in the same sentence as a jurisdictional grant was still not jurisdictional.

Judge Ashford mistakenly conflated the Tax Court's view of the merits of Ms. Vu's position regarding its jurisdiction in 6015 cases with the decision to remove the Small case designation in this case. While Ms. Vu's primary position is that this court has jurisdiction to hear this appeal because

the statutory bar on hearing appeals of Small tax cases does not apply to dismissals for lack of jurisdiction, to the extent that this Court finds Judge Ashford's reasoning relevant, her reasoning fails to address the underlying jurisdictional issue in this case in a meaningful way. Her decision to deny the motion to remove the Small case designation also bucks the Tax Court norms for review of motions of this type. A review of the Tax Court order page which allows research on orders for removal of the small tax case designation from 2011 to the present reveals that petitioners have requested this relief approximately 45 times (there is some duplication of cases) and the Tax Court has granted it 44 times, i.e. in all cases except the case of Ms. Vu.[6]

In Ms. Vu's case the government did not object to the granting of the motion to remove the small case designation and the granting of the motion would have had no adverse impact on the Tax Court. The decision of the Tax Court to deny the motion simply makes it more difficult for Ms. Vu to appeal because she must respond to and overcome a motion such as this

[6] The search was performed using the terms "Petitioner's Motion for Removal of Small Tax Case Designation." Similar search terms ("Motion to Remove", "Small Case", "'S' Designation", etc.) also produced no denials of petitioners' motions other than that in Ms. Vu's case. None of the cases in which the Tax Court granted the motion present the same procedural situation as the situation presented in Ms. Vu's case; however the historical outcome of this particular motion does provide some context for the decision here.

court has issued. In this circumstance, the refusal to grant the motion to lift the small tax case designation in light of the Tax Court's long history of granting these motions and the precedential nature of the issue presented, represents an abuse of discretion.

While Ms. Vu does not believe that this court needs to reach the issue of whether Judge Ashford abused her discretion, the decision here does not follow Tax Court norms with respect to this type of motion based on its history of granting motions by petitioners seeking to remove the small case designation; based on the apparent misreading of the spirit of a rule and based upon the precedent setting nature of the underlying issue.

With respect to the impact of the merits of the underlying argument regarding jurisdiction on the issue of whether Judge Ashford abused her discretion, Ms. Vu informs this Court that the issue of whether the CDP filing deadline is jurisdictional under current Supreme Court case law is really being litigated only for the first time in two pending cases, Cunningham v. Commissioner, Fourth Circuit Docket No. 17-1433, and Duggan v. Commissioner, Ninth Circuit Docket No. 15-73819. Because Judge Ashford's order raises the merits of the underlying issue, this Court could put off ruling on the appellate jurisdiction question until after a brief is filed that would address both the appellate jurisdiction issues and why the

filing deadlines in § 6015(e)(1)(A) are not jurisdictional. That is, this Court could simply order the parties to include argument on the appellate jurisdictional issue in their merits briefing in this case.

CONCLUSION

For the reasons stated above, this Court should hold that it has appellate jurisdiction in this case.

Respectfully submitted,

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November 15, 2017

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, version 1.257.539.0, updated November 15, 2017, and according to the program are free of viruses.

s/ T. Keith Fogg
Professor T. Keith Fogg
Counsel for Appellant

Dated: November 15, 2017

CERTIFICATE OF SERVICE

This is to certify that a copy of this response was served on counsel for the appellee, Regina S. Moriarty, Esq., by filing it with the CM/ECF system on November 15, 2017, of which she is a member. All counsel in the case are members of the CM/ECF system.

s/ T. Keith Fogg
Professor T. Keith Fogg
Counsel for Appellant

Dated: November 15, 2017