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EQUITABLE DOCTRINES: Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling, and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case

PROBLEM

Various provisions in the Internal Revenue Code (IRC) authorize proceedings or suits against the government. These actions are generally brought in the Tax Court, a United States district court, or the Court of Federal Claims.¹ For example, taxpayers who seek to challenge the IRS's assertion that they owe additional tax, without first paying the additional tax, must petition the Tax Court.² Taxpayers who wish to contest the IRS's denial of a claim for a whistleblower award or seek certain declaratory judgments must also petition the Tax Court.³ Taxpayers whose claims for tax refunds have been denied by the IRS cannot bring refund suits in the Tax Court, but may seek refunds in the United States district courts or in the United States Court of Federal Claims. Suits for civil damages arising from unauthorized conduct by the IRS must be also brought in these federal courts.⁴ The periods for petitioning the Tax Court or bringing suit in a United States district court or the Court of Federal Claims are prescribed in IRC provisions or Treasury regulations, sometimes in language that confuses taxpayers.⁵ The sanction for failing to commence suit within those times is severe: taxpayers lose their day in that court, which may be the only prepayment forum, or the only forum at all, with jurisdiction to hear their claim. There are judicial doctrines pursuant to which a court may excuse a late suit, but the Tax Court has held, and courts of appeal have agreed, that the time limits for petitioning the Tax Court are jurisdictional requirements that cannot be modified by applying equitable doctrines.⁶ The courts do not agree as to whether the time limits for filing tax suits in United States district courts or the Court of Federal Claims are jurisdictional or are instead statutes of limitation subject to judicial doctrines that could excuse late suits.⁷

- 1 As discussed below, some tax claims may also be heard by U.S. Bankruptcy courts.
- 2 See, e.g., Internal Revenue Code (IRC) § 6213 (deficiency cases); IRC §§ 6320(c), 6330(d) (collection due process cases); IRC § 6015(e) (innocent spouse cases), discussed below.
- 3 IRC § 7623(b) (whistleblower awards); IRC § 7476 (declaratory judgment that a retirement plan qualifies or continues to qualify for favorable tax treatment).
- 4 28 U.S.C. § 1346 (refund suits); IRC § 7426 (wrongful levy suits); IRC §§ 7431-7433 (civil damages suits). See also IRC § 7428 (declaratory judgment suits for recognition of exempt status as an IRC § 501(c) organization, which may be brought in these federal courts as well as in the Tax Court).
- 5 See, e.g., Treas. Reg. § 301.6330-1(b)(1), providing "[t]he taxpayer must request the CDP [collection due process] hearing within the 30-day period commencing on the day after the date of the CDP Notice," discussed below.
- 6 See, e.g., *Tilden v. Comm'r*, 846 F.3d 882 (7th Cir. 2017) (deficiency case); *Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017) (innocent spouse case), discussed below.
- 7 Compare *RHI Holdings, Inc. v. U.S.*, 142 F.3d 1459, 1460, 1463 (Fed. Cir. 1998) with *Howard Bank v. U.S.* 759 F. Supp. 1073, 1080 (D. Vt.1991), *aff'd*, 948 F.2d 1275 (2d Cir. 1991) (refund suits); compare *Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 351-354 (3d Cir. 2000) with *Volpicelli v. U.S.*, 777 F.3d 1042 (9th Cir. 2015) (wrongful levy suits); and compare *Aloe Vera of America, Inc. v. U.S.*, 580 F.3d 867, 871-72 (9th Cir. 2009) with *U.S. v. Marsh*, 89 F. Supp. 2d 1171, 1177 (D. Haw. 2000) and *Bennett v. U.S.*, 366 F. Supp. 2d 877, 879 (D. Neb. 2005) (suits for civil damages).

EXAMPLE

Taxpayer A and her spouse filed a joint return that understated the amount of tax the couple owed. The couple did not seek Tax Court review of the asserted deficiency, and the IRS assessed additional tax. Taxpayer A then submitted Form 8857, *Request for Innocent Spouse Relief*, to the IRS, seeking innocent spouse relief under IRC § 6015. The IRS sent a Notice of Determination to Taxpayer A, denying relief. The Notice of Determination advised Taxpayer A that she could request Tax Court review of the IRS's determination to deny relief by filing a Tax Court petition within 90 days of the date of the Notice of Determination.⁸ The date on the Notice of Determination was October 7, 2014. According to Taxpayer A's calculations, the 90-day period for petitioning the Tax Court would expire on January 7, 2015; she filed her Tax Court petition on January 6, 2015. Because 90 days from October 7, 2014 was actually January 5, 2015, Taxpayer A's petition was not timely under the statute. The Tax Court held it did not have jurisdiction to hear the claim and dismissed the case.⁹ The Court of Appeals for the Second Circuit agreed with the Tax Court's decision.¹⁰

In contesting the dismissal of her case, Taxpayer A alleged that on two occasions she had spoken with IRS employees who informed her the 90-day period would expire on January 7, 2015. If the Tax Court had employed the judicial doctrine of equitable tolling, it might have considered this evidence, and in the light of the evidence may have excused Taxpayer A's late petition and allowed her to proceed with her case. However, the Tax Court has repeatedly held that the time limit under IRC § 6015 for petitioning the Tax Court is jurisdictional and not subject to equitable estoppel.¹¹

RECOMMENDATION

1. Enact a new section of the IRC, or amend IRC § 7442, to provide that the following time limits are not jurisdictional and are subject to the judicial doctrines of forfeiture, waiver, estoppel, and equitable tolling:
 - a. The periods within which taxpayers may petition the Tax Court, and
 - b. The periods set out in the IRC within which taxpayers may commence suit in United States district courts or the Court of Federal Claims.
2. Amend IRC § 7459(d) to clarify that a Tax Court decision dismissing a petition filed in response to a statutory notice of deficiency as untimely is not a decision on the merits and does not require entry of a decision reflecting the deficiency.

CURRENT LAW

Tax Court Jurisdiction

In general, the Tax Court is the only judicial forum in which a taxpayer can challenge the IRS's assertion that he or she is liable for a deficiency in tax (generally, an amount greater than that shown

⁸ See IRC § 6015(e)(1)(A).

⁹ See Dec. 29, 2015 Order in Tax Court Docket No. 471-15.

¹⁰ See *Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017).

¹¹ See, e.g., *Pollock v. Comm'r*, 132 T.C. 21 (2009); *Elgart v. Comm'r*, T.C. Memo. 1996-379.

on the taxpayer's return) before paying the asserted liability in full.¹² Before a taxpayer can litigate a deficiency case in the Tax Court, however, the IRS must issue a statutory notice of deficiency.¹³ For this reason, a statutory notice is often called the “ticket” to Tax Court — without it, the taxpayer does not have the right to petition the Tax Court for a redetermination of the deficiency.¹⁴ In addition, the taxpayer must file his or her Tax Court petition within a specified period (generally, 90 days) after the IRS mails the statutory notice of deficiency.¹⁵ If a taxpayer does not timely petition the Tax Court for review of a notice of deficiency, the IRS must assess the additional tax.¹⁶ If the taxpayer does petition the Tax Court, the Tax Court may decide the case on the merits. In that case, as the Supreme Court explained:

[i]ncome taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year.¹⁷

The Tax Court may also dispose of the deficiency case without considering the merits. For example, it may hold a party in default and enter judgment against that party.¹⁸ It may dismiss the case due to the petitioner's failure to prosecute and enter judgment against the petitioner.¹⁹ Under IRC § 7459(d), an order dismissing the petition for these reasons is treated as sustaining the deficiency.²⁰ Thus, these orders of dismissal are *res judicata* to the same extent as are judgments on the merits — if raised as an affirmative defense by the government, affected taxpayers are not permitted to resurrect and relitigate the same claims in a later proceeding, either in the Tax Court or in a different judicial forum. They cannot, for example, pay the asserted tax and then bring a suit for refund.

However, a Tax Court order dismissing for lack of jurisdiction an untimely petition filed in response to a statutory notice of deficiency is not a decision on the merits for purposes of applying the doctrine of *res judicata*.²¹ Thus, dismissal in this situation does not prevent the taxpayer from paying the asserted deficiency and bringing suit for refund.

12 IRC § 6213(a). IRC § 6211(a) defines “deficiency” as “the amount by which the correct tax exceeds the excess of: (1) the sum of the amount reported on the taxpayer's return for such tax if a return was filed and an amount of tax was reported on the return plus amounts previously assessed (or collected without assessment) as a deficiency, over (2) the amount of any rebate.”

13 IRC § 6213(a).

14 As discussed below, taxpayers who cannot challenge a tax liability in the Tax Court may still have the opportunity to challenge the liability in a U.S. district court or the U.S. Court of Federal Claims. These courts have jurisdiction over suits for federal tax refunds. 28 U.S.C. § 1346(a)(1). Unlike in the Tax Court, in order to receive judicial review of a tax liability in one of the refund forums, a taxpayer generally must first pay the disputed income tax in full and then file a claim for refund with the IRS. See *Flora v. United States*, 362 U.S. 145 (1960).

15 IRC § 6213(a).

16 IRC § 6213(c).

17 *Comm'r v. Sunnen*, 333 U.S. 591, 598 (1948). The doctrine of *res judicata* prevents relitigation of a taxpayer's liability for a given tax year both as to matters that were actually litigated in the prior suit and matters that could have been raised. *Sunnen*, 333 U.S. 591, 597-98 (1948).

18 Rule 123(a), Tax Court Rules of Practice and Procedure.

19 Rule 123(b), Tax Court Rules of Practice and Procedure.

20 IRC § 7459 (d) provides: “If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court unless the Tax Court cannot determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.”

21 IRC § 7459(d); Rule 123(d), Tax Court Rules of Practice and Procedure.

The Tax Court Has Jurisdiction to Decide Various Types of Cases

Most Tax Court cases arise when taxpayers file a petition in response to a statutory notice of deficiency.²² However, there are other situations in which the Tax Court is the only forum in which taxpayers, by filing a petition within a prescribed time after the IRS issues a required notice, may litigate their tax liability without first paying the tax asserted. Examples are where:

- The IRS, at the conclusion of a collection due process (CDP) hearing, determines to proceed with a lien or levy;²³
- The IRS denies a taxpayer's request for innocent spouse relief that was not made in response to a statutory notice of deficiency or during a CDP hearing (referred to as a stand-alone request for relief);²⁴
- The IRS denies a request for abatement of interest attributable to unreasonable errors and delays by the IRS;²⁵ or
- The IRS determines worker classification and the corresponding amount of employment tax.²⁶

As in deficiency cases, if taxpayers do not timely petition the Tax Court for review of these determinations, the IRS may assess additional tax (if the tax was not already assessed) and proceed to collect it.

The Tax Court is also the only judicial forum in which a taxpayer may seek review of the IRS's position in other types of cases. For example, the Tax Court is the only court with jurisdiction to review the

22 See Arthur L. Nims, III, Chief Judge of the Tax Court, *Tax Court Management of Jumbo Cases: the New Challenge*, 38 Fed. B. News & J. 330 (Aug. 1991) (describing the Tax Court's deficiency jurisdiction as its "core mission" and deficiency cases as the "mainstay" of its operations).

23 At the conclusion of an IRC § 6330 due process hearing, the IRS issues a Notice of Determination. Treas. Reg. § 301.6330-1(e)(3), Q&AE8. Taxpayers, within 30 days after the IRS mails a notice of determination, may petition the Tax Court for review of the determination. IRC §§ 6320(c), 6330(d); *Weber v. Comm'r*, 122 T.C. 258 (2004); Rule 330, Tax Court Rules of Practice and Procedure. The Pension Protection Act of 2006, Pub. L. No. 109-280, § 855(a), 120 Stat. 780, 1019, amended IRC § 6330(d)(1) to provide exclusive jurisdiction to the Tax Court in all collection due process cases. However, review of the underlying liability will only be available if the taxpayer did not receive the statutory notice of deficiency or otherwise have the opportunity to dispute the tax liability. IRC § 6330(c)(2)(B).

24 IRC § 6015(e). Taxpayers, within 90 days after the IRS mails a notice of determination, may petition the Tax Court for review of the determination. IRC § 6015(e)(1)(A); Rule 320, Tax Court Rules of Practice and Procedure. Innocent spouse relief may be raised in bankruptcy proceedings, under 11 U.S.C.A. § 505(a). *In re Pendergraft*, 119 A.F.T.R. 2d (RIA) 1229 (Bankr. S.D. Tex. 2017); *Michaud v. U.S.*, 206 B.R. 1 (Bankr. D.N.H. 1997). The National Taxpayer Advocate's position is that innocent spouse relief may also be raised as a defense in district court collection proceedings. See, e.g., National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*). Some district courts have held otherwise, however. See, e.g., *U.S. v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (S.D. Cal. 2007) and cases relying on it. The National Taxpayer Advocate reiterates her recommendation this year. See *National Taxpayer Advocate Purple Book: Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration*, *infra*. For further discussion of this issue, see Most Litigated Issue: *Relief From Joint and Several Liability Under IRC § 6015*, *infra*.

25 IRC § 6404(e)(1). Taxpayers, within 180 days after the IRS mails a notice of final determination not to abate, may petition the Tax Court for review of the determination. IRC § 6404(h)(1); Rule 280, Tax Court Rules of Practice and Procedure. The Tax Court has exclusive jurisdiction to review a refusal to abate interest under § 6404(e)(1). *Hinck v. U.S.*, 550 U.S. 501, 503 (2007).

26 IRC § 7436(a). Taxpayers, within 90 days after the IRS sends its determination by certified or registered mail, may seek Tax Court review of the determination. IRC § 7436(b), Rule 290, Tax Court Rules of Practice and Procedure. Congress enacted IRC § 7436 for the express purpose of allowing taxpayers to seek Tax Court review as an alternative to first paying the tax and then seeking a refund in a U.S. district court or the U.S. Court of Federal Claims. See H.R. Rep. No. 105-148 at 639 (1997); S. Rep. No. 105-33 at 304 (1997); *Flora v. U.S.*, 362 U.S. 145 (1960), discussed below.

IRS's denial of a tax whistleblower's claim for an award.²⁷ A taxpayer seeking a declaratory judgment that a retirement plan qualifies or continues to qualify for favorable tax treatment must petition the Tax Court.²⁸ Taxpayers who do not timely file their petitions have no other forum in which to challenge the IRS's position.

As some scholars have noted:

At times, however, depriving one of access to the courts because of an arbitrary deadline is simply too severe a sanction. Certain circumstances may excuse a late complaint and the statutory clock will not run, it will be stopped or tolled. Four doctrines identify circumstances where tolling applies. First, equitable tolling applies when it is unfair to hold the plaintiff to the statutory deadline because of some extraordinary event that impeded the plaintiff's compliance. Second, equitable estoppel applies when it is unfair to allow the defendant to benefit from the statutory deadline because of something the defendant did to prevent a timely suit. Third, forfeiture applies when the parties have acted as if the case need not operate under the statutory deadlines. Fourth, waiver applies when the parties have explicitly agreed that their case need not operate under legal deadlines.²⁹

In 2015, Congress amended IRC § 7803 to require the Commissioner of Internal Revenue to “ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title.” Among these rights are the right to appeal an IRS decision in an independent forum and the right to a fair and just tax system.³⁰

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- 27 IRC § 7623(b). Taxpayers, within 30 days after the IRS sends its determination, may seek Tax Court review of the determination. IRC § 7623(b)(4), Rule 340, Tax Court Rules of Practice and Procedure. The Tax Court's jurisdiction is exclusive. *DaCosta v. U.S.*, 82 Fed. Cl. 549, 555 (2008).
- 28 IRC § 7476. Taxpayers may seek Tax Court review of the determination if they do so “before the ninety-first day after the day after such notice is mailed to such person.” IRC § 7476(b)(5). If no such notice was mailed and 270 days have expired since the request for the determination was made taxpayers will be deemed to have exhausted their administrative remedies and may seek a Tax Court determination. IRC § 7476(b)(3). A similar provision allows taxpayers whose request for innocent spouse relief has gone unanswered for six months to petition the Tax Court for a determination. IRC § 6015(e)(1)(A). See *Vu v. Comm'r*, T.C. Summ. Op. 2016-75 for facts that illustrate how both the 90-day and six-month deadlines may be at issue in a case.
- 29 Michael J. Kaufman, John M. Wunderlich, *Leave Time For Trouble: The Limitations Periods Under the Securities Laws*, 40 J. CORP. L. 143 (2014). Arguably, Congress has already adopted, as a jurisdictional provision, the principals that underlie the equitable doctrine of equitable estoppel in the context of deficiency suits. IRC § 6213(a) requires that the notice specify the date by which a petition must be filed with the Tax Court and further provides that a petition filed by such specified date will be treated as timely filed. Thus, taxpayers may rely on the date shown on the notice of deficiency, even if it is not the 90th day after the date of the notice of deficiency. The National Taxpayer Advocate recommended that in innocent spouse cases the IRS be required to provide in the notice of final determination the last date to petition the Tax Court, and provide for the taxpayer to be able to petition the Tax Court by the later of the date specified in the notice of final determination or 90 days from the date of the notice. National Taxpayer Advocate 2001 Annual Report to Congress 159, 160 (Key Legislative Recommendation: *Joint and Several Liability, Final Determination Rights*). This year, she reiterates that recommendation and also recommends that the last day to file Tax Court petitions in IRC § 6330 collection due process cases be placed on notices of determinations. See Legislative Recommendation: *Collection Due Process and Innocent Spouse Notices: Amend IRC §§ 6320, 6330, and 6015 to Require That IRS Notices Sent to Taxpayers Include a Specific Date by Which Taxpayers Must File Their Tax Court Petitions, and Provide That a Petition Filed by Such Specified Date Will Be Treated as Timely*, *infra*.
- 30 IRC § 7803(a)(3), added by the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015).

The Tax Court and Other Courts Have Held That the Tax Court Does Not Have Jurisdiction to Apply Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling

In considering its jurisdiction to redetermine deficiencies, hear appeals from IRS CDP proceedings, or consider stand-alone innocent spouse claims, the Tax Court has held that the statutory times for petitioning the Tax Court are jurisdictional.³¹ Thus, in the absence of a timely-filed petition, it does not have jurisdiction to hear the case, including a claim that the petition should, under equitable doctrines, be deemed timely.³² Several Courts of Appeal have agreed with the Tax Court with respect to deficiency cases and stand-alone innocent spouse cases.³³ IRC § 7442, which describes the jurisdiction of the Tax Court, does not specify that prescribed periods for petitioning the Tax Court are never statutes of limitation subject to equitable doctrines.³⁴

Federal Court Jurisdiction Over Taxpayer Suits

In a variety of situations, the IRC gives taxpayers the right to obtain judicial review in federal courts other than the Tax Court if they commence the suit within a specified period. For example, taxpayers who cannot challenge a tax liability in the Tax Court may still have the opportunity to challenge the liability in a United States district court or the United States Court of Federal Claims. These courts, unlike the Tax Court, have jurisdiction over suits for federal tax refunds.³⁵ In order to receive judicial review in one of these forums, a taxpayer generally must first pay the disputed tax in full and then file a claim for refund with the IRS.³⁶ In general, the taxpayer must commence the suit within two years after

31 See, e.g., *Guralnik v. Comm’r*, 146 T.C. 230, 238 (2016) (noting that “[i]n cases too numerous to mention, dating back to 1924, we have held that the statutorily-prescribed filing period in deficiency cases is jurisdictional” and “reaffirm[ing] our rulings that the 30-day filing period prescribed by section 6330(d)(1) is jurisdictional and accordingly hold that equitable tolling does not apply.”) See also *Pollock v. Comm’r*, 132 T.C. 21, 32 (2009) (holding that “section 6015(e)(1)(A)’s 90-day limit is jurisdictional and therefore doesn’t allow for equitable tolling, even though such a result may be very harsh for Pollock.”).

32 For a fuller description of how courts determine whether equitable doctrines may apply, cases in which courts, including the Supreme Court, have actually applied equitable doctrines to jurisdictional time periods, and “the Supreme Court’s continuing but uncertain distinction between periods that are jurisdictional and those that are ‘mere’ claims-processing rules,” see Bryan T. Camp, *Equitable Principles and Jurisdictional Time Periods, Part 1*, 2017 TAX NOTES 37-34 (Sept. 11, 2017).

33 See, e.g., *Tilden v. Comm’r*, 846 F.3d 882 (7th Cir. 2017) (deficiency case); *Matuszak v. Comm’r*, 862 F.3d 192 (2d Cir. 2017) (innocent spouse case).

34 IRC § 7442 provides in its entirety:

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

35 28 U.S.C. § 1346(a)(1).

36 IRC § 7422(a). See *Flora v. U.S.*, 362 U.S. 145 (1960). If the disputed tax is a divisible tax (such as employment or excise tax), the taxpayer need only pay the amount of tax attributable to a single transaction or event (for example, employment taxes for one employee for one quarter) in order to file suit in one of the courts with jurisdiction over federal tax refund suits. *Id.* at 171, n. 37 and 175; *Fidelity Bank, N.A. v. U.S.*, 616 F.2d 1181 (10th Cir. 1980) (employment taxes); *U.S. v. Papandon*, 331 F.3d 52 (2d Cir. 2003) (excise taxes).

the IRS denies the claim.³⁷ The Courts of Appeal do not agree as to whether this two-year period is jurisdictional or whether it is a period of limitation subject to equitable doctrines.³⁸

As another example, IRC § 7426 provides a judicial remedy to a person whose property was wrongfully seized to satisfy the tax liability of someone else. Under IRC § 6532(c)(1), suit to enjoin enforcement of the levy or sale, or to recover the property (or proceeds from the sale of the property) must be brought in a United States district court within nine months of the date of levy.³⁹ Several federal courts have held that the IRC § 6532(c) period is jurisdictional and not subject to equitable tolling,⁴⁰ but at least one Court of Appeals has held otherwise.⁴¹

Similarly, IRC §§ 7431-7433 generally allow taxpayers, if they bring suit within the specified periods, to seek civil damages in a United States district court or bankruptcy court with respect to unauthorized actions by the IRS.⁴² At least one Court of Appeals has held that the two-year period for bringing suit under IRC § 7431 is jurisdictional and not subject to equitable tolling.⁴³ Some district courts have held that the two-year period for bringing suits under IRC § 7433 may be equitably tolled.⁴⁴ At least one district court noted that the issue was unsettled.⁴⁵

IRC provisions also permit taxpayers to seek declaratory judgments in federal courts. For example, under IRC § 7428, taxpayers may request the Tax Court, the United States Court of Federal Claims,

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- 37 IRC § 6532. Another pre-requisite to bringing a refund suit is to first make an administrative refund request from the IRS. A separate time limit, found in IRC § 6511, applies for making these administrative claims. Generally, taxpayers must request a refund within three years from the date their return was filed, or two years from the time the tax was paid, whichever occurs later, or, if no return was filed, within two years from the time the tax was paid. IRC § 6511(a). If taxpayers meet the three-year requirement, they can recover payments made during the three-year period that precedes the date of the refund request, plus the period of any extension of time for filing the return. However, taxpayers who do not meet the three-year requirement can recover only payments made during the two-year period preceding the date of the refund request. IRC § 6511(b)(2). The Supreme Court, in the *Brockamp* case, held the three-year time limit of IRC § 6511(a) was jurisdictional and not subject to equitable tolling. *U.S. v. Brockamp*, 519 U.S. 347 (1997). In response, Congress effectively overruled the result reached by the court in *Brockamp* by adding subsection (h) to IRC § 6511, providing for tolling of the IRC § 6511(a) time limit in cases where taxpayers are financially disabled. IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3202(a), 112 Stat. 685, 740. The National Taxpayer Advocate has recommended that the provision be adjusted to better protect more taxpayers who lack the capacity to file a refund claim while balancing the IRS's need to administer requests for relief. Specifically, she recommended clarifying that the impairment can be determined by a health professional and that a qualifying disability includes one that materially limits an individual's management of his or her financial affairs, rather than only one that leaves the individual "unable to manage" these affairs. See National Taxpayer Advocate 2013 Annual Report to Congress 302, Legislative Recommendation: *Broaden Relief from Timeframes for Filing a Claim for Refund for Taxpayers with Physical or Mental Impairments*.
- 38 *Compare RHI Holdings, Inc. v. U.S.*, 142 F.3d 1459, 1460, 1463 (Fed. Cir. 1998) (holding that "[r]egardless of any confusion that the IRS's actions may have caused RHI," because IRC § 6532 does not "contain[s] an implied equitable exception, considerations of equitable principles are not appropriate") with *Howard Bank v. U.S.*, 759 F. Supp. 1073, 1080 (D. Vt. 1991, *aff'd*, 948 F.2d 1275, 2d Cir. 1991) (based on a conversation with the IRS the taxpayer reasonably believed the IRS had withdrawn its disallowance of refund so that the final determination was pending with the IRS; the IRS was estopped from raising the two-year limitations period as a bar to the refund suit).
- 39 Damages may also be recovered for the wrongful levy if suit is brought "within 2 years after the date the right of action accrues." IRC § 7426(h)(2), incorporating IRC § 7433(d).
- 40 See *Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 351-54 (3d Cir. 2000) and cases cited therein.
- 41 *Volpicelli v. U.S.*, 777 F.3d 1042 (9th Cir. 2015).
- 42 IRC §§ 7431 (unauthorized inspection or disclosure of returns and return information); 7432 (failure to timely release a lien); and 7433 (unauthorized collection actions).
- 43 *Aloe Vera of America, Inc. v. U.S.*, 580 F. 3d 867, 871-72 (9th Cir. 2009).
- 44 See, e.g., *U.S. v. Marsh*, 89 F. Supp. 2d 1171, 1177 (D. Haw. 2000) (doctrine of equitable tolling may apply to IRC § 7433 claims); *Ramos v. U.S.*, No. C 01-21148-RS, 2002 WL 31466751, (N.D. Cal. Nov. 1, 2002) (IRC § 7433 permits equitable tolling).
- 45 *Bennett v. U.S.*, 366 F. Supp. 2d 877, 879 (D. Neb. 2005) (noting that "[w]hether the statutes of limitations in 26 U.S.C. §§ 7432 and 7433 may be suspended by equitable tolling has not been definitively determined.").

or the District Court for the District of Columbia to review the IRS's determination to deny their application for recognition of exempt status as an IRC § 501(c) organization. They must request review "before the 91st day after the date" the notice of determination was mailed.⁴⁶

Virtually all tax cases are brought in the Tax Court rather than in United States district courts or the Court of Federal Claims. For example, in Fiscal Year (FY) 2015, there were approximately 30,400 cases pending in the Tax Court, 600 tax cases in the district courts, and 200 tax cases in the Court of Federal Claims.⁴⁷ Thus, Tax Court cases comprised approximately 97 percent of the total number of federal tax cases docketed in trial courts. Of the 32,377 petitions filed in the Tax Court in FY 2015 (not all of which had yet been docketed), the vast majority, 27,096, or 84 percent, were filed by taxpayers proceeding *pro se* (without representation).⁴⁸

Federal Courts Have Long Applied Equitable Doctrines to Determine Whether to Excuse Late Filings in Non-Tax Contexts

As discussed above, the doctrine of equitable tolling applies to excuse a late filing where some extraordinary event impeded the plaintiff's compliance with the statutory deadline. Since the Supreme Court decided the *Bowen* case in 1986, it has been settled that the time limit for bringing suit to challenge the Social Security Administration's determination to deny or terminate disability benefits is subject to equitable tolling.⁴⁹ Since the Supreme Court decided the *Irwin* case in 1990, it has been settled that the time limit for bringing suit to challenge a decision by the Equal Employment Opportunity Commission (EEOC) is subject to equitable tolling.⁵⁰ As discussed below, the outcomes in these two cases show how the doctrine is applied to grant or deny relief from a late filing.

In *Bowen*, the Court applied the doctrine of equitable tolling to suspend the time frame for bringing suit. The plaintiffs in *Bowen* showed that the agency had unlawfully employed a "secret" presumption that resulted in findings of lack of disability in their cases even though they actually qualified for benefits under the controlling statute and regulations. The Court found that "the Government's secretive conduct prevent[ed] plaintiffs from knowing of a violation of rights" and "the full extent of the Government's clandestine policy was uncovered only in the course of this litigation."⁵¹

In *Irwin*, the applicable time period was not tolled. The plaintiff in *Irwin* did not file his complaint within the statutory period of 30 days from the day the EEOC notice was received. Notice was sent to the plaintiff's attorney, who was out of the office when the notice was received. The plaintiff did file within 30 days of the date he personally received notice, however. The Court held, "the principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect."⁵² As the Court explained:

Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies

46 IRC § 7428(b)(3). If no such notice was mailed and 270 days have expired since the request for the determination was made taxpayers will be deemed to have exhausted their administrative remedies and may seek a declaratory judgment. IRC § 7428(b)(2).

47 IRS Office of Chief Counsel report to American Bar Association, Tax Section, Court Procedure Committee, Fiscal Year 2015 3.

48 *Id.* at 13.

49 *Bowen v. City of New York*, 476 U.S. 467 (1986).

50 *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, (1990).

51 *Bowen v. City of New York*, 476 U.S. 467 (1986).

52 *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.⁵³

The doctrine of equitable estoppel, which may excuse a filing that was late due to something the defendant did to prevent a timely suit, is even less likely to apply than the doctrine of equitable tolling. As one scholar has noted, “equitable tolling is theoretically easier to prove [than equitable estoppel], but that is like saying climbing Mount Everest is easier than climbing K2.”⁵⁴

As discussed above, the doctrine of forfeiture applies when the parties have acted as if the statutory deadlines do not apply, and the doctrine of waiver applies when the parties have explicitly so agreed. In the 2006 *Day* case, the Supreme Court considered both doctrines when a state prisoner filed an untimely petition seeking *habeas corpus* relief (*i.e.*, he claimed he was being held unlawfully).⁵⁵ The State conceded that the petition was timely filed, but it later emerged that the State did not properly compute the relevant time limit. As the Court observed, “[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant’s answer or in an amendment thereto.”⁵⁶ The Court also noted, “we would count it an abuse of discretion to override a State’s deliberate waiver of a limitations defense.” However, the Court found nothing in the record to suggest that the State had “strategically” withheld the defense or chose to relinquish it; the State had simply made an inadvertent computational error.⁵⁷ Thus, the defense had not been forfeited or waived. The lower court’s dismissal of the petition was affirmed.

REASONS FOR CHANGE

Treating the IRC time limits for commencing a judicial proceeding as jurisdictional leads to unfair outcomes. It is perhaps for this reason that the courts do not always agree as to whether a time limit is jurisdictional. Unrepresented taxpayers in particular may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late, and most Tax Court petitioners do not have representation. Clarifying that IRC time periods are not jurisdictional would resolve uncertainty in the courts, reduce litigation, and provide uniformity. By amending IRC § 7803 in 2015, Congress recognized that taxpayers have the right to a fair and just tax system; they are entitled to expect that the tax system will take into account their facts and circumstances. Allowing courts to consider judicial doctrines that could mitigate the harsh results that follow from treating the IRC deadlines as jurisdictional requirements would support this right. Jurisprudence in non-tax contexts demonstrates the difficulty plaintiffs encounter when they seek to excuse an untimely filing by relying on an equitable doctrine. There is no reason to suppose that taxpayers would succeed, or expect to succeed, more often if they were allowed to raise equitable doctrines to excuse a late filing to commence tax litigation. But the *right to a fair and just tax system* requires that these doctrines be available to taxpayers in the rare cases they would apply.

53 *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990).

54 Bryan T. Camp, *Equitable Principles and Jurisdictional Time Periods, Part 1*, 2017 Tax Notes 37-34, 13 (Sept. 11, 2017).

55 *Day v. McDonough*, 547 U.S. 198 (2006).

56 *Id.* at 202 (2006) (citing Federal Rules of Civil Procedures 8(c), 12(b), and 15(a)). See also Rule 39, Tax Court Rules of Practice and Procedure, requiring that some matters such as statute of limitations defenses be pleaded: “A mere denial in a responsive pleading will not be sufficient to raise any such issue.”

57 *Day v. McDonough*, 547 U.S. 198, 200 (2006).

EXPLANATION OF PROVISION

Under the proposal, the IRC time limits for petitioning the Tax Court and bringing suit in other federal courts would be treated as not jurisdictional. Thus, when taxpayers file petitions or commence suits beyond the applicable statutory periods, the courts would have jurisdiction to deem the suits timely under the judicial doctrines of forfeiture, waiver, estoppel, and equitable tolling. Taxpayers would still be required to demonstrate that an equitable doctrine applies in their cases, and the courts could still dismiss their petitions or complaints as untimely. Untimely petitions, including those filed in response to a statutory notice of deficiency, would no longer be subject to dismissal for lack of jurisdiction. Thus, taxpayers whose petitions in response to a statutory notice of deficiency are dismissed as *untimely* would no longer have the protection of IRC § 7459(d). IRC § 7459(d) specifies that a dismissal for *lack of jurisdiction* is not a decision on the merits, and thereby preserves these taxpayers' right to pay the asserted tax and seek a refund. Clarifying that a dismissal of an untimely petition filed in response to a statutory notice of deficiency is not a decision on the merits and does not require entry of a decision reflecting the deficiency would permit the taxpayer to pay the asserted deficiency and seek a refund. This would afford the same treatment to taxpayers whose petitions are dismissed for lack of jurisdiction as those whose petitions are dismissed as untimely.