

No. 19-2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BOECHLER, P.C.,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

On Appeal from the United States Tax Court
Docket No. 18578-17L (Carluzzo, S.T.J.)

**AMICUS BRIEF OF THE FEDERAL TAX CLINIC OF THE LEGAL
SERVICES CENTER OF HARVARD LAW SCHOOL IN SUPPORT OF
THE APPELLANT'S PETITION FOR REHEARING *EN BANC***

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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 before the Internal Revenue Service and in tax matters before the courts. With some frequency, potential clients of the Clinic have come to the Clinic having allegedly filed a Tax Court petition late, like the appellant in this case. Since this is a continuing problem for low-income *pro se* taxpayers, both as counsel for such taxpayers in the courts of appeals and as *amicus*, the Clinic has recently argued that the deadlines in §§ 6015(e)(1)(A),² 6330(d)(1), and 7623(b)(4) for filing Tax Court innocent spouse, deficiency, Collection Due Process (“CDP”), and whistleblower award petitions, respectively, are not jurisdictional and are subject to equitable tolling or estoppel under recent Supreme Court case law that has narrowed the use of the word “jurisdictional” generally to exclude filing deadlines. Indeed, the Clinic was *amicus* earlier in this case and in both of the most on point opinions previously issued on whether §§ 6330(d)(1)’s and 7623(b)(4)’s

¹ 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.

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

filing deadlines are jurisdictional, *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), and *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019).

The Clinic’s purpose in filing this brief is to support the appellant’s request that this full Court hold that the deadline in § 6330(d)(1) to file a CDP petition is not jurisdictional and is subject to equitable tolling under appropriate facts. Such rulings may be of aid to *pro se* low-income taxpayers in CDP cases who have some equitable excuse for filing late.

ARGUMENT

IT IS IMPORTANT THAT THE FILING DEADLINE FOR TAX COURT CDP PETITIONS BE DECLARED NOT JURISDICTIONAL AND SUBJECT TO EQUITABLE TOLLING

In *Henderson v. Shinseki*, 562 U.S. 428 (2011), the Supreme Court explained why it is generally a poor outcome – both for the courts and for plaintiffs – if a filing deadline is jurisdictional:

Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system. Under that system, Courts are generally limited to addressing the claims and arguments advanced by the parties. Courts do not usually raise claims or arguments on their own. But federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.

Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants. For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times. Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after

losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction. Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction. And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.

Id. at 434-435 (citations omitted). In *Henderson*, the Supreme Court held that the filing deadline for another Article I court besides the Tax Court, the Court of Appeals for Veterans Claims, is not jurisdictional.

The purpose of this brief is to give this Court background on why, in particular, it would be a very bad outcome to low-income (and even high-income) taxpayers to have the filing deadline for Tax Court CDP petitions to be jurisdictional. This issue is not a rare one.

First, some statistics: CDP hearings are held in the IRS Independent Office of Appeals, and those hearings conclude with the Office of Appeals issuing a notice of determination – the ticket to the Tax Court. In the fiscal year ended September 30, 2019, the Office of Appeals closed 26,655 CDP cases, presumably each with a notice of determination mailed to the taxpayer(s). IRS Data Book, 2019 at 63 (Table 27), available on the IRS website. In the fiscal year ended September 30, 2018, IRS Chief Counsel statistics show that taxpayers filed 1,914 Tax Court CDP petitions, of which 1,409 (74%) were filed *pro se*. See p. 25 at

<http://procedurallytaxing.com/wp-content/uploads/2019/08/Group-I->

Releasable.pdf. A study conducted by counsel for the Clinic long before this case indicated that 8% of CDP petitions (13 of 154) filed in the first six weeks of 2008 were dismissed for lack of jurisdiction – no doubt many for late filing. *See* Carlton M. Smith & T. Keith Fogg, “Tax Court Collection Due Process Cases Take Too Long”, 130 *Tax Notes* 403, 413 (Jan. 24, 2011), 2011 TNT 16-20 (Jan. 25, 2011).

It is generally conceded that there are three common grounds for allowing equitable tolling of non-jurisdictional filing deadlines:

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) (cleaned up).

In CDP, each of these grounds regularly occurs, yet the Tax Court's position that the filing deadline is jurisdictional has resulted in the inequitable denial of the taxpayers' right to Tax Court review of IRS CDP rulings.

I. Timely Filing in the Wrong Forum

In *Haitsuka v. Commissioner*, Tax Court Docket No. 14495-15L, the taxpayer mistakenly timely mailed his Tax Court CDP petition to the IRS. Later, after the statutory due date, the petition was re-mailed to the Tax Court. In an order dated October 9, 2015 (orders can be found on the Tax

Court's website), the Court dismissed the untimely-filed petition for lack of jurisdiction. By contrast, in cases involving the Court of Appeals for Veterans Claims, this common error (i.e., mailing a petition to the office issuing the notice, not the court, coupled with the late arrival of the petition at the court) is one forgiven by equitable tolling under the usual ground of timely filing in the wrong forum. *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).

II. The IRS Sometimes Misleads Taxpayers into Late Filing.

Sometimes, the IRS, unintentionally, actively misleads taxpayers into filing late. That is another ground for equitable tolling.

Misleading IRS behavior does not just happen with respect to CDP notices, but with respect to notices of determination relating to the Tax Court's innocent spouse jurisdiction at § 6015(e)(1)(A). For example, in three cases litigated by the Clinic, during the 90-day filing periods provided in that section, individuals at the IRS told (or wrote a letter giving) the taxpayers the wrong last date to file, on which the taxpayers relied to their detriment. Because the language of that section was held to contain a clear statement that the filing deadline is jurisdictional, the taxpayers lost their right to have the Tax Court consider the issue of their relief from liability for

income taxes arising from joint returns. *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017), *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017), and *Naufflett v. Commissioner*, 892 F.3d 649 (4th Cir. 2018). (It should be noted that in *Myers, supra*, at 1035, the D.C. Circuit’s opinion contrasted the language of § 6015(e)(1)(A) with the language of § 7623(b)(4) (which is much more like the CDP jurisdiction language at § 6330(d)(1) at issue in this case).)

Section 6330(d)(1) has long provided that a Tax Court CDP petition be filed “within 30 days of a determination under this section”. CDP notices of determination do not show a last date to file, but do, in the text of the notices, tell taxpayers that they have a limited period in which to petition the Tax Court. For years, the notices stated: “If you want to dispute this determination in court, you must file a petition with the United States Tax Court for a redetermination *within 30 days from the date of this letter.*” See *Jones v. Commissioner*, T.C. Memo. 2003-29 at *3 (language from notice issued in 2001; emphasis added). At some point, the IRS modified that sentence in the notice to state: “If you want to dispute this determination in court, you must file a petition with the United States Tax Court *within a 30-day period beginning the day after the date of this letter.*” (Emphasis added). Some *pro se* taxpayers took the words “the day after the date of this

letter” to indicate that the 30-day period began a day later, so that the taxpayers had 31 days from the date of the letter to file a timely petition. The Tax Court dismissed eight *pro se* petitions mailed to the Tax Court on the 31st day after the dates of the notices of determination where the taxpayers thought they had 31 days from the date of the letter to file. Two of the taxpayers appealed their dismissals, arguing that the filing deadline was not jurisdictional and should be equitably tolled because of the misleading IRS notice language. In *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), where the Clinic was an *amicus*, the Ninth Circuit held that the CDP filing deadline is jurisdictional. However, days later, in *Cunningham v. Commissioner*, 716 Fed. Appx. 182 (4th Cir. 2018), where the Clinic represented the taxpayer, the Fourth Circuit held that the notice language was not misleading enough to justify equitable tolling, so the court declined to decide whether the filing deadline is jurisdictional.³ Despite winning these two appellate cases, when the IRS was confronted about this confusing

³ Six other Tax Court dockets dismissed presenting identical facts are found at *Swanson v. Commissioner*, Tax Court Docket No. 14406-15S (Jan. 14, 2016 dismissal order); *Pottgen v. Commissioner*, Tax Court Docket No. 1410-15L (Mar. 4, 2016 dismissal order); *Wallaesa v. Commissioner*, Tax Court Docket No. 1179-17L (Apr. 20, 2017); *Saporito v. Commissioner*, Tax Court Docket No. 8471-17L (May 31, 2017 dismissal order); *Integrated Event Management, Inc. v. Commissioner*, Tax Court Docket No. 27674-16SL (May 31, 2017 dismissal order); and *Protter v. Commissioner*, Tax Court Docket No. 22975-15SL (Sept. 26, 2017 dismissal order).

language, the IRS changed the language for future notices, reverting to the former language to eliminate confusion.

The IRS also has a history of sending CDP notices with misleading language or wrong dates on them. For example, in *Weiss v. Commissioner*, 2018 U.S. App. LEXIS 13934 (D.C. Cir. 2018), an IRS Revenue Officer attempted to hand-deliver a notice of intention to levy, but he was deterred by a barking dog. He went back to his office and mailed the notice two days later without changing the date on the notice. Litigation ensued over whether the taxpayer's request for a hearing should have been treated as for a CDP hearing or as for an 'equivalent hearing' (as the taxpayer said he wanted), The ruling depended on the date from which the 30 days was to be counted – the date of the notice's mailing or the date on the notice.

More recently, COVID-19 is going to cause a huge number of IRS collection notices to be sent with incorrect dates shown thereon. Apparently, the IRS created and dated many collection notices and letters before the IRS largely shut down. The IRS did not get to mail the notices before the shut-down. The IRS now says that it will mail out these notices and letters without re-dating them, but will send with each notice an insert explaining that the date on the notice is not to be relied upon. See IRS Statement on Balances Due Notices (Jun. 12, 2020) at <https://www.irs.gov/newsroom/irs->

statement-on-balance-due-notices; IRS National Taxpayer Advocate Blog Post, “Keep an Eye on Your Mailbox: Millions of Backlogged Notices Are Being Mailed Over the Next Few Months, Some Reflect Expired Action Dates. But Don’t Panic, See Inserts Providing Extended Due Dates” (June 22, 2020) at <https://taxpayeradvocate.irs.gov/news/nta-blog-mailbox?category=Tax%20News>. These notices will often be mailed after the date a response is permitted. This is a recipe for confusing taxpayers as to their rights to contest such notices. Without equitable tolling, taxpayers who belatedly contest CDP notices of determination with the wrong dates thereon will lose their ability to get Tax Court review.

III. Circumstances Beyond the Taxpayer’s Control, Such as COVID-19, May Lead to Late Filing.

Finally, Congress has long authorized the IRS to extend certain deadlines in the case of Presidentially-declared disasters. §7508A(a). COVID-19 has triggered such a declaration, and the IRS responded by extending many deadlines, including Tax Court filing deadlines. But, the extension the IRS granted only was from April 1, 2020 until July 15, 2020. Notice 2020-23, § III.C., 2020-18 I.R.B. 742, 743-744. No further extension is anticipated, yet the pandemic has continued. What if a taxpayer is hospitalized for six weeks, starting August 1, 2020, with COVID-19, and the IRS mails her a CDP notice of determination on August 4, 2020? Assume

the taxpayer was intubated and placed in a coma for the six weeks. By the time the taxpayer awakes from the coma, the time to file a Tax Court CDP petition will have expired. Clearly, this would have been a circumstance beyond the taxpayer's control that prevented timely filing. Absent this Court holding that the Tax Court CDP petition filing deadline is not jurisdictional and is subject to equitable tolling, the taxpayer will have lost her pre-payment judicial contest rights. Such a holding would only compound the pandemic's tragedies.

CONCLUSION

This Court should grant the petition for rehearing and hold that the filing deadline in § 6330(d)(1) is not jurisdictional and is subject to equitable tolling.

Respectfully submitted,

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Dated: Sept. 8, 2020

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

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

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Dated: Sept. 8, 2020

CERTIFICATION OF VIRUS SCAN

Pursuant to Eighth Circuit Local Rule 28A(h)(2), this is to certify that the electronic version of this brief has been scanned for viruses using Kaspersky Internet Security Virus Scan and is free of viruses.

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Dated: Sept. 8, 2020

CERTIFICATE OF SERVICE

This is to certify that a copy of this *amicus* brief was served on counsel for the appellant, David C. Thompson, Melissa Arbus Sherry, and Amy Feinberg, Esqs., and counsel for the appellee, Janet A. Bradley and Joan I. Oppenheimer, Esqs., by filing the original with the CM/ECF system on Sept. 8, 2020. All counsel in the case are members of the CM/ECF system.

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