

UNITED STATES TAX COURT

SCOTT ALLAN WEBBER,)
)
 Petitioner,)
)
 v.) Docket No. 14307-18L
)
 COMMISSIONER OF INTERNAL REVENUE,) Filed Electronically
)
 Respondent.)

PETITIONER’S RESPONSE TO RESPONDENT’S MOTION TO WITHDRAW MOTION TO DISMISS FOR LACK OF JURISDICTION

PETITIONER RESPONDS in support of Respondent’s motion to withdraw his motion to dismiss for lack of jurisdiction, because the 30-day statutory period to request a Collection Due Process (“CDP”) hearing is a nonjurisdictional claims-processing rule and is thus subject to equitable tolling and waiver. Both equitable tolling and waiver are applicable in the present case.

1. The Supreme Court has stated that most time bars are nonjurisdictional claim-processing rules, which “seek to promote the orderly progress of litigation, but do not deprive a court of authority to hear a case.” United States v. Wong, 135 S. Ct. 1625, 1632 (2015); see e.g., Henderson v. Shinseki, 562 U.S. 428, 438-41 (2011) (holding that the statutory deadline for appeal in veterans’ benefit cases is nonjurisdictional). For a time bar to indeed be jurisdictional, the Supreme Court has applied the clear statement rule,

holding that Congress must make a clear statement in the statute that a deadline is jurisdictional. Wong, 135 S. Ct. at 1632 (“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.”).

2. The applicable provisions of Section 6330 governing CDP filing requests do not contain a clear statement that the filing deadline is jurisdictional. Section 6330(a)(3)(B) refers to “the right of the person to request a hearing during the 30-day period under paragraph (2),” and section 6330(a)(2)(C) states: “not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.” The word “jurisdiction” does not appear in either provision. Lacking a clear statement that the 30-day period is jurisdictional, the statutory deadline is a claims-processing rule and is thus subject to equitable tolling.

3. The lack of a clear statement also distinguishes Section 6330(a) from what have been held to be jurisdictional time deadlines in Section 6015(e)(1)(A) (innocent spouse relief 90-day period to file Tax Court petition) and Section 6330(d)(1) (post-CDP determination 30-day period to file Tax Court petition). The former, Section 6015(e)(1)(A), reads in relevant part: “[T]he individual may petition the Tax Court (*and the Tax Court shall have jurisdiction*) to determine the appropriate relief available” if the petition is filed

within 90 days of the IRS final determination of relief. IRC 6015(e)(1)(A) (emphasis added). Three circuit courts have determined that the Section 6015(e)(1)(A) filing deadline is jurisdictional and have relied heavily on the presence of the word “jurisdiction” in the statute. See Naufflett v. Commissioner, 892 F.3d 649, 654-55 (4th Cir. 2018); Matuszak v. Commissioner, 862 F.3d 192, 196-198 (2d Cir. 2017); Rubel v. Commissioner, 856 F.3d 301, 305-306 (3d Cir. 2017).

4. Similarly, courts have held that Section 6330(d)(1) contains a clear statement that the post-CDP Tax Court petition filing period is jurisdictional. That statute states: “The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (*and the Tax Court shall have jurisdiction with respect to such matter*).” IRC 6330(d)(1) (emphasis added). The Tax Court has interpreted 6330(d)(1)’s filing deadline as a jurisdictional requirement and the Ninth Circuit has recently followed. See Guralnik v. Commissioner, 146 T.C. 230, 236-38 (2016) (extending the jurisdictional 90-day filing period of section 6213(a) to section 6330(d)(1)); see also Duggan v. Commissioner, 879 F.3d 1029, 1034-1035 (9th Cir. 2018) (affirming the 30-day period as jurisdictional on the basis of the statutory text). Both courts so held primarily because the filing deadline is in the same sentence as the jurisdictional grant. The Supreme Court has held that the separation of a

filing deadline from a jurisdictional grant is evidence that Congress intended the filing deadline to be nonjurisdictional. See Wong, 135 S. Ct. at 1632. However, mere proximity of a claims processing rule to a jurisdictional grant in a nearby subsection of the U.S. Code does not make the claims processing rule also jurisdictional. See Gonzalez v. Thaler, 565 U.S. 134, 147 (2012); Lippolis v. Commissioner, 143 T.C. 393, 397 (2014) (holding that section 7623(b)(5)'s \$2 million at issue threshold is a nonjurisdictional claims processing rule, despite its proximity to section 7623(b)(4)'s grant of Tax Court whistleblower award jurisdiction). Section 6330(b)(1) contains the jurisdictional authorization for the Office of Appeals to hold CDP hearings and does not mention time deadlines. By contrast, Section 6330(a) contains no such mention of jurisdiction and is readily distinguishable as a nonjurisdictional requirement.

5. The Commissioner's regulations suggest that the 30-day period to request a CDP hearing is a jurisdictional requirement of a CDP hearing at Appeals. 26 C.F.R. § 301.6330-1(b)(1) (stating that a CDP request must be submitted within 30 days of the date of the CDP notice); 26 C.F.R. § 301.6330-1(c)(2) Q&A-C6 (stating that a CDP request must be sent to the office and address as directed on the CDP notice). However, these regulations are not entitled to Chevron deference, as their practical effect is to restrict the scope of judicial review by creating non-statutory regulatory barriers that prevent

taxpayer's access to the Tax Court. See Smith v. Berryhill, 587 U. S. ___, slip op. at 13-14 (2019) (May 28, 2019); see also Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984). In Berryhill, the petitioner requested review of a denial of his application for disability benefits, but the SSA Appeals Council denied his request for being untimely. Id. The SSA's regulations interpreting the applicable statute, 42 U.S.C. §405(g), treated such a dismissal for untimeliness not to be a "final decision" subject to judicial review in federal court. Id. Upon review, the Supreme Court determined otherwise, affording no Chevron deference to the SSA interpretation and holding that a SSA dismissal for untimeliness is a "final decision" subject to judicial review. Id. In an opinion for a unanimous Court, Justice Sotomayor declared that "[t]he scope of judicial review is . . . hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency." Id.

6. Here, the regulations' interpretation of Section 6330's 30 day-period and the location of filing for a CDP hearing as jurisdictional requirements poses a similar restriction and should not be entitled to Chevron deference. The IRS treatment of both requirements as jurisdictional impermissibly narrows the scope of judicial review and thus should not be entitled to any deference. See Harris v. Commissioner, 32 T.C. 1216, 1217 (1959) ("[O]ne litigant cannot write into law limitations on the jurisdiction of the Court as to the other party by

his own regulations.”). Consequently, Section 6330(a) should be interpreted in light of the clear statement rule and, due to the statutory text’s silence on jurisdiction, this Court should find that Section 6330(a)’s 30-day requirement is nonjurisdictional. See Wong, 135 S. Ct. at 1632.

7. The Tax Court has generally treated compliance with the 30-day CDP period as mandatory to its review jurisdiction under section 6330(d)(1). See, e.g., Offiler v. Commissioner, 114 T.C. 492, 498 (2000) (dismissing for lack of jurisdiction when the IRS did not hold a CDP hearing due to a late-filed request). However, in a case where the IRS properly held an equivalent hearing (because the CDP request was late), but erroneously issued a CDP Notice of Determination (“NOD”) at the end of the hearing, the Tax Court held that it had jurisdiction on account of the NOD’s issuance. Kim v. Commissioner, T.C. Memo. 2005-96. The Tax Court proceeded to rule on the merits of the case and granted the respondent’s motion for summary judgment on the grounds of the taxpayers’ failure to timely file their CDP request. Id. Summary judgment is only available for nonjurisdictional merits arguments. See e.g., Robinson v. Union Pac. R.R., 245 F.3d 1188, 1191 (10th Cir. 2001). The holding in Kim strongly suggests that timely filing is not a jurisdictional requirement obtain a CDP hearing at Appeals.

8. The Tax Court has been inconsistent in its treatment of CDP requests filed timely with the wrong IRS office or address. Under similar facts to those present here, Judge Carluzzo denied respondent's motion to dismiss for lack of jurisdiction, holding that a taxpayer's "wrong office" CDP request was timely, as the respondent failed to demonstrate that he was prejudiced by receiving the request in the wrong location. Taylor v. Commissioner, Docket No. 3043-17L (order dated Nov. 8, 2017). The idea of prejudice is an equitable concept, but true jurisdictional deadlines are not subject to equitable exceptions. See Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 154 (2013). Conversely, in a pair of cases involving the same taxpayer, Judge Nega granted respondent's motion to dismiss for lack of jurisdiction on a CDP request that the taxpayer mistakenly addressed to the wrong city. Nunez v. Commissioner, Docket No. 2925-17L (order dated May 21, 2018); Nunez v. Commissioner, Docket No. 2946-17L (order dated May 18, 2018). Judge Nega held that petitioner could not rely on the mailbox rule of 26 CFR § 301.7502-1 because of his failure to properly address the CDP request. Id. None of these three cases considered the question of whether the 30-day period is nonjurisdictional and thus subject to equitable tolling.

9. The Tax Court has never issued a precedential decision as to whether the 30-day CDP hearing request period is jurisdictional. Last year, in a case

involving similar facts to those present here (but with the added issue of a late-filed Tax Court petition), Judge Gale touched on the question in an order directing respondent to provide evidence of a mailing of the equivalent hearing decision letter that might indicate a late-filed Tax Court petition. Khanna v. Commissioner, Docket No. 5469-16L (order dated Feb. 13, 2018). In his order, Judge Gale noted that, depending on the evidence provided on the separate late-filed petition issue, the Court would direct the IRS to address “the impact of recent U.S. Supreme Court and Third Circuit Court of Appeals cases concerning equitable tolling upon respondent’s position that the requirement that a CDP hearing request be filed within 30 days of the CDP notice is jurisdictional.” *Id.* Judge Gale never reached this issue, as the parties settled the case, after which the taxpayer successfully moved that the case be voluntarily dismissed, without Judge Gale making any rulings on the IRS’s motion to dismiss. Nevertheless, in his Feb. 13, 2018 order, Judge Gale properly recognized the applicability of new developments in jurisdictional doctrine to the 30-day CDP request period. Id.

10. Perhaps somewhat inconsistently with respondent’s regulations, the Internal Revenue Manual (“IRM”) treats CDP filing deadlines as nonjurisdictional and subject to equitable considerations. The IRM states in relevant part:

“If the CDP hearing request is not addressed to the correct office as indicated in the CDP notice, the date to determine timeliness is the date the request is received by the IRS office to which the request should have been sent. However, if the address does not appear on the notice, or if it is determined that the taxpayer received erroneous instructions from an IRS employee resulting in the request being sent to the wrong office, use the postmark date to that office to determine timeliness.”

IRM § 5.19.8.4.2(8)(8-5). This provision of the IRM essentially creates two equitable tolling exceptions to the 30-day period: (1) for a failure to provide an address on the notice or (2) for erroneous instructions from an IRS employee. Another provision of the IRM creates a third equitable exception for non-processable CDP requests, stating: “[i]f a request for a CDP hearing is filed timely, but is not processable, contact the taxpayer and allow up to 15 calendar days for the taxpayer to perfect the request so that it is processable. If the taxpayer meets this requirement, the request is timely filed.” IRM § 5.19.8.4.2.2 (8-27-10). These IRM provisions demonstrate that the IRS itself is concerned with overly stringent CDP request requirements and has sought to create equitable exceptions to the 30-day rule. However, if a statutory requirement is found to be jurisdictional, then such a requirement is absolute and with no exceptions. See Auburn Reg'l Med. Ctr., 568 U.S. at 154 (noting that if a deadline was found to be jurisdictional then an existing DHHS “good cause” exception would be impermissible). The three IRM exceptions would thus not

stand if the 30-day requirement is jurisdictional. The exceptions' continued existence strongly supports a finding that the requirement is nonjurisdictional.

11. In an appeal of a Tax Court innocent spouse dismissal, the Third Circuit emphasized the particular circumstances when equitable tolling may be appropriate for a nonjurisdictional filing deadline¹, stating that there may be equitable tolling “(1) where the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.” Mannella v. Commissioner, 631 F.3d 115, 125 (3d Cir. 2011) (quoting Hedges v. United States, 404 F.3d 744, 751 (3d Cir. 2005) (internal quotation marks and citation omitted)). Two the grounds articulated in Mannella are applicable in the present case.

12. Petitioner has a basis for equitable tolling because he timely asserted his rights in the wrong forum by sending his request to a separate IRS office from the one the IRS intended. Indeed, Petitioner’s CDP request was not only timely mailed but was actually received at the “incorrect” IRS office in Kansas

¹ There, the regulatory requirement at issue was the 2-year period in Reg. § 1.6015-5(b)(1) in which to request relief under Section 6015 (f).

City five days before the expiration of the 30-day CDP period.² While equitable tolling has not yet been applied to CDP periods, the Federal Circuit has done so for “wrong forum” administrative appeals in an analogous line of veterans’ benefit cases, tolling filings that should have been made in the Court of Appeals for Veterans Claims, but that were sent elsewhere in a timely fashion. See Bailey v. Principi, 351 F.3d 1381, 1382 (Fed. Cir. 2003); Santana-Venegas v. Principi, 314 F.3d 1293, 1298 (Fed. Cir. 2002); Jaquay v. Principi, 304 F.3d 1276, 1289 (Fed. Cir. 2002).

13. In addition, a Treasury Inspector General for Tax Administration (“TIGTA”) report from last year demonstrates that “wrong office” CDP requests are an ongoing and substantial issue for taxpayers. TIGTA, “Review of the Office of Appeals Collection Due Process Program,” 2018-10-054 (Sept. 5, 2018). From a sample size of 140 taxpayers that requested CDP hearings, TIGTA identified 8 taxpayers who mistakenly sent their requests to the wrong address and were denied a CDP hearing due to the IRS failing to timely forward to the correct address. Id.

14. Petitioner also has grounds for equitable tolling because the IRS unintentionally, but actively misled him by including multiple unlabeled

² Thus, the rules of Section 7502 to make timely mailing timely filing are not even implicated in this case.

addresses on the mailing slip of the LT11 notice. As noted in IRM 5.19.8.4.2 (excerpted above), the IRS allows an equitable exception to the 30-day period when the taxpayer receives “erroneous instructions” from the IRS that lead to the request being filed in the wrong office. Here, the multiple conflicting addresses are the practical equivalent of erroneous instructions, as a taxpayer could follow the instructions of the notice and still easily fail to submit to the proper address³. By the IRS’s own equitable guidance, Petitioner has a textbook case for equitable tolling due to the IRS issuing erroneous instructions that led to Petitioner filing his request with the wrong address.

15. If this Court does not grant equitable tolling of the statutory deadline, it should still find that the statutory deadline has been met, because any argument that the CDP request was untimely filed has since been waived by Respondent’s motion to withdraw. The Supreme Court has held that a plaintiff’s failure to meet a nonjurisdictional deadline is not an “ironclad limit” upon a court’s authority. Dolan v. United States, 560 U.S. 605, 610 (2010). Nonjurisdictional statutory deadlines can be waived. Zipes v. TWA, 455 U.S. 385, 392-93 (1982). Here, Respondent’s motion to withdraw his motion to dismiss is an effective waiver of the nonjurisdictional 30-day requirement.

³ The statistical frequency of “wrong office” CDP requests (8 out of 140 taxpayers) found in the above referenced TIGTA report is a strong indication of the confusion caused by the multiple addresses.

WHEREFORE, it is prayed that Respondent's motion to withdraw his motion to dismiss for lack of jurisdiction should be granted.

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