ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID T. MYERS,
Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

On Appeal from the United States Tax Court
Docket No. 2181-15W (Ashford, J.)

AMICUS **BRIEF OF THE FEDERAL TAX CLINIC OF THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL IN SUPPORT OF THE APPELLANT**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 28(a)(1) and 29, the undersigned counsel certify as follows:

(A) Parties and *Amici*

All parties, intervenors, and *amici* appearing before the United States Tax Court and in this Court are listed in the Brief for Appellant.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

(C) Related Cases

There are no related cases under D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY OF ABBREVIATIONS

CDP	Collection Due Process, the statutory review procedures, found at 26 U.S.C. §§ 6230 and 6330, following issuance by the IRS of either notices of filing of a tax lien or notices of intention to levy

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AMICUS BRIEF OF THE FEDERAL TAX CLINIC OF THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL IN SUPPORT OF THE APPELLANT

INTEREST OF THE *AMICUS*[1]

The Federal Tax Clinic of the Legal Services Center of Harvard Law School ("the Clinic") was formed in 2015 to represent low-income taxpayers

[1] This brief is filed with the consent of both parties. Pursuant to FRAP 29(a)(4)(E), this is to affirm that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The only person who contributed money that was intended to fund preparing or submitting this brief is Harvard University, which operates the Federal Tax Clinic as part of the Legal Services Center of Harvard Law School. The views expressed herein are those of the Clinic, not Harvard University.

before the Internal Revenue Service and in tax matters before the courts. While the Clinic has never had a whistleblower award client, in a series of recent cases, the Clinic has argued that the deadlines in §§ 6015(e)(1)(A) and 6330(d)(1)[2] for filing Tax Court innocent spouse and Collection Due Process ("CDP") petitions, respectively, are not jurisdictional and are subject to equitable tolling under recent Supreme Court case law that has narrowed the use of the word "jurisdictional" generally to exclude filing deadlines. In the innocent spouse cases of *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017), and *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017), the courts held the filing deadlines to be jurisdictional. In *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), where the Clinic was an *amicus*, it was held that the CDP filing deadline is jurisdictional. Days later, in *Cunningham v. Commissioner*, 716 Fed. Appx. 182 (4th Cir. 2018), the Fourth Circuit declined to opine on whether the CDP filing period is jurisdictional or subject to equitable tolling – finding that the facts presented would not justify equitable tolling, in any event.

The Clinic is continuing to litigate the issue of the jurisdictional nature of the innocent spouse filing deadline in § 6015(e)(1)(A) in Nauflett

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

v. Commissioner, Fourth Circuit Docket No. 17-1986. The Fourth Circuit held oral argument in Nauflett on May 9.

As an *amicus*, the Clinic has also filed a brief in Pfizer v. United States, Second Circuit Docket No. 17-2307, arguing that the deadline in § 6532(a) in which to bring a district court tax refund suit is not jurisdictional under current Supreme Court case law. The Second Circuit held oral argument in Pfizer on February 13.

As an *amicus*, the Clinic has also filed briefs in Organic Cannabis Foundation v. Commissioner, Ninth Circuit Docket No. 17-72874, and Northern California Small Business Assistants, Inc. v. Commissioner, Ninth Circuit Docket No.17-72877, arguing that the deadline in § 6213(a) in which to file Tax Court deficiency petitions is not jurisdictional and is subject to equitable tolling under current Supreme Court case law. Briefing in these two cases is ongoing.

As an *amicus* in *Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015), Carlton Smith (pro bono counsel to the Clinic, who was, in 2013, the Director of the tax clinic at Cardozo School of Law), helped persuade the Ninth Circuit to hold that the filing deadline in § 6532(c) in which to bring a district court wrongful levy suit is not jurisdictional and is subject to equitable tolling.

The Clinic's purpose in filing this brief is to request that this Court hold that the deadline in § 7623(b)(4) (which is derived from the CDP petition filing period language) is not jurisdictional. Such a nonjurisdictional ruling may be of aid, by analogy, to low-income taxpayers in CDP cases because, in that event, any noncompliance with the filing deadline would become an affirmative defense that the government could waive or would forfeit (if the government did not raise the argument early enough in the litigation). Other CDP taxpayers who, for equitable reasons, missed the filing deadline might also benefit.

STATUTES AND REGULATIONS

All applicable statutes and regulations appear in the Addendum of the Brief for Appellant.

ARGUMENT

In the instant case, the Tax Court granted an IRS motion to dismiss the petition for lack of jurisdiction as untimely under § 7623(b)(4). However, untimely filing does not deprive the Tax Court of jurisdiction of a whistleblower award review matter. Accordingly, the dismissal for lack of jurisdiction was improper and any dismissal for late filing should have been, if at all, for failure to state a claim on which relief could be granted.

Section 7623(a) has long authorized the IRS to issue discretionary whistleblower awards. In 2006, Congress enacted § 7623(b), which provides for mandatory whistleblower awards within a certain range and in limited circumstances. Section 7623(b)(4) was enacted as part thereof, providing for Tax Court review over the sufficiency of any mandatory whistleblower award or lack thereof. Section 7623(b)(4) contains both a jurisdictional grant to the Tax Court and a 30-day filing deadline. A number of whistleblowers have filed late Tax Court petitions, and the Tax Court has held, as it did in this case, that the failure to file on time is a jurisdictional defect of such a suit. *See, e.g., Friedland v. Commissioner*, T.C. Memo. 2011-90. However, no Tax Court opinion concerning § 7623(b)(4) has ever considered how the Supreme Court's case law starting with *Kontrick v. Ryan*, 540 U.S. 433 (2004) -- which has generally excluded filing deadlines from jurisdictional effect -- applies to the whistleblower petition filing deadline.

This Court is the sole proper appellate venue for whistleblower award suits commend in the Tax Court. § 7482(b)(1) (flush language). This Court has not yet ruled on whether the filing deadline in § 7623(b)(4) is jurisdictional. The closest this Court came to ruling on this issue is in an appeal from an unpublished order in *Perales v. Commissioner*, Tax Court

Docket No. 28044-14W (order dated July 16, 2015).[3] Mr. Perales repeatedly sent claims to the IRS, and the IRS, on 34 occasions, wrote back letters denying those claims. After Mr. Perales filed a Tax Court petition, the IRS moved to dismiss the suit for lack of jurisdiction as untimely. In the order, the Tax Court granted the IRS' motion as to the first 17 IRS letters, but not as to the remaining 17 IRS letters. Mr. Perales then appealed the order to this Court, which, in an unpublished, nonprecedential opinion, affirmed the Tax Court stating:

> **ORDERED AND ADJUDGED** that the Tax Court's order filed July 16, 2015 be affirmed. The Tax Court held that appellant's petition was untimely with respect to the denials of seventeen whistleblower claims, *see* 26 U.S.C. § 7623(b)(4), and appellant does not challenge this ruling. He therefore has forfeited any issue regarding the timeliness of his petition. *See U.S. ex rel. Totten v. Bombardier Corp*., 380 F.3d 488, 497 (D.C. Cir. 2004).

Perales v. Commissioner, 2016 U.S. App. LEXIS 16597 (D.C. Cir. 2016). (The Tax Court later granted summary judgment to the IRS with respect to the remaining letters. *Perales v. Commissioner*, T.C. Memo. 2017-90.) Since timeliness was not even argued by Mr. Perales, this is hardly persuasive authority for this Court. Further, if anything, the Court's noting that the taxpayer made no argument on the point suggests that the Court

[3] Unpublished orders can be viewed on the Tax Court's website by first accessing the docket sheet of the case.

viewed the time period as not jurisdictional, since courts have an independent duty to enforce jurisdictional limits – a duty the parties cannot affect by failing to argue jurisdictional issues.

I. Section 7623(b)(4)'s Filing Deadline is Not Jurisdictional Under Current Supreme Court Case Law.

Beginning in 2004, the Supreme Court observed that it and other courts had been too careless in using the word "jurisdictional". The Court held that, henceforth, claims processing rules (which include filing deadlines) should usually not be considered jurisdictional. Rather, the word "jurisdictional" should be reserved only for subject matter and personal jurisdiction. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

Since *Kontrick*, the Supreme Court has held that filing deadlines are almost never jurisdictional. *United States v. Wong*, 135 S. Ct. 1625 (2015). However, the Court acknowledges that filing deadlines still can be jurisdictional if Congress makes a "clear statement" to that effect. *Id*. at 1632. The Court has stated:

> [I]n applying that clear statement rule, we have made plain that most time bars are nonjurisdictional. *See, e.g.*, [*Sebelius v. Auburn Regional Med. Cntr.*, 568 U.S.] at 154 (noting the rarity of jurisdictional time limits). Time and again, we have described filing deadlines as "quintessential claim-processing rules," which "seek to promote the orderly progress of litigation," but do not deprive a court of authority to hear a case. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *see Auburn Regional*. 568 U.S., at 154; *Scarborough v. Principi*, 541 U.S. 401, 413 (2004). That is so, contrary to the dissent's suggestion, *see*

> *post*, at ___, ___ - ___, 191 L. Ed. 2d, at 551, 554-555, even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so "however emphatic[ally]" expressed those terms may be. *Henderson*, 562 U.S., at 439 (quoting *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81 (2009)). Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.

Id.

In *Wong*, the Court also wrote:

> This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional. *See Henderson*, 562 U.S. at 439-440; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164-165 [(2010)]; *Arbaugh* [*v. Y & H Corp.*], 546 U.S. [500], at 515 [(2006)]; *Zipes* [*v. T.W.A.*], 455 U.S. [385], at 393-394 [(1982)].

Id. at 1633.

Three Supreme Court opinions issued after *Kontrick* have held a statutory filing deadline nonjurisdictional because (1) there was no clear statement otherwise from Congress within the statute and (2) an actual jurisdictional grant was located far away from the stated time period in the United States Code. *Musacchio v. United States*, 136 S. Ct. 709 (2016); *Wong*, *supra*; *Henderson v. Shinseki*, 562 U.S. 428 (2011) (holding the period to file in the Article I Court of Appeals for Veterans Claims

nonjurisdictional).[4] But, the Supreme Court has also held a filing deadline not jurisdictional, even where the jurisdictional grant was in the same sentence as the deadline. *Sebelius v. Auburn Regional Med. Cntr.*, 568 U.S. 145 (2013).

The Court has never yet held, following *Kontrick*, that statutory words clearly stated Congress' intent that a filing deadline be jurisdictional. This makes it especially difficult for lower courts to hold time periods jurisdictional under the clear statement rule, since there are no examples provided by the Supreme Court to consider at this time.

Compliance with the 30-day period in § 7623(b)(4) is most certainly not a jurisdictional predicate for a suit under the clear statement exception.

Section 7623(b)(4) states: "Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)."

The opinion most pertinent to interpreting § 7623(b)(4) is *Sebelius v. Auburn Regional Med. Cntr.*, *supra*, which involved the 180-day deadline

[4] That court is one of limited jurisdiction, like the Tax Court. Yet, the Supreme Court in *Henderson* held that the time limit to file in such court was not jurisdictional. Thus, the observation that the Tax Court is a court of limited jurisdiction is irrelevant in determining whether a filing period in the Tax Court is jurisdictional.

under 42 U.S.C. § 1395*oo*(a)(3) for Medicare providers to bring reimbursement disputes before an administrative board. In a single, long sentence, subsection (a) of that statute stated that those providers "may" obtain hearings before such boards if (1) the providers were dissatisfied with certain reimbursement determinations, (2) the amount in controversy was $10,000 or more, and (3) the providers requested a hearing within 180 days after the determination (or waited 180 days from the time a determination should have been issued).

The Supreme Court appointed an *amicus* to argue that the 180-day period was jurisdictional. However, the Court then rejected that argument, writing:

> *Amicus* urges that the three requirements in § 1395*oo*(a) are specifications that together define the limits of the PRRB's jurisdiction. Subsection (a)(1) specifies the claims providers may bring to the Board, and subsection (a)(2) sets forth an amount-in-controversy requirement. These are jurisdictional requirements, *amicus* asserts, so we should read the third specification, subsection (a)(3)'s 180-day limitation, as also setting a jurisdictional requirement.

Last Term, we rejected a similar proximity-based argument. *Auburn*, 568 U.S. at 156.

The Court noted that subsection (a)(3) did not contain words similar to "shall file a notice of appeal" – words insufficient even in *Henderson* to make the time period jurisdictional – but rather contained the much milder

words “may obtain a hearing” before the Board if “such provider files a request for a hearing within 180 days after notice of the intermediary's final determination.” *Id*. at 154-155. The Court found this did not overcome the usual rule that filing deadlines are not jurisdictional.

As the Court noted, the proximity-based argument made by the *amicus* in *Auburn* was previously made the year before – in *Gonzalez v. Thaler*, 565 U.S. 134 (2012). In that case, 28 U.S.C. § 2253 addressed the jurisdiction of district courts in *habeas* review. Section (c)(3) of that statute provided that “[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).” As in *Auburn*, the Court in *Gonzalez* refused to consider the requirement of paragraph (c)(3) jurisdictional, even though it was adjacent to several jurisdiction-related provisions within the same section of the United States Code. The Court reasoned that, “Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle.” *Id.* at 147.

Even before *Gonzalez* and *Auburn*, the Ninth Circuit in *Magnum v. Action Collection Services, Inc.*, 575 F.3d 935 (9th Cir. 2009), held a time period nonjurisdictional, even though it was adjacent to a jurisdictional grant in the same sentence. 15 U.S.C. § 1692k authorizes a suit for monetary

damages under the Fair Debt Collection Practices Act. Subsection (d) thereof provides: "Jurisdiction: An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs." The Ninth Circuit stated:

> [W]e attach no particular significance to the fact that this statute of limitations appears in the same sentence in which the jurisdiction provision appears. Nothing in the structure of that sentence tells us that the time limitation was also a jurisdictional limitation. In fact, a more natural reading is that parties may bring their action in any "court of competent jurisdiction" and may do so "within one year." 15 U.S.C. § 1692k(d)**.** It is fair to say that parties are faced with a "when" issue and a "what court" issue for every action, but the former does not usually control or affect the latter.

Id. at 940.

Similarly to in *Auburn* and *Magnum*, § 7623(b)(4) is a single sentence containing a jurisdictional grant and a time period. But, there is no clear statement that the time period is similarly intended to be jurisdictional. Instead, there is confusion. While it is arguable that "such matter" in the jurisdictional parenthetical refers to (1) the filing of an appeal and (2) rigid compliance with the 30-day requirement, that is only one possible interpretation, not a clear statement. The jurisdictional nature of the filing deadline would be more likely if the jurisdictional grant was expressly

contingent on compliance with the filing deadline, such as: "Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter only if the appeal is brought within such period)".[5] *Indeed, the word "matter" in the parenthetical most likely refers to "subject matter", which, under recent Supreme Court case law in effect when the statute was adopted, did not include claims processing rules like filing deadlines.*

The "clear statement" exception was first articulated in in *Arbaugh v. Y & H Corp*., 546 U.S. 500, 515-516 (Feb. 22, 2006) (involving a claims processing rule other than a filing deadline). Section 7623(b)(4) was enacted on December 20, 2006, by Division A, § 406, Pub. L. 109-432. So, when Congress drafted § 7623(b)(4), it should be presumed that Congress knew that the filing deadline would be interpreted as nonjurisdictional unless Congress made a clear statement otherwise. This distinguishes § 7623(b)(4)

[5] The "only if" language in the hypothetical statute is derived from dicta in *V.L. v. E.L*., 136 S. Ct. 1017, 1021 (2016) (per curiam) (hypothetical statute could have made a condition jurisdictional if the statute had contained the words "shall have jurisdiction…only if" the condition was met). This is not the only way Congress could have made a clear statement. It could, for example, also have added to § 7623(b)(4) a second sentence stating: "The timely filing requirement in the previous sentence is jurisdictional."

from earlier-enacted Tax Court filing deadlines, such as in its deficiency (§ 6213(a)), innocent spouse (§ 6015(e)(1)(A)), and CDP (§ 6330(d)(1)) jurisdictions.

Since *Kontrick*, there have been only two Supreme Court opinions holding that a filing period is jurisdictional. However, those holdings were predicated not on the clear statement exception, but only on *stare decisis*, since for over 100 years, the Supreme Court had held those time periods jurisdictional. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007).

The Supreme Court has never ruled one way or the other on whether any Tax Court filing deadline is jurisdictional. Accordingly, this *stare decisis* exception cannot apply here.

The Clinic observes that the *stare decisis* exception does not apply to give deference to opinions of courts below the Supreme Court. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 173-174 (2010) (Ginsburg, J, concurring, joined by Stevens and Breyer, JJ.) ("[I]n *Bowles* and *John R. Sand & Gravel Co.* . . . we relied on longstanding decisions of *this Court* typing the relevant prescriptions 'jurisdictional.' *Amicus* cites well over 200 opinions that characterize § 411(a) as jurisdictional, but not one is from this Court. . . ."; emphasis in original; citations omitted).

The Clinic represented the taxpayer in *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017) (a case involving § 6015(e)(1)(A)). When the Clinic made this identical observation and also cited to Justice Ginsburg's concurrence in *Reed Elsevier* for support, in its answering brief, the government wrote (p. 27 n.10) that the taxpayer was "incorrect, because the unanimous Supreme Court, in an opinion by Justice Ginsburg, has stated that extensive "'precedent and practice in American courts'" generally can render a statutory requirement jurisdictional. *Auburn Reg'l*, 133 S. Ct. at 825 (quoting *Bowles*, 551 U.S. at 209 n.2)." In response, the Clinic wrote that the government's quote indirectly from *Bowles* was taken out of context, since the precedent and practice in American courts referred to in *Bowles* there included a number of prior Supreme Court opinions stretching over about 100 years. In the following six Supreme Court opinions, the *stare decisis* exception was clearly articulated only to apply to a long line of Supreme Court opinions: *Hamer v. Neighborhood Housing Servs*., 138 S. Ct. 13, 20 n.9 (2017); *Wong*, 135 S. Ct. at 1636; *Gonzalez v. Thaler*, 565 U.S. at 142 n.3; *Henderson v. Shinseki*, 562 U.S. at 436; *Reed Elsevier*, 559 U.S. at 168;*Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 82 (2009).

Judge Ashford's opinion in this case (at pp. 9-10) only cites other Tax Court opinions for the holding that the whistleblower filing period is jurisdictional. However, those opinions simply rely on prior Tax Court opinions in deficiency and CDP cases that did not consider *Kontrick* and its progeny. This lack of consideration of recent Supreme Court opinions is particularly odd, since in *Lippolis v. Commissioner*, 143 T.C. 393 (2014), the Tax Court, citing *Gonzalez* and other post-*Kontrick* opinions, held that the mere fact that the $2 million amount in dispute condition of whistleblower awards set out in § 7623(b)(5) is adjacent to the jurisdictional grant in § 7623(b)(4) does not turn the amount in dispute condition into a Tax Court jurisdictional condition; rather, the $2 million condition is an affirmative defense.

In sum, neither under the clear statement exception nor the *stare decisis* exception is the filing deadline in § 7623(b)(4) jurisdictional.

II. Case Law Regarding Other Tax Court Filing Deadlines Does Not Require that § 7623(b)(4)'s Filing Period Also Be Treated as Jurisdictional.

The Supreme Court rules of what conditions are jurisdictional apply to the Tax Code. This Court and other courts of appeal have recently held certain Tax Code filing deadlines nonjurisdictional:

In *Keohane v. United States*, 669 F.3d 325, 330 (D.C. Cir. 2012), this Court, citing *Henderson* and other recent Supreme Court opinions, held that the 2-year deadline in § 7433(d)(3) in which to bring a district court action for damages from wrongful IRS collection actions is nonjurisdictional. Notably, this Court decided this issue, even though it made no difference in the case. This Court clearly did not want anyone to cite its affirmance of the district court's dismissal as evidence that this Court considered the deadline jurisdictional. For similar reasons, even if it affirms the Tax Court on any ground, this Court should decide the jurisdictional issue in this case, as well.

In *Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015), the Ninth Circuit held that the 9-month deadline in § 6532(c) to bring a district court wrongful levy action is not jurisdictional and is subject to equitable tolling under current Supreme Court case law.

Four recent opinions of courts of appeals that have held deadlines to file certain Tax Court petitions jurisdictional under the recent Supreme Court case law are worth discussing because, to the extent they are not wrong (as the Clinic believes they are), the statutes they construe are, in critical respects, different from the statute at issue in this case. Below, the Clinic describes the four opinions.

A. Collection Due Process Jurisdiction

The pattern provision from which § 7623(b)(4)'s language was derived is § 6330(d)(1), which was enacted in 1998 to allow the Tax Court and district courts to review determinations issued after newly-created IRS Office of Appeals Collection Due Process ("CDP") hearings. *See Tucker v. Commissioner*, 676 F.3d 1129 (D.C. Cir. 2012).

As originally enacted by § 3401(b) of Pub. L. 105-206, § 6330(d)(1) provided, as relevant to the Tax Court:

> (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) . . . .

In 2000, Congress amended § 6330(d)(1) to replace the parenthetical "(and the Tax Court shall have jurisdiction to hear such matter)" with the broader parenthetical "(and the Tax Court shall have jurisdiction with respect to such matter)". Pub. L. 106-554, § 313(d). In the Conference Report on the legislation, this change to the wording is explained merely as one to clarify that a CDP determination of the Tax Court is a decision that is reviewable on appeal in another court. H.R. (Conf.) Rept. 106-1033 at 1024-1025.

In 2006, a few months before § 7623(b)(4) was enacted, Congress made the Tax Court the sole venue for appeal of CDP notices of determination by shortening § 6330(d)(1) to read, in full: "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)." Pub. L. 109-280, § 855(a). This was the version of the CDP statute recently construed in *Guralnik v. Commissioner*, 146 T.C. 230 (2016), and *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018). Section 7623(b)(4) tracks the language of § 6330(d)(1) as in effect just before § 7623(b)(4) was enacted. (Since December 2015, the word "appeal" has been removed from § 6330(d)(1) in favor of "review"; Pub. L. 114-113, Div. Q, § 424(a); though the word "appeal" still remains in § 7623(b)(4).)

Before discussing two court of appeals opinions issued earlier this year involving the CDP filing period under recent Supreme Court case law, the Clinic notes that, in *Guralnik v. Commissioner*, *supra*, the Clinic (as an *amicus*) asked the Tax Court to reconsider its long-standing position that the CDP filing deadline is jurisdictional. The Clinic noted that the Tax Court's position had been taken without any acknowledgement of post-*Kontrick* case law indicating that filing deadlines are now only rarely jurisdictional. The

Clinic argued that the CDP filing deadline is not jurisdictional and is subject to equitable tolling under current Supreme Court case law.

The Tax Court rejected both arguments. *Id*. at 235-238.

With regard to the jurisdictional question, the Tax Court wrote:

> Here, the filing period and the grant of jurisdiction are set forth in the same sentence of the statute and are explicitly linked. Section 6330(d)(1) provides 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)." 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. at 237.

The Clinic vehemently disagrees with the Tax Court that "such matter" includes filing periods. "Matter" most likely refers only to "subject matter". Subject matter today does not include claims processing rules.

Texas Tech Professor Bryan Camp has written:

> In the Guralnik opinion, the Tax Court focuses on the fact that the parenthetical occurs in the same sentence as the SMJ [subject matter jurisdiction] grant. That's a strange reason to find the timing rule jurisdictional. There are two better reasons to find otherwise. First, the use of the word "and" is, to me, a HUGE clue that the SMJ grant has nothing to do with the 30 day period. Grammatically, the connector "and" denotes the start of a new independent clause, a clause that can stand on its own as a separate sentence. . . . So, functionally, the clause after the "and" in 6330(d) is a different sentence.

> Second, the statute says the Tax Court has SMJ "with respect to such matters." If you want to find a reference in the same subsection, the word "such" most naturally references the phrase "determination under this section" and not the clause "within 30 days." However, I think the better reading is to read section 6330 as a whole. In the immediately preceding subsection, 6330(c) lists all the "Matters Considered at Hearing." So it makes sense to me that 6330(c) tells the IRS what matters it must consider at the CDP hearing and then 6330(d) tells the Tax Court it has SMJ over "such matters." I think THAT's the reference as to what the Tax Court has power to review.

Bryan Camp, "Guralnik – Equity Through Court Rules Not Court Rulings", www.procedurallytaxing.com (June 6, 2016) (emphasis in original).

In *Duggan v. Commissioner*, *supra* – where the Clinic was also an *amicus* – the Ninth Circuit recently held that the CDP filing period is jurisdictional under the clear statement exception of current Supreme Court case law. Acknowledging that the legislative history of § 6330(d)(1) is silent on whether Congress intended the deadline to be jurisdictional, the court wrote:

> The statute at issue expressly contemplates the Tax Court's jurisdiction. Moreover, the filing deadline is given in the same breath as the grant of jurisdiction. Although "[m]ere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle," *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012), § 6330(d)(1) makes timely filing of the petition a condition of the Tax Court's jurisdiction. . . . [Section] 6330(d)(1) is "unambiguous" that in order for the Tax Court to have jurisdiction, a petition for review must be filed "within 30 days of a determination." This makes § 6330(d)(1)'s thirty-day deadline jurisdictional.

> *Amicus* insists that the statutory language is ambiguous. According to *amicus*, to tag § 6330(d)(1) 's filing deadline as jurisdictional, Congress needed to specify that:
>
> > A person may, within 30 days of determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter only if the appeal is brought within such period).
>
> *Amicus*'s rendition of the statute makes the consequences of missing the thirty-day deadline pellucid. But the test is whether Congress made a clear statement, not whether it made the clearest statement possible. The plain language of § 6330(d)(1) confers jurisdiction on the Tax Court if (and only if) a petition for review is filed in that court within thirty days of the IRS's determination. .

Id., 879 F.3d at 1034 (some citations and footnote omitted). The Clinic believes that the Ninth Circuit overstates the clarity of § 6330(d)(1)'s language in making timely filing a condition of the Tax Court's jurisdiction. Especially since the Supreme Court has said that "Congress must do something special . . . to tag a statute of limitations as jurisdictional"; *Wong*, *supra*, 135 S. Ct. at 1632; the Ninth Circuit should not have allowed a less "pellucid" sentence to tag the CDP filing deadline as jurisdictional. The presumption these days is that filing deadlines should usually not be jurisdictional because of the potential harm to the courts and litigants of making filing deadlines jurisdictional. *Henderson v. Shinseki*, *supra*, 562 U.S. at 434-435.

The government brought the *Duggan* opinion to the attention of the Fourth Circuit in a case on all fours, where the Clinic represented the taxpayer. Notably, when the Fourth Circuit issued the opinion in its case, *Cunningham v. Commissioner*, 716 Fed. Appx. 182 (4th Cir. 2018), the court made no reference to *Duggan* and explicitly declined to rule one way or the other on whether the CDP filing period is jurisdictional or subject to equitable tolling – not reaching those questions because the facts would not justify tolling in that case, in any event. The Fourth Circuit's action in *Cunningham* suggests that it considers the holding in *Duggan* arguably problematic.

B. Innocent Spouse Jurisdiction

If the IRS sends out a notice of determination denying an election or request for innocent spouse relief, the taxpayer has 90 days to file a petition contesting the denial in the Tax Court. Like § 7623(b)(4), the sentence in § 6015(e)(1)(A) that contains the 90-day filing period also contains the jurisdictional grant.

In *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017), and *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017) (cases litigated by the Clinic), the courts relied on the clear statement exception to find that the 90-day filing period is jurisdictional. *See, e.g.*, *Matuszak* at 196 ("Not only did

Congress place the grant of jurisdiction and the time limitation in the same sentence and subsection, it expressly conditioned the Tax Court's jurisdiction on the timely filing of a petition: "the Tax Court shall have jurisdiction . . . *if* [the] petition is filed" within the specified period.") (citation and footnote omitted; emphasis in original). The courts rejected the Clinic's argument that the wording of the 90-day period was not materially different from the wording of the sentence in *Auburn* that gave Medicare reimbursement boards the right to hear cases and that conditioned the grant with a final phrase saying "if" the appeal was brought in certain time periods. *Rubel* and *Matuszak* distinguished *Auburn*'s statutory sentence from the one in § 6015(e)(1)(A) because the innocent spouse sentence, unlike the Medicare sentence, contains the words "shall have jurisdiction". But, this must be a distinction without a difference, as there was no other sentence in the United States Code that granted "jurisdiction" to the Medicare reimbursement boards at issue in *Auburn*. *Auburn* did not turn on the absence of the word "jurisdiction" from the sentence, since the Court understood that part of the sentence made an implicit jurisdictional grant to the boards.

Further, § 6015(e)(1)(A) differs from § 7623(b)(4) in that the jurisdictional parenthetical in the former precedes the stated filing deadline

and the former's sentence says the Tax Court shall have jurisdiction "if" the filing deadlines are complied with – which is far closer to a clear statement. Since there is no "if" condition in § 7623(b)(4), both *Rubel* and *Matuszak* construe distinguishable language.

Rubel and *Matuszak* also focused on an injunctive power in § 6015(e)(1)(B)(ii) given to the Tax Court to enforce a prohibition on collection while an innocent spouse election or request was pending before the IRS or the courts. The provision states that "the Tax Court shall have no [injunctive] jurisdiction . . . unless a timely petition has been filed under subparagraph A". "Read alongside § 6015(e)(1)(B), the ninety-day deadline in § 6015(e)(1)(A) represents '[t]he most obvious example' of a jurisdictional rule, because Congress clearly and repeatedly expressed that it imposes a jurisdictional limit on the Tax Court's authority." *Matuszak* at 197 (citation omitted). Understandably, and by contrast, there is no parallel injunctive jurisdiction given to the Tax Court in connection with whistleblower award suits.

Thus, to the extent that *Rubel* and *Matuszak* are correct, the statute they construe is not similar enough to make those opinions instructive for interpreting § 7623(b)(4).

C. Deficiency Jurisdiction

Tilden v. Commissioner, 846 F.3d 882 (7th Cir. 2017) (not involving the Clinic), held jurisdictional under recent Supreme Court case law the 90- (or 150-) day period in the first sentence of § 6213(a) in which a taxpayer may petition the Tax Court to redetermine a tax deficiency. Unlike § 7623(b)(4), the first sentence of § 6213(a), does not even contain the word "jurisdiction". Despite the first sentence's not speaking in jurisdictional terms, *Tilden* cited the clear statement exception, noting that later sentences in the subsection provide a similar prohibition on collection while the Tax Court case is pending and a similarly-phrased jurisdictional grant to the Tax Court to enjoin premature collection only if a "timely petition has been filed". *Tilden* observed that the word "jurisdiction" in the fourth sentence of § 6213(a) was a "magic word". *Id*. at 886. *Tilden* also accorded *stare decisis* to a long list of pre-*Kontrick* opinions of the Tax Court and appellate courts holding the deficiency suit filing period jurisdictional.

Tilden is incompatible with *Gonzalez v. Thaler*, which instructs courts not to look to adjacent provisions to determine whether a filing deadline is jurisdictional.

Tilden also fails to note that the third sentence of § 6213(a) was only modified and the fourth sentence was only enacted to allow the Tax Court injunctive jurisdiction in 1988; Pub. L. 100-647, § 6243(a); whereas the first

sentence of § 6213(a) has been in the tax laws (in one version or another) since 1924. See §§ 274(a) (for income tax) and 308(a) (for estate tax) of the Revenue Act of 1924, ch. 234. Since the Tax Court's authority to enjoin the IRS was added long after the first sentence of § 6213(a) and its predecessors were enacted, it should have no impact on the interpretation of the first sentence of § 6213(a), which is clearly a statute of limitations. Anyway, as noted with the previous comments on § 6015(e)(1)(A), the statute *Tilden* interprets is distinguishable from § 7623(b)(4), which contains no injunctive provisions.

Tilden also fails to observe that the grant for the Tax Court to redetermine deficiencies is not in § 6213(a), but in § 6214(a), which provides, in part: "Except as provided by section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency . . . ." *Dees v. Commissioner*, 148 T.C. No. 1 at *18 (Feb. 2, 2017) (Ashford, J., concurring in the result only) ("Section 6214(a) establishes our deficiency jurisdiction".); *Moyer v. Commissioner*, T.C. Memo. 2016-236 at *1 ("Moyer timely filed a petition under section 6213(a) for redetermination of the deficiency and the penalties. We have jurisdiction under section 6214(a)."; footnote omitted). Section 6214(a) has its origins in §§ 274(e)

(for income tax) and 308(e) (for estate tax) of the Revenue Act of 1926, ch. 27.

Tilden also wrongly applies *stare decisis* to opinions of courts below the Supreme Court.

Finally, *Tilden* sought, but failed, to create "jurisdictional" symmetry for Article I courts. While it noted the Supreme Court's holding in *John R. Sand* that 28 U.S.C. § 2501's filing period for some Article I Court of Federal Claims actions is jurisdictional (though, only because of *stare decisis*); 846 F.3d at 886-887; it failed to note that in *Henderson v. Shinseki*, the Supreme Court held that the filing period for the Article I Court of Appeals for Veterans Claims actions is nonjurisdictional. Additionally, for tax cases, the relevant comparable time period to file a tax refund suit in the Court of Federal Claims is § 6532(a) (not 28 U.S.C. § 2501); *Detroit Trust Co. v. United States*, 131 Ct. Cl. 223 (1955); on which the Supreme Court has never made a jurisdictional ruling.

In sum, the badly-reasoned opinion in *Tilden* should not serve as instructive for cases involving the jurisdictional status of any Tax Court filing deadlines under the recent Supreme Court case law on jurisdiction.

CONCLUSION

This Court should hold that timely filing under § 7623(b)(4) is not a jurisdictional condition of a Tax Court whistleblower award suit.

Respectfully submitted,

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This is to certify that a copy of this amicus brief was served on counsel for the appellant, Joseph A. DiRuzzo, III, Esq., by filing it with the CM/ECF system on May 14, 2018, of which he is a member. This is to certify that a copy of this amicus brief was served on counsel for the appellee, Janet A. Bradley, Esq., by filing it with the CM/ECF system on May 14, 2018, of which she is a member. All counsel in the case are members of the CM/ECF system.

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