20-1635

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSEFA CASTILLO,

Petitioner-Appellant,

---v.---

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON APPEAL FROM A FINAL ORDER OF
THE UNITED STATES TAX COURT
Docket No. 18336-19L

BRIEF OF PETITIONER-APPELLANT

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Petitioner-Appellant, Josefa Castillo, filed a Petition in the U.S. Tax Court seeking review of the IRS' determination in her Collection Due Process hearing in which she contested the filing of a Federal Tax Lien for unpaid taxes for the year 2014. The alleged unpaid taxes are based on an IRS computer generated audit notice that wrongly attributed income – earned and received by a seafood store that she had sold in 2009 – to Ms. Castillo.[1]

Ms. Castillo petitioned the Tax Court for review of a Collection Due Process determination by the IRS pursuant to I.R.C. [2] § 6330(d)(1) on October 7, 2019. Respondent-Appellee moved to dismiss the Petition for lack of jurisdiction and Petitioner-Appellant opposed. The Tax Court issued a final Order of Dismissal for Lack of Jurisdiction on March 25, 2020. The Plaintiff-Appellant, filed her appeal to this Court on May 19, 2020.

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[1] The IRS computer generated audit notice that attributed the income to Ms. Castillo relied solely on Forms 1099-Ks, merchant services reports, filed by American Express and Bank of America for Visa, Mastercard, and other credit card transactions. The merchant accounts were reported under an employer identification number related to a seafood store that Ms. Castillo sold in 2009. The 2014 tax return filed by the seafood store reported the income which the IRS wrongly attributed to Ms. Castillo and that it was wholly owned by a different individual.

[2] Unless explicitly stated otherwise, all sections refer to provisions of the Internal Revenue Code.

This Court has appellate jurisdiction to review the Tax Court's final Order dismissing the case for lack of jurisdiction under 28 U.S.C. § 7482(a)(1). Venue is proper in this Court, since Ms. Castillo resided in the Bronx, New York on the date she filed her Tax Court petition. 28 U.S.C. § 7482(b)(1).

STATEMENT OF THE ISSUES PRESENTED

I. The Tax Court improperly dismissed Petitioner-Appellant's case for lack of jurisdiction.

II. The Petitioner-Appellant does not owe the taxes at issue.

STATEMENT OF THE CASE

Procedural History

On February 13, 2018, the IRS issued a Notice of Federal Tax Lien Filing and Your Right to a Hearing under section 6320(a) for unpaid taxes, penalties, and interest that it assessed against Petitioner-Appellant for the year 2014.[3]

On March 2, 2018, Ms. Castillo filed a timely request for a Collection Due Process ("CDP") hearing pursuant to sections 6330(b)-(c).[4]

On October 8, 2019, Petitioner-Appellant petitioned the Tax Court for review of a Collection Due Process Notice of Determination pursuant to I.R.C. § 6330(d).[5]

On December 12, 2019, Respondent-Appellee filed an Answer.[6]

On January 6, 2020, Respondent-Appellee filed a Motion to Dismiss for Lack of Jurisdiction.[7]

On January 28, 2020 the Tax Court granted Petitioner-Appellant's request to extend time to file an objection to the Motion to Dismiss until March 2, 2020.[8]

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[3] JA. 3.
[4] JA. 3.
[5] JA. 3.
[6] JA. 14–23.
[7] JA. 26–34.
[8] JA. 39.

On March 2, 2020, Petitioner-Appellant file an Opposition to the Motion to Dismiss with supporting Declarations from Petitioner-Appellant and her counsel, Elizabeth Maresca.[9]

On March 3, 2020, the Tax Court Ordered Respondent-Appellee to file a Response by March 25, 2020.[10]

On March 24, 2020, Respondent-Appellee filed a Response to the Order dated March 3, 2020.[11]

On March 25, 2020, the Tax Court issued a final Order of Dismissal for lack of jurisdiction.[12]

On May 19, 2020, Ms. Castillo filed a timely notice of appeal with the Tax Court contesting the dismissal under § 7483.[13]

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[9] JA. 40–160.
[10] JA. 161–62.
[11] JA. 163–68.
[12] JA. 169–71.
[13] JA. 173–74.

Statement of Facts

Based solely on a computer generated audit notice, [14] the IRS wrongly asserts that Petitioner-Appellant owes over $80,000 of unpaid tax, penalties and interest for the year 2014 even though –

- the underlying income was earned by a seafood store[15] which she had sold five years prior,
- the store filed an income tax return that
  - reported the income, and
  - a different individual was the 100% owner of the store in 2014.[16]

Despite these unproven[17] and clearly inaccurate allegations, Ms. Castillo, a low-income, non-English speaking taxpayer, has been deprived of her only

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[14] JA. 117–23.

[15] The IRS computer generated audit notice that attributed the income to Ms. Castillo relied solely on Forms 1099-Ks, merchant services reports filed by American Express and Bank of America for Visa, Mastercard and other credit card transactions. The merchant accounts were reported under an employer identification number related to a seafood store. JA. Ex. I 117–23, see 119–20.

[16] JA. 90–91, 136–46.

[17] The normal presumption of correctness does not apply to the IRS audit notices based solely on third-party reporting. I.R.C. § 6201(d) (if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return, i.e. forms 1099-K, the Secretary shall have the burden of producing reasonable and probative information concerning such tax deficiency). *See also Portillo v. Comm'r*, 932 F.2d 1128, 1134 (5th Cir. 1991); I.R.C. § 7491.

opportunity to challenge tax assessment in court because the Respondent-Appellant failed to provide a final Collection Due Process Notice of Determination ("Notice of Determination") to her and her legally authorized representative as section 6330 requires. She faces a tax bill in excess of $80,000 which she does not owe and cannot pay.

By Notice of Federal Tax Lien Filing and Your Right to a Hearing under section 6320 dated February 13, 2018, the IRS asserted a lien against Ms. Castillo for unpaid taxes, penalties and interest. On March 2, 2018, Ms. Castillo filed a timely request for a Collection Due Process Hearing ("CDP Hearing") explaining that she did not owe the taxes at issue because they related to Castillo Seafood, a store in Brooklyn, which she sold and ceased all affiliation with in 2009.[18]

By letters faxed to and acknowledged by the IRS on September 25 and 27, 2018, respectively, Ms. Castillo revoked the Form 2848 Power of Attorney ("POA")[19] for her former representative, Victor Molina[20] and filed a new POA appointing her counsel herein ("Counsel") as her authorized IRS representative. As of October 2, 2018, the IRS cancelled Mr. Molina's POA.[21] Several copies of

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[18] JA. 32–33, 85–87, 98.
[19] A Form 2848 authorizes an individual to represent a taxpayer before the IRS. Tax information is confidential and cannot be shared without the taxpayer's consent.
[20] JA. 85–107 ¶¶12–14, Exs. C, D, & E, 112, 157.
[21] JA. 102, 157.

Counsel's POA and the revocation for Mr. Molina were contained in the IRS Administrative file[22] and the IRS hearing officer, Theresa Brideson, ("Settlement Officer") acknowledged that Counsel was the authorized representative for Ms. Castillo in her case notes on September 26, 2018.[23]

By telephone on September 26 and October 11, 2018, Counsel explained to the Settlement Officer that Ms. Castillo was not liable for the underlying tax and that section 6330(c)(2)(B) allowed her to raise the underlying tax liability at the Hearing because she did not receive the Notice of Deficiency, which asserted the taxes due.[24] By letters dated October 19 and November 13, 2018, Counsel confirmed this position.[25] The Settlement Officer failed to respond.[26]

From December 22, 2018 through January 25, 2019, due to a lapse in appropriations, most of the IRS was shut down and, upon information and belief,

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[22] JA. 112, 157, Ex. J. Specifically, Counsel's POA was faxed to both IRS' Settlement Officer (Teresa Brideson) and to the IRS CAF Unit, which processes POAs.
[23] JA. 112 ¶¶ 8–10, Ex. D 100, Ex. E 102, Ex. J 124–28, Ex. K 130–32, 157.
[24] The USPS tracking information for the Final Audit Notice shows that it was returned to the IRS. JA. Ex. B 92–113 ¶¶12–16.
[25] JA. 111–57, Ex. K & L. Although it is well settled that a taxpayer can raise the underlying liability in a CDP Hearing when she does not receive (or refuse receipt) of the Notice of Deficiency, the Settlement Officer's notes inexplicably states that she didn't consider the underlying liability because the Petitioner was "precluded from raising the liability" unless she could "prove that she was out of the country" when the Notice of Determination was mailed. *Tatum v. Commissioner*, 85 T.C.M. 1200 (2003), Treas. Reg. 301.6330-1(e), Q&A (e)(2), I.R.M. 8.22.8.3. JA. 157.
[26] JA. 112 ¶15, 17.

the Settlement Officer and her manager were on furlough.[27] Assuming that the shutdown and the legal issues raised in the October and November letters caused delays at the IRS, Ms. Castillo and her Counsel waited for a response from the Settlement Officer.[28] In spring of 2019, Counsel left phone messages for the Settlement Officer asking about the status of the case, which yielded no response.[29]

With over 20 years of practice before the IRS, Counsel knew that the IRS often took months and even years to respond to a taxpayer request.[30] Thinking that the legal issues and the long government shutdown caused delays to a process that normally takes months to conclude, Ms. Castillo and her Counsel waited to be contacted by the Respondent-Appellant to no avail.[31]

On September 18, 2019, Counsel obtained a 2014 IRS Account Transcript which listed a code with the following explanation, "Collection due process (hearing) resolved by Appeals – Notice of Determination letter issued, you waived judicial review or withdrew the hearing request."[32] On October 7, 2019, Ms. Castillo filed a Petition with the Tax Court, as neither she nor her Counsel ever

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[27] JA. 114 ¶20.
[28] JA. 114, ¶20–23.
[29] JA. 114, ¶¶21–24.
[30] JA. 114 ¶21.
[31] JA. 87 ¶19,114 ¶22.
[32] JA. 159–60.

received a Notice of Determination or withdrew the hearing request.[33] In its Answer, the IRS attached a copy of the Notice of Determination dated December 11, 2018 that it allegedly mailed to Ms. Castillo at her last known address by United States Postal Service ("USPS") certified mail.[34]

The parties agree that Ms. Castillo never received the Notice of Determination.[35] The tracking information for the Notice of Determination confirms that the USPS did not deliver or attempt to deliver it to Ms. Castillo. In fact, it has been "In-Transit" since December 17, 2018.[36] The Notice of Determination indicates that the IRS failed to send a copy to Ms. Castillo's Counsel. Inexplicably, the Settlement Officer sent the copy to Ms. Castillo's previous representative, whose POA and authority to receive any tax documents was revoked months before on September 25, 2018.[37] These USPS and IRS errors effectively prevented Ms. Castillo from filing a Petition with the Tax Court on or before January 29, 2019.[38] A Tax Court proceeding is the only opportunity for Mr. Castillo to challenge the erroneous tax assessment in court without full

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[33] JA. 3–10.
[34] JA. 20–23.
[35] JA. 28 ¶ 7, 87 ¶ 17, 115 ¶¶ 27 & 28.
[36] JA. 29 ¶7, 115 ¶28, 104–05 & Ex. F.
[37] Section 6103(a) provides that taxpayer information is confidential. IRS employees are subject to civil and criminal penalties for unauthorized disclosures. *See, e.g.*, IRS Publication 4761, https://www.irs.gov/pub/irs-pdf/p4761.pdf.
[38] *See Guralnik v Commissioner*, 146 T.C. 230, 252–53 (2016).

payment or filing a bankruptcy petition and bringing an adversary proceeding under 11 U.S.C. § 505.

On January 6, 2020, Respondent-Appellee filed a Motion to Dismiss for Lack of Jurisdiction. On March 2, 2020, Petitioner-Appellant filed an Objection to the Motion with supporting Declarations, arguing that:

1. she does not owe the underlying taxes at issue;

2. the IRS failed to provide a fair hearing and abused its discretion by failing to consider and abate the underlying tax liability;

3. the IRS failed to prove that it mailed the Notice of Determination, and therefore could not show that Ms. Castillo's Petition was untimely;

4. that section 6330(d)(1) is non-jurisdictional and should be equitably tolled in this case; and

5. assuming arguendo, that section 6330(d)(1) is jurisdictional, then the 30-day period did not begin to run until Ms. Castillo had actual knowledge that the Notice of Determination was mailed.[39]

On March 24, 2020 Respondent-Appellee filed a Response clarifying its position that the 30-day period expired on January 29, 2019. One day later, the

[39] JA. 40–83.

Tax Court dismissed on the grounds that it lacked jurisdiction to review the Notice of Determination because the Petition was not filed on or before January 29, 2020. Despite the fact that the issues herein are at the center of a de facto split in the circuit courts, the Tax Court failed to reconsider them.

SUMMARY OF ARGUMENT

The Tax Court improperly dismissed this case for lack of jurisdiction, holding that it lacked subject matter jurisdiction because the petition was filed after the 30-day period in section 6330(d)(1). This wrongful dismissal deprived Petitioner-Appellant of her only opportunity for judicial review of an erroneous tax bill which by Respondent-Appellee wrongfully upheld in the collection due process hearing.

As a preliminary matter, the Respondent-Appellee has not proven that it mailed the Notice of Determination to Ms. Castillo's last known address by certified mail. Although the government bears the burden of proving proper mailing by competent and persuasive evidence, it relies solely on a handwritten mail return form that was not accompanied by an affidavit of a custodian or any other qualified witness. USPS records show that the envelope bearing the tracking number was never delivered. The Tax Court erred in finding that this sole piece of paper sufficiently evidenced that the Respondent-Appellee properly mailed the Notice of Determination.

Section 6330(d)(1) is a non-jurisdictional claim-processing rule subject to equitable tolling. The Tax Court's holding that section 6330(d)(1) is jurisdictional is unsupported by robust Supreme Court precedent that all filing periods are non-jurisdictional, the statutory text, and the legislative history. Prior Tax Court

holdings which the Tax Court used to support the instant dismissal, ignored the Supreme Court precedent; relied on conditional language – "if and only if" – which does not appear in section 6330(d)(1); and ignored legislative history which created a new collection structure intended to increase taxpayers' rights, protect taxpayers from unfair IRS actions, and expand the Tax Court's jurisdiction over those outcomes.

While section 6330(d)(1) states that a taxpayer *may* file her petition within 30-days of the determination, in this case, USPS and IRS errors prevented Ms. Castillo from doing so. Further, Ms. Castillo exercised due diligence in seeking to identify the existence of her claim, sending letters and making phone calls that went unanswered and unreturned. The undisputed facts show that Ms. Castillo's claim should be equitably tolled.

Ms. Castillo does not owe the taxes at issue. That income was earned by a store which she sold in 2009, was reported on the tax return of that store, and the Respondent-Appellant cannot meet its burden to prove otherwise.

The Tax Court improperly dismissed Petitioner-Appellant's case for lack of jurisdiction and she does not owe the taxes at issue.

ARGUMENT

Standard of Review

The Tax Court's conclusions of law are reviewed *de novo* and finding of facts for clear error.[40] The Tax Court's interpretation of statutory language is reviewed *de novo*.[41]

I. THE TAX COURT IMPROPERLY DISMISSED THIS CASE FOR LACK OF JURISDICTION.

A. The IRS Did Not Carry Its Burden of Proving Proper Mailing and Therefore Has Not Proved that the Petition Was Untimely.

As a threshold matter, the IRS has not proven that it sent the Notice of Determination to Ms. Castillo's last known address by certified mail.[42] The government bears the burden of proving proper mailing by competent and persuasive evidence.[43] As proof of mailing, the IRS merely attached to its Motion to Dismiss a photo copy of a handwritten Certified Mail Return Receipt Approval

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[40] *Cinema '84 v. Commissioner*, 294 F.3d 432, 435 (2d Cir. 2002); *Am. Int'l Group, Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 778 (2d Cir. 2013); *U.S. v. L-3 Commc'ns EOTech, Inc.*, 921 F.3d 11, 18 (2d Cir. 2019).
[41] *Parisi v. Goldman Sachs & Co.*, 710 F.3d 483, 486 (2d Cir. 2013).
[42] *See Weber v. Commissioner*, 122 T.C. 258, 261–62 (2004) ("a notice of determination issued pursuant to sections 6320 and/or 6330 is sufficient if such notice is sent by certified or registered mail to a taxpayer at the taxpayer's last known address").
[43] *See Welch v. United States*, 678 F.3d 1371, 1376 (Fed. Cir. 2012); *see also Knudsen v. Commissioner*, 109 T.C.M. (CCH) 1374 (T.C. 2015) (declining to give the IRS a presumption of regularity where it offered a defective, unsigned Form 3877 as proof of mailing).

Form and an unverified handwritten certified mail receipt.[44] The copy of the certified mail receipt obscures the signature of the "APS Manager."[45] These documents were not accompanied by an affidavit of the record's custodian or any other qualified witness. Further, the IRS failed to establish that the envelope in which they allegedly mailed the Notice of Determination was properly addressed, had proper postage attached, or was otherwise free from defect, any of which could explain the USPS' failure to deliver.[46] The documents relied upon by the IRS should be disregarded by this Court; they are hearsay, not self-authenticating, and not accompanied by a declaration or affidavit from an individual with personal knowledge.[47]

In its Order of Dismissal, the Tax Court found that although the IRS did not comply with the mailing procedure outlined in the IRS Manual (i.e., a properly completed USPS Form 3877 certified mail log)[48] it nonetheless proved proper mailing. The Tax Court erred by relying on *Welch*, which held that where the government cannot provide a Form 3877, it can meet its burden to prove proper

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[44] JA. 34.
[45] *Id.*
[46] JA. 28, ¶ 7, 87 ¶ 17, 103–05 Ex. F, 115 ¶ 28.
[47] *See* Fed. R. Evid. 801, 803, and 902.
[48] Records of certified and registered mailing should be kept on PS Form 3877 together with the certified/registered mail numbers, which are supplied by the United States Postal Service. *See* I.R.M. 4.8.9.11.3.

mailing with "otherwise sufficient" evidence.[49] However, the evidence deemed "otherwise sufficient" in *Welch* was much stronger than the scant evidence the IRS provided in the present case. In *Welch*, the "otherwise sufficient" evidence consisted of: (1) an internal IRS Appeals Case Memorandum; (2) the sworn declaration of the Lead Tax Examiner for Appeals in the IRS' Manhattan Office regarding that office's mailing procedures; (3) the computer-generated control card for the taxpayers; and (4) an associated transmittal letter to the taxpayers' attorney, explaining that the notice had been sent to his clients.[50]

In stark contrast, the IRS has not presented conclusive, admissible evidence establishing proper mailing of the Notice of Determination. Even using the more lenient *Welch* standard of "otherwise sufficient" evidence, Respondent-Appellee has not met its burden. The Tax Court, relying on an erroneous finding that the IRS established proof of mailing, erred in finding that the petition was untimely.

B. I.R.C. § 6330(d)(1) is a Non-Jurisdictional Claim-Processing Rule Subject to Equitable Tolling.

The Tax Court erred in granting the IRS' Motion to Dismiss for Lack of Jurisdiction. Section 6330(d)(1), which enables Ms. Castillo to seek review from the Tax Court, is a non-jurisdictional claim-processing rule subject to equitable

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[49] 678 F.3d at 1377.
[50] *Id.* at 1379.

tolling. Prior holdings, including the decision below, that erroneously hold that the 30-day period in section 6330(d)(1) is a jurisdictional time bar –

- violate the strong Supreme Court presumption that time periods are claim-processing rules subject to equitable tolling,
- are at odds with the plain language of the statute, and
- contradict the legislature's intent to protect taxpayers from unfair outcomes.[51]

1. Supreme Court Precedent Provides That Time Periods to Petition a Court are Presumptively Non-Jurisdictional.

The 30-day period must be considered non-jurisdictional. Under Supreme Court precedent, there is a strong presumption that time filing periods are non-jurisdictional.[52] The Court has "pressed a stricter distinction between truly jurisdictional time bars, which govern a court's adjudicatory authority, and non-jurisdictional claim-processing rules, which do not."[53] The common practice of loosely reading jurisdiction in statutory provisions has drastic implications for

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[51] *See e.g., Boechler, P.C. v. Commissioner*, 967 F.3d 760 (8th Cir. 2020); *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018); *Guralnik*, 146 T.C. 230.
[52] *U.S. v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015).
[53] *Myers v. Commissioner*, 928 F.3d 1025, 1034 (D.C. Cir. 2019) (citing *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)); *see also, Fort Bend County, Texas v. Davis*, 139 S.Ct. 1843 (2019) (holding mandatory claim-processing rules are not jurisdictional).

individual complainants and the justice system at large[54] and mischaracterization of statutes as jurisdictional served as the impetus for the Supreme Court to scrutinize its usage.[55] The strong presumption that filing deadlines are non-jurisdictional may only be rebutted if Congress has "clearly state[d]" as such.[56] A high degree of clarity from Congress is required before the Court will find that a statute is jurisdictional.[57] If the statutory language does not "plainly show that Congress imbued a procedural bar with jurisdictional consequences," a jurisdictional designation is prohibited.[58] While there are no "magic words" for Congress to make a statute jurisdictional, the Supreme Court has been highly skeptical of interpretations that find procedural rules to be jurisdictional

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[54] *Wong*, 575 U.S. at 410; *see also*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) ("Branding a procedural rule as going to a court's subject-matter jurisdiction alters the normal operation of the adversarial system.")
[55] *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.")
[56] *Shinseki*, 562 U.S. at 430 (2011) (stating that the severe consequences that result from a jurisdictional label warrant a strong non-jurisdictional presumption); *see also*, *Wong*, 575 U.S. at 409.
[57] *Shinseki*, 562 U.S at 430; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006) (establishing an "administrable bright line" rule to determine whether a time limitation is a jurisdictional requirement).
[58] *Wong*, 575 U.S. at 410.

mandates.[59] Furthermore, since the word "jurisdiction" is imprecise, its presence within the statutory text is not enough to render the statute as jurisdictional.[60] In sum, if the statutory language is ambiguous – i.e., if reasonable minds could differ as to its meaning – then the time period must be deemed a non-jurisdictional claim-processing rule.[61] There is no such clear statement in section 6330(d)(1). The 30-day period in section 6330(d)(1) is an example of a claim-processing rule that "promote[s] the orderly progress of litigation," not an absolute bar on the court's ability to hear the underlying claim. [62]

2. The Plain Language Of I.R.C. § 6330(D)(1) Supports That It Is Non-Jurisdictional.

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[59] *Musacchio v. United States*, 136 S. Ct. 709 (2016) (rejecting the argument that the mandatory nature of 18 U.S.C. 3282(a) limitation period made it jurisdictional); *Arbaugh,* 564 U.S. at 501 (holding that the employee-numerosity requirement of fifteen employees for purposes of an employer's status in a Title VII claim was not a jurisdictional mandate).

[60] *United States v. Prado,* 933 F.3d 121, 141 (2019) ("the verbal formulation of statutes conferring subject matter jurisdiction on the courts uniformly adopt a very different terminology"); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (finding that the word "jurisdiction" within 17 U.S.C. §411(a) did not imply that the copyright registration requirement was also jurisdictional).

[61] The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. Other authority holds that statutory language is ambiguous if it is capable of more than one reasonable interpretation.

[62] *Wong*, 575 U.S. at 410 ("Time and again, we have described filing deadlines as quintessential claim-processing rules")(internal quotations omitted).

Section 6330(d)(1) is non-jurisdictional because it fails to rebut the Supreme Court's strong presumption, and the traditional tools of statutory construction support that conclusion. Courts give varying weight to the statute's text, context, and relevant historical treatment, [63] however it is customary to analyze the statutory text first. [64] Section 6330(d)(1) reads:

> (d) PROCEEDING AFTER HEARING.
>
> (1) PETITION FOR REVIEW BY TAX COURT.–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).[65]

A textual analysis of section 6330(d)(1) suggests that it is a claim-processing rule because the grant of jurisdictional clause is both separate and distinct from the 30-day clause. The phrase, "(and the tax Court shall have jurisdiction with respect to such matter)." grants jurisdiction to the Tax Court. But a time period's proximity to a jurisdictional grant is not enough to render a statute jurisdictional.[66] Congress separated the 30-day clause from the jurisdictional language by the conjunctive "***and***," a grammatical device most naturally used to convey two

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[63] *Musacchio*, 136 S.Ct. at 712 (citing *Muchnick*, 559 U.S. at 166).
[64] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("the best evidence of Congress's intent is the statutory text").
[65] Section 6330(d)(1).
[66] *Auburn*, 568 U.S. at 145 ("A requirement we would otherwise classify as non-jurisdictional . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions.")

independent ideas.[67] "Such matter" refers to the subject matter of the appeal – namely, "petition that Tax Court for review of such determination" – and not the requirement that a petition be filed "within 30-days."[68]

a. Second Circuit Jurisprudence Supports a holding that I.R.C. § 6330(d)(1) is Non-jurisdictional.

Second Circuit jurisprudence supports a finding that section 6330(d)(1) is non-jurisdictional.[69] In *Matuszak,* this Court acknowledged that the Supreme Court has brought discipline to the term jurisdiction because of the "drastic consequences" of labeling a statute as jurisdictional.[70] The presumption that time periods are non-jurisdictional means that it takes a significant and clear statement from Congress to find that a time period is a jurisdictional time bar.[71] This Court held that section 6015(e)(1)(A)[72] is jurisdictional because it "references the Tax

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[67] *Nielsen v. Preap*, 139 S.Ct. 954, 965 (2019) ("[w]ords are to be given the meaning that proper grammar and usage would assign them . . . rules of grammar govern statutory interpretation") (internal quotations omitted); *see also, United States v. Ron Pair Enterprises*, 489 U.S. 235 (1989).
[68] Section 6330(d)(1).
[69] *See Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2012).
[70] *Id.* at 195 (citing *Gonzalez v. Thaler*, 556 U.S. 134, 141 (2012)).
[71] *Matuszak*, 862 F.3d at 196 ("Statutes of limitation and other filing deadlines typically fall into the [ ] category [of non-jurisdictional claim-processing rules]") (citing *Gonzalez*, 556 U.S. at 141).
[72] Section 6015(e)(1)(A) reads as follows:
(e) PETITION FOR REVIEW BY TAX COURT.—

Court's jurisdiction" *and* uses the word "if" to condition that jurisdiction "on the timely filing of a petition."[73] While in certain circumstances other courts have held that conditional language renders a statute jurisdictional, the Supreme Court has held that conditional language by itself is insufficient to support a jurisdictional interpretation.[74] In *Auburn*, the Court found the 180-day period in 42 U.S.C. § 1395oo(a) was not a jurisdictional time bar despite the fact that the word "if" preceded the 180-days and was within the same sentence as the grant of

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(1) IN GENERAL.—In the case of an individual against whom a deficiency has been asserted and who elects to have subsection (b) or (c) apply, or in the case of an individual who requests equitable relief under subsection (f)--

(A) IN GENERAL.—In addition to any other remedy provided by law, the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed—

(i) at any time after the earlier of—

(I) the date the Secretary mails, by certified or registered mail to the taxpayer's last known address, notice of the Secretary's final determination of relief available to the individual, or

(II) the date which is 6 months after the date such election is filed or request is made with the Secretary, and

(ii) not later than the close of the 90th day after the date described in clause (i)(I).

(Emphasis added.)

[73] *Matuszak*, 862 F.3d at 198; *see also*, *Maier v. Commissioner*, 360 F.3d 361 (2d Cir. 2004) (holding that section 6015(e) only permits a requesting spouse to petition the court).

[74] *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 155 (2013) (holding that the 180-day statutory filing period 42 in U.S.C. § 1395oo(a) which allows Medicare providers to appeal under-reimbursement claims on a was not a jurisdiction time bar).

jurisdiction.[75] Since section 6330(d)(1) is missing the crucial conditional "if," the 30-days is not "one of the 'rare' statutory periods that speak in clear jurisdictional terms."[76] The Supreme Court's non-jurisdictional presumption is not overcome by a plain text reading of section 6330(d)(1).

The D.C. Circuit agreed with this Court's reasoning in *Matuszak*[77] in holding that a petition filed outside of the 30-day period in section 7623(b)(4), a similarly-worded statute, does not deprive the Tax Court of jurisdiction.

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).

In *Myers*, the D.C. Circuit held that section 7623(b)(4) is non-jurisdictional for two reasons: (1) U.S. Supreme Court precedent states that the default interpretation of statutory provisions should be non-jurisdictional and; (2) courts should resist jurisdictional interpretations of statutory provisions when there is no clear statement from Congress to support that interpretation.

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[75] *Id.* ("This case is scarcely the exceptional one in which a century's worth of precedent and practice in American courts rank a time limit as jurisdictional.") (internal quotations omitted)
[76] *Matuszak*, 862 F.3d at 196 (citing *Wong*, 575 U.S. at 409).
[77] *Myers*, 928 F.3d at 1035 (citing *Matuszak*, 862 F.3d 197–98).

The *Myers* court correctly applied the Supreme Court's clear statement rule declaring, "Congress must make *unmistakable* its intent to deprive the Tax Court of authority to hear an untimely petition."[78] To contextualize the level of clarity required, both the D.C. Circuit and the Second Circuit noted that the Supreme Court has yet to identify a single filing deadline that meets the 'clear statement' rule,[79] as is the case here. The *Myers* court concluded that section 7623(b)(4) was ambiguous because words linking the time period for filing to the grant of jurisdiction were wholly absent from the text.[80] The D.C. Circuit did "not attach dispositive significance to the proximity between . . . the time period and the jurisdictional grant."[81] It also found that the term "such matters" refers to the subject matter of the appeal (i.e., any determination made under this section) but not the 30-day period. The D.C. Circuit properly found the jurisdictional grant to be a new clause, independent from the 30-days; placing the jurisdictional grant in parentheses and utilizing the conjunctive "and" sufficiently establishes a demarcation between the two clauses. Section 6330(d)(1) also uses parenthesis and the conjunctive "and" to separate the clauses. Accordingly, the reasoning as to

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[78] *Myers*, 928 F.3d at 1035 (citing *Shinseki*, 562 U.S. at 435 (claiming an "unusually high degree of clarity [is required] to trigger the 'drastic' consequences that attach to the jurisdictional label.")
[79] *Myers*, 928 F.3d at 1035; *Matuszak*, 862 F.3d at 196.
[80] *Myers*, 928 F.3d at 1034.
[81] *Id.* at 1035.

why section 7423 is non-jurisdictional supports a similar holding for section 6330(d)(1).

3. The Legislative History Behind Section 6330 Shows That Congress Did Not Intend Section 6330(d)(1) to be Jurisdictional.

Section 6330(d)(1), a taxpayer's ticket into Tax Court to appeal a CDP determination, came into law as part of the 1998 IRS Restructuring and Reform Act ("RRA"), whose entire purpose was to reform the IRS to make it more "taxpayer-friendly."[82] In enacting the RRA, Congress aimed to increase taxpayers' rights, protect taxpayers from unfair outcomes, and expand the Tax Court's jurisdiction toward those outcomes. It established a civilian IRS Oversight Board, new Tax Court jurisdiction to review responsible person penalties, innocent spouse protections, and added an entire 30-page section dedicated to "Protections for Taxpayers Subject to Audit or Collection Activities."[83]

Congress included CDP in the RRA to address the hardships that taxpayers faced when dealing with forced IRS collection actions. CDP provides taxpayers with notice, a fair hearing, and an opportunity for judicial review.[84] The law requires the IRS to send a Notice of Federal Tax Lien or a Notice of Intent to Levy

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[82] 2001 CRS Report for Congress. IRS: Status of Restructuring and Reform at the Opening of the 107th Congress, March 22, 2001, Summary.
[83] H.R. Rep. 105-599 (1997).
[84] I.R.C. §§ 6320, 6330.

and provides a CDP hearing with the IRS settlement officer if requested by the taxpayer. The hearing concludes with the issuance of a final determination, i.e., a Notice of Determination, which sets forth the IRS' decision in the case and provides the taxpayer with the right to petition the Tax Court for a redetermination of the agency's findings.[85] Interpreting the 30-day period as a jurisdictional time bar directly contradicts the purpose of the RRA. The legislative history of this taxpayer-friendly bill shows that Congress did not intend the "harsh consequences" of finding the 30-day period to be jurisdictional.[86]

a. Section 6330(d)(1) is Non-Jurisdictional Because Congress Did Not Use a Conditional "If" in Granting Jurisdiction to the Tax Court.

In the RRA, Congress enacted section 6330(d)(1), and section 6015 which established new innocent spouse rights and granted the Tax Court jurisdiction to review them. A good example of the clear statement rule, section 6015(e), states "the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section *if such petition is filed* . . . at any time after the earlier of . . ." Congress clearly designated section 6015(e) as jurisdictional by using the

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[85] *Id.*
[86] *Id.* at 409.

conditional link, "if" and "not later than," thereby tying the jurisdiction of the Tax Court to timely filing.[87]

Unlike section 6015(e), Congress omitted the conditional "if" from section 6330(d)(1) indicating that it did not intend the 30-day period to be jurisdictional.[88] When there are particular conditions in a statute that are not present in another one contained in the same Act, it is presumed that Congress intended the disparity.[89] In other words, Congress' decision to exclude any conditional language from section 6330(d)(1) is presumed to be intentional and thus, the statute fails the clear statement rule needed to overcome the Supreme Court's non-jurisdictional presumption.

b. Congress Omitted Heightened Mailing Requirements from Section 6330 That Require Registered or Certified Mail and Gives the Taxpayer Significantly More Time to Petition the Tax Court.

When Congress drafts a tax statute which intends to contain a jurisdictional time bar, it protects taxpayers by requiring certified or registered mail to their last known address and provides 90 days to file a petition in Tax Court. In both

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[87] *Matuszak*, 862 F.3d at 198; section 6015(e)(1)(A).
[88] Section 6330(d)(1) "(and the Tax Court shall have jurisdiction with respect to such matter)."; section 6015(e)(1)(A) "(and the Tax Court shall have jurisdiction) . . . if such petition is filed--"
[89] *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)).

sections 6015 and 6212, Congress requires a secure method of mailing–certified or registered to the taxpayer's last known address–and grants the taxpayer 90 days (150 days to a taxpayer who is out of the country) to petition the Tax Court.[90] There are no similar mailing requirements in section 6330(d)(1), which only provides 30 days indicating that Congress intended that section 6330 be non-jurisdictional. Congress would not attach the "drastic consequences" of jurisdiction to a statute that did not require secure mailing, and only gave the taxpayer 30 days to protect their rights.[91]

4. Tax Court Holdings That Section 6330(d)(1) is Jurisdictional are Wrong.

The Tax Court's holding that section 6330(d)(1) is jurisdictional and does not allow for equitable tolling[92] is misguided for three reasons.

First, it embraces tax exceptionalism, or interpreting statutes differently merely because a statute relates to tax matters.[93] Tax exceptionalism has been

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[90] Sections 6015(e)(1)(A)(i)(I) and 6212(a). Section 6212 contains the requirements that the IRS must follow to properly send a notice of deficiency to a taxpayer that is then used to petition the Tax Court under section 6213.
[91] *Matuszak*, 862 F.3d at 195 (citing *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)).
[92] *Guralnik v. Commissioner*, 146 T.C. 230, 235–36 (2016).
[93] *See Mayo Foundation v. United States*, 562 U.S. 44, 55 (2011).

repeatedly disallowed by the Supreme Court.[94] Indeed, in *Guralnik*, the Tax Court criticized Petitioner's citation of "a line of Supreme Court cases outside the tax arena."[95] To support this disallowed tax exceptionalism, the Tax Court relied on precedent[96] that predates the Supreme Court's recent approach to interpreting statutory provisions and the 1998 RRA which, by adding due process protections, fundamentally changed the way the IRS is permitted to collect delinquent tax debt.

Second, the *Guralnik* Court held "the plain meaning of [section 6330(d)(1)] 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."[97] The Tax Court added "if and only if" out of whole cloth. Those words are not in the statute and the Tax Court does not and cannot provide how or where it found the conditional language that it relied on for its holding. There is no conditional language in section 6330(d)(1) to justify this interpretation.

Third, the *Guralnik* Court relied on "precedents holding that the 90-day period prescribed by section 6213(a) sets forth a jurisdictional deadline."[98]

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[94] *Id*. ("[W]e are not inclined to carve out an approach to administrative review good for tax law only").
[95] *Guralnik*, 146 T.C. at 235.
[96] *See, e.g.*, *United States v. Brockamp*, 519 U.S. 347 (1997)(superseded by statute); *United States v. Dalm*, 494 U.S. 596 (1990).
[97] *Guralnik*, 146 T.C. at 235. (internal quotations omitted; emphasis added).
[98] *Id*. at 237.

However, these are different statutes with different purposes and language. Section 6213(a) cannot be used to justify a finding that section 6330(d)(1) is jurisdictional. Section 6213(a) has a 90-day period and requires the IRS to send the Notice of Deficiency by certified or registered mail to the taxpayer's last known address. Those protections are not found in section 6330(d)(1) because Congress intended that the section be non-jurisdictional and subject to equitable tolling.

a. The Eight and Ninth Circuit Erroneously Followed the Tax Court Holding.

The Eighth and Ninth simply accepted and relied on the Tax Court's misguided reasoning in *Guralnik*.[99] In *Duggan*, the Ninth Circuit justified ruling the 30-day period in section 6330(d)(1) as jurisdictional by first establishing that "the test is whether Congress made a clear statement, not the clearest statement possible."[100] The court does not, however, specify any congressional statement, or any "clear" qualities of the provision that render section 6330(d)(1) jurisdictional. *Duggan* agrees that "mere proximity will not turn a rule that speaks in non-jurisdictional terms into a jurisdictional hurdle" and then inexplicably concludes

[99] *See*, *Boechler v. Commissioner*, 967 F.3d 760 (8th Cir 2020); *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018).
[100] *Duggan*, 879 F.3d at 1034.

that the 30-days is a time bar merely because it is mentioned "in the same breath as the grant of jurisdiction."[101] As previously discussed, the conjunctive "and" between the filing period and the jurisdictional grant create two independent clauses separating the 30-days period from the grant of subject matter jurisdiction.[102]

The Eight and Ninth Circuit both misinterpret the parenthetical, "(and the Tax Court shall have jurisdiction with respect to such matter)" in holding that the 30 days is a jurisdictional time period.[103] "[S]uch matter" refers to the grant of subject matter jurisdiction allowing the Tax Court to review CDP determinations. Congress did not limit that jurisdiction to petitioners who filed within 30 days. If it intended that result, the statute would instead read "and the Tax Court shall have jurisdiction with respect to such matter *if the appeal is brought within such period*."[104] *Myers* relies on the *Matuszak* reasoning and explained that section 6015(e) "shows one way the Congress could have more clearly conditioned the Tax Court's jurisdiction upon timely filing" by stating within the parenthetical "the

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[101] *Id*. (citing *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012)).
[102] This "same breath" argument is synonymous to the proximity argument, which has been rejected by the Supreme Court on countless occasions. *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012).
[103] *Boechler, P.C., v. Commissioner*, 967 F.3d 760 (8th Cir. 2020) (citing *Fort Bend Cty. V. Davis*, 139 S.Ct. 1843 (2019)).
[104] *Myers*, 928 F.3d 1025 n. ‡.

Tax Court shall have jurisdiction with respect to such matter if the appeal is brought within such period."[105]

The Eighth and Ninth Circuit also relied on the conditional language, "*if and only if*" that the Tax Court invented in *Guralnik*. As explained above, the Supreme Court precedent makes clear that section 6330(d)(1) is non-jurisdictional. There is no conditional language linking the 30-days with the grant of jurisdiction and there is no clear and unambiguous statement from Congress to overcome the presumption. Congress used the conjunctive "and" in section 6330(d)(1) and the legislative history supports a holding that the Tax Court's subject matter jurisdiction is not conditioned on the filing of a petition within the 30-day period. The Eighth and Ninth Circuits' holdings are unsupported and unpersuasive.

b. The Stare Decisis Exception Should not Apply.

Since the 2004 opinion in *Kontrick v. Ryan*,[106] only two Supreme Court opinions have held that a time period is jurisdictional. In those holdings, the Supreme Court explicitly relied on the fact that they had considered those specific filing periods as jurisdictional for over 100 years.[107] On numerous occasions, the

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[105] *Id.*
[106] 540 U.S. 443 (2004).
[107] *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007).

stare decisis exception has been articulated only to apply to processions of Supreme Court opinions.[108] Further, the stare decisis exception does not apply to holdings of lower courts[109] and the Supreme Court has never ruled as to whether any Tax Court filing deadline is jurisdictional. The Tax Court erroneously applied the stare decisis exception to its own opinions. The exception does not apply here.

5. The 30-day Period in Section 6330(d)(1) is Subject to the Presumption of Equitable Tolling and Should be Tolled Here Because Ms. Castillo was Prevented from Learning About her Claim and Exercised Due Diligence During the Intervening Period.

Ms. Castillo can seek review from the Tax Court because non-jurisdictional statutes, such as section 6330, are subject to a presumption of equitable tolling.

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[108] *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843, 1849 (2019) (Ginsburg, J., writing for a unanimous Court) ("the Court has stated it would treat a requirement as 'jurisdictional' when 'a long line of [Supreme] Cour[t] decisions left undisturbed by Congress attached a jurisdictional label to the prescription'"; citations omitted; brackets and bracketed material as in original); *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 20 n.9 (2017); *Wong*, 575 U.S. at 416; *Gonzalez*, 565 U.S. at 142 n.3 (2012); *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011); *Reed Elsevier*, 559 U.S. at 168; *Union Pacific Railroad v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment*, 558 U.S. 67, 82 (2009).

[109] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 173–74 (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).

Extraordinary circumstances, USPS and IRS errors, prevented Ms. Castillo from filing her petition within the 30-day period and she exercised due diligence throughout the period she seeks to toll.

a. Section 6330(d)(1) is Subject to a Presumption of Equitable Tolling.

In actions against the government, non-jurisdictional statutes, such as section 6330, are subject to a presumption of equitable tolling.[110] This presumption "was adopted in part on the premise that such a principle is likely to be a realistic assessment of legislative intent,"[111] and it can only be rebutted if Congress specifies.[112] The government bears the burden to show that the statute is not subject to equitable tolling.[113]

The *Irwin* presumption of equitable tolling applies to section 6330 because Congress never stated otherwise. The Tax Court[114] is not an "internal" "administrative body," its petitioners are typically pro se,[115] and the legislative

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[110] *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96 (1990); *Myers*, 928 F.3d at 1036 (citing *Holland v. Florida*, 560 U.S. 631, 645–46 (2010)).
[111] *Myer*s, 928 F.3d at 1036 (citing *Sebelius*, 568 U.S. at 159) (cleaned up).
[112] *Id.*; *see also Irwin*, 498 U.S. at 96.
[113] *Irwin*, 498 U.S. at 94.
[114] *Id.*
[115] A large majority, 68%, of the CDP cases in the Tax Court are filed by pro se petitioners. In fiscal 2018, 74% of CDP petitions were filed pro se, 1,409 of 1,914). *Id.* This is in stark contrast to statutes that are ***not*** subject to equitable tolling, i.e. statutes that are mainly litigated by "'sophisticated' institutional providers assisted

history supports the *Irwin* presumption.[116] It is hard to imagine a more remedial structure than the CDP protections that Congress added to the Internal Revenue Code in 1998. Congress enacted section 6330(d)(1) as part of a new statutory structure designed to increase taxpayer rights, protect taxpayers from perceived IRS abuses, unduly harsh inequitable collection action and to protect them from unfair outcomes during the collection process.[117] Missing a deadline restarts a burdensome collection process and could lead to dire results for the taxpayer,[118] exactly the type of consequences that Congress intended to prevent through the new collection due process protections. The remedial nature of section 6330(d)(1) clearly shows that it is subject to equitable tolling.[119]

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by legal counsel" who were "repeat players who elect to participate in the Medicare system. . . ." which would not be subject to equitable tolling. *Sebelius*, 568 U.S. at 160 (internal quotations omitted).

[116] *Myers*, 928 F.3d at 1037 (citing *Young v. United States*, 535 U.S. 43, 49 (2002) (citations omitted) ("It is hornbook law that limitations periods are customarily subject to equitable tolling") (cleaned up).

[117] *See supra* Section I(B)(iii); *see also Myers* (holding that the 30-day period in section 7623(b)(4) is subject to equitable tolling; Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 77–88 (2009)(The 1998 RRA was enacted to protect taxpayers against abuse by IRS employees during the collection process.)

[118] "Given what is at stake in CDP cases, any confusing or inadequate correspondence can have grave consequences for a taxpayer's rights." National Taxpayer Advocate 2018 Annual Report to Congress, Vol. I, 213.

[119] The D.C. Circuit held that section 7623(b)(4), with its near identical language, was subject to equitable tolling, even though the only thing at stake was the denial of a windfall once the filing period is missed. *Myer*s, 928 F.3d at 1037.

The government has argued in the past that subjecting the 30-day period in 6330(d)(1) to equitable tolling creates serious administrative challenges because it would open the floodgates for an unmanageable number of claims. This argument is imaginary and unsupported by the government's own statistics. The overwhelming majority of tax collections, over 98% of the $3.25 trillion of tax receipts, are collected without any delinquent collection action on the part of the IRS. The majority of the remaining 1.5% to 2% is collected in response to IRS computer issued "balance due notices" without any additional action or burden on the part of the IRS.[120] Further, CDP cases represent only 5% of the Tax Court's total inventory: CDP petitions comprise only 1,747 of the total 29,700 matters filed in the Tax Court per year.[121]

b. Under Supreme Court and Second Circuit Precedent, the Facts of this Case Justify Equitable Tolling.

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[120] IRS Data Book, https://www.irs.gov/statistics/soi-tax-stats-all-years-irs-data-books. Historic tables provide collection details. See e.g., 2006 IRS Data Book, Table 16.

[121] ABA Section of Taxation, 2019 May Meeting, Court Procedure & Practice, Current Developments, Rich Goldman, Deputy Associate Chief Counsel (Procedures & Administration) (Reporting that in the 10-year average of total Tax Court receipts was 29,700 and total CDP petitions was 1,747 of which 1,194 were filed pro se. In fiscal 2018, 74% of CDP petitions were filed pro se, 1,409 of 1,914). (May 10, 2019). Presentation is discussed here: https://procedurallytaxing.com/statistics-on-cases-in-litigation-from-aba-tax-section-meeting-in-may/ and available here: http://procedurallytaxing.com/wp-content/uploads/2019/08/Group-I-Releasable.pdf

To qualify for equitable tolling, a plaintiff must establish that: (1) extraordinary circumstances prevented her from filing her claim on time, and (2) she acted with reasonable diligence throughout the period she seeks to toll.[122] Both prongs of this test are satisfied here. IRS and USPS errors prevented Ms. Castillo from filing her petition within the 30-day period and she acted with reasonable diligence during the intervening period.

According to the Supreme Court, the first prong of the equitable tolling test is met "only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond [her] control."[123] Similarly, this court has held that equitable tolling is appropriate "[w]here defendant is responsible for concealing the existence of a plaintiff's cause of action."[124] This concealment need not be purposeful: "[t]he relevant question is not the intention underlying the defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action."[125]

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[122] *Irwin*, 498 U.S. at 96; *see also Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Holland*, 560 U.S. at 648; *Parada v. Banco Indus. De Venezuela, C.A.*, 753 F.3d 62, 71 (2d Cir. 2014); *Gonzalez v. Hasty*, 651 F.3d 318, 322 (2d Cir. 2011) (equitable tolling is necessary to prevent unfairness to a plaintiff who is not at fault for her lateness in filing).
[123] *Menominee Indian Tribe of Wisc. v. United States*, 136 S. Ct. 750, 752 (2016) (internal quotation marks and citations omitted).
[124] *Veltri v. Building Services 32B-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004).
[125] *Id.*

The IRS asserts that the Notice of Determination was mailed on December 11, 2018,[126] but as the parties agree, the USPS did not deliver or attempt to deliver it; it has been "In-Transit," since December 17, 2018.[127] Despite diligently checking her mail and taking measures necessary to ensure receipt of certified mail,[128] Ms. Castillo never received the Notice of Determination until after she filed her Petition in the Tax Court.[129]

The IRS compounded the USPS mistake by misdirecting the representative's copy of the Notice of Determination to the wrong representative. Despite having had repeated contact with Counsel and although it acknowledged and confirmed the receipt and revocation of the prior representative's authority, the Settlement Officer misdirected the Notice of Determination to the wrong representative and Counsel never received it.[130]

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[126] JA. 16, 34, 27.
[127] JA. 104, 28 ¶7.
[128] JA. 87 ¶19.
[129] JA. 87 ¶16, 114 ¶25–27.
[130] Sending the Notice of Determination to the wrong representative violated several federal statutes, section 6103 which ensures the confidentiality of taxpayer information; section 7431(a) which provide civil damages when an IRS employee knowingly or negligently discloses taxpayer information; and section 7803 which ensure that "[IRS employees] act in accord with taxpayer, including . . . the right to be informed." In violating these provisions, the IRS' actions ensured that Ms. Castillo remained ignorant of her right to file her Petition with the Tax Court.

The USPS and IRS errors prevented Ms. Castillo from receiving the Notice of Determination. This is a rare case where the taxpayer possesses undeniable proof of non-receipt,[131] and the fault clearly lies with the USPS and the IRS.

Petitioner-Appellant also meets the second prong of this Court's equitable tolling test: the due diligence requirement. Equitable tolling is appropriate when "despite all due diligence a [plaintiff] is unable to obtain vital information bearing on the existence of his claim."[132] "The standard is not 'extreme diligence' or 'exceptional diligence,' it is *reasonable* diligence . . . *under the circumstance*s."[133]

Ms. Castillo's CDP hearing originally was scheduled for September 26, 2018.[134] On that day, Counsel and the Settlement Officer had preliminary discussions about the merits of the case and agreed to speak again[135] on October 11, 2018. During these calls, Counsel informed the Settlement Officer that Ms. Castillo wanted to raise the underlying tax liability in the Hearing and would send

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[131] JA. 104.
[132] *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 182 (2d Cir. 2008) (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990)).
[133] *Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003) (emphasis in original); *see also Holland*, 560 U.S. at 653 ("The diligence required for equitable tolling purposes is 'reasonable diligence' . . . not 'maximum feasible diligence') (citations omitted) (cleaned up).
[134] JA. 112 ¶11.
[135] *Id.*

a letter explaining the legal issues in the matter.[136] On October 19, 2018[137] and November 13, 2018,[138] Counsel sent letters explaining that under section 6330(c)(2)(B), Ms. Castillo was permitted to raise the underlying liability in her CDP Hearing, that she did not owe the underlying tax liability,[139] and that she was entitled to a fair Hearing which had yet to take place. The Settlement Officer never responded.[140]

During the government shutdown from December 22, 2018 through January 25, 2019, the longest in history, the Settlement Officer was furloughed due to the lapse in appropriations.[141] After waiting a reasonable period of time to allow things to return to normal, Counsel left phone messages for the Settlement Officer which were not returned.[142] Expecting that the legal issues and the long government shutdown would cause delays to a process that normally takes months to conclude,[143] Petitioner-Appellant waited for a reply from the IRS which never

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[136] JA. 113 ¶13.
[137] JA. 149–50.
[138] JA. 152–54.
[139] IRM 8.22.8.3 and 8.22.9.6.5
[140] JA. 112 ¶15, 17.
[141] JA. 114 ¶20.
[142] JA. 114 ¶23.
[143] With over 20 years of practice before the IRS, Counsel knew that the IRS often took months and even years to respond to a taxpayer request. JA. 114 ¶21. To wit, Ms. Castillo filed her request for a CDP Hearing in March 2018, (JA. 86 ¶10), which the IRS didn't acknowledge until July, (JA. 86 ¶11), and the Hearing–

came.[144] USPS and IRS errors and the Settlement Officer's failure to respond to letters and repeated phone calls prevented Ms. Castillo from learning that a determination had been issued.[145]

An IRS Account Transcript requested on September 18, 2019 was the first indication that the IRS had taken action in the CDP Hearing[146] and Petitioner-Appellant filed a petition in the Tax Court as soon thereafter as practicable on October 7, 2019.[147] Despite diligent and repeated attempts to contact the Settlement Officer, Petitioner-Appellant remained unaware of her right to petition the Tax Court.

The facts herein are ripe for equitable tolling. Extraordinary circumstances – USPS and IRS errors – prevented Ms. Castillo from filing her claim on time and she acted with reasonable diligence, repeatedly trying to contact the Settlement Officer to no avail.[148] Equitable tolling is necessary to prevent unfairness to Ms.

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originally scheduled in September–didn't start until October, a full 7-months later. JA. 112 ¶11.

[144] JA. 114 ¶21–22.

[145] It is customary for the Settlement Officer to call and communicate this information before issuing a Notice of Determination.

[146] JA. 159–60, 114 ¶¶24–25, 87 ¶20.

[147] JA. 11, 114 ¶26.

[148] This lack of accountability by the IRS should be taken seriously. It is exactly why Congress enacted CDP protections! If section 6330(d)(1), designed by Congress to protect taxpayers from IRS errors and abuses, is not found to be subject to equitable tolling, there is no legal recourse left to protect them from

Castillo, [149] who is not at fault for her lateness in filing. The 30-day period in section 6330(d)(1) is subject to equitable tolling and under these circumstances, Petitioner-Appellant's petition to the Tax Court should be deemed timely.

C. Assuming Arguendo that Section 6330(d)(1) is Jurisdictional, Ms. Castillo's Actual Notice of the IRS' Determination in her CDP Hearing Started the 30-Day Period.[150]

The 30-day period in section 6330(d)(1) commenced on September 18, 2019, the date Ms. Castillo received actual notice that the Settlement Officer made a determination in her CDP Hearing.[151] Assuming arguendo that section 6330(d)(1) is jurisdictional and not subject to equitable tolling, this Court should reverse the Tax Court's incorrect holding, repeated in this case, that the 30-day period starts when the IRS mails a Notice of Determination regardless of when a taxpayer actually receives it. Section 6330(d)(1) does not contain heightened

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similar IRS carelessness, incompetence, malfeasance, and misfeasance which prevent taxpayers from exercising their rights under the law.

[149] *Irwin*, 498 U.S. at 96; *see also Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Holland*, 560 U.S. at 648; *Parada v. Banco Indus. De Venezuela, C.A.*, 753 F.3d 62, 71 (2d Cir. 2014); *Gonzalez v. Hasty*, 651 F.3d 318, 322 (2d Cir. 2011).

[150] This issue is also raised by the amici, The Center for Taxpayer Rights, in its brief filed on June 17, 2020.

[151] JA. 5. ¶18.

mailing requirements,[152] and mailing does not substitute for the actual notice that Congress intended to protect taxpayers.[153]

The 1998 RRA was enacted to protect taxpayer rights even when a collection notice, although issued by the IRS, was not received. Congress added: (1) the right to a Hearing regarding the underlying tax, and (2) an "equivalent CDP Hearing," during which the IRS is prohibited from collecting the tax at issue. [154] These new rights show that Congress intended to provide ***actual receipt***

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[152] To the extent that the regulations under section 6330(d) might at all disagree with the argument stated herein, those regulations should be given no deference, since no deference is owed to an agency's conclusions concerning a court's jurisdiction. *See Smith v. Berryhill*, 139 S. Ct, 1765, 1778 (2019) ("The scope of review, meanwhile, is hardly the kind of question that the Court presumes that Congress implicitly delegated to an Agency.") As the Tax Court wrote in *Bongam*, *supra*, 146 T.C. at 56 n.2:

> The Treasury Regulations appear to specify notice by certified or registered mail as the preferred form of [a CDP] notice [of determination]. *See* sec. 301.6330–1(e)(3), Q&A–E8, Proced. & Admin. Regs. (''Taxpayers will be sent a dated Notice of Determination by certified or registered mail.''). Respondent does not argue that these regulations limit our jurisdiction. *See Harris v. Commissioner*, 32 T.C. 1216, 1217 (1959) (''[O]ne litigant cannot write into the law limitations on the jurisdiction of the Court as to the other party by his own regulations.'').

[153] To date, there has been no judicial discussion of the argument made herein.

[154] The Committee report indicates that for people who did not timely receive the NOIL), the IRS must suspend collection activity. "[C]ollection shall be suspended" and "a hearing [shall be] provided to the taxpayer." Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206.

protections and that constructive receipt by certified mailing to a taxpayer's last known address is insufficient to cut off taxpayer's collection due process rights.[155]

The Tax Court itself has agreed that the 30-day period starts when a taxpayer receives actual notice that of the Agency's determination, not when the IRS first mailed it to an incorrect address.[156] While the Tax Court's reasoning in that case relied on the additional mailing requirements it incorrectly added to section 6330(d)(1), it clearly supports an actual notice requirement. Like the taxpayer in *Bongam*, Ms. Castillo neither saw nor was aware of the existence of the Notice of Determination and filed a petition 30-days after the actual receipt of the notice. Therefore, the 30-day period commenced on September 18, 2019, the date Ms. Castillo received actual notice that the agency made a determination in her CDP Hearing.[157]

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[155] The Conference Committee report regarding CDP hearing after a notice of intent to levy is issued states in relevant part:

> [T]he validity of the tax liability can be challenged only if the taxpayer ***did not actually receive*** the statutory notice of deficiency or has not otherwise had the opportunity to dispute the liability.
>
> If the taxpayer ***did not receive the required notice*** and requests a hearing after collection activity has begun, then collection shall be suspended and a hearing provided to the taxpayer.

[156] Bongam v. Commissioner, 146 T.C. 52, 58 (2016): See also, (period began to run only after the IRS re-sent the Notice of Determination to taxpayer's correct address)

[157] JA. 5. ¶18.

Taxpayers should not lose their rights to judicial review of IRS collection actions simply because they did not actually receive an IRS notice. This Court should find that the Tax Court has jurisdiction over this matter because Ms. Castillo filed her petition within 30-days of learning that the agency made a determination in her CDP Hearing.

II. MS. CASTILLO DOES NOT OWE THE UNDERLYING TAX.

Ms. Castillo does not owe the taxes, penalties, and interest for the year 2014 at issue in this case. The income is attributable to Castillo Seafood, a business entity that Ms. Castillo sold entirely in 2009 and had no affiliation with in 2014.[158] "[G]ross income means all income, from whatever source derived."[159] Income is only taxable to the individual that earned or has command over that income.[160] Absent the earning of or command over income, an individual is not liable for the taxes resulting from that income.[161] Thus, an individual who is not affiliated with a business cannot be liable for the tax derived from that business income.[162]

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[158] JA. 85 ¶¶ 2–4, Exhibit A.
[159] Section 61(a).
[160] *Harrison v. Schaffner*, 312 U.S. 579, 581 (1941).
[161] See *Schaffner*, 312 U.S. at 581–82.
[162] Indeed, even where an owner still had an affiliation with a business, he was not liable for the income derived from the hotel because the business activity that produced the income was conducted by another taxpayer. *Bartell Hotel Co. v. Commissioner*, 32 T.C. 311, 314–15 (T.C. 1959).

The Forms 1099-K reported under Ms. Castillo's Social Security Number (SSN) and an Employer Identification Number (EIN) allegedly affiliated with her SSN reflect amounts paid to Castillo Seafood.[163] Ms. Castillo did not have any legal title or business association whatsoever with Castillo Seafood in 2014. She sold her entire ownership interest to Luis Gonzalez in or around 2009.

The 2014 income tax return filed by Castillo Seafood claims the income that the IRS wrongly attributed to Ms. Castillo and reports that Mr. Gonzalez was the 100% owner of the business.[164] Ms. Castillo is not liable for the tax, interest, and penalties at issue in this case.[165]

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[163] JA. 119.
[164] JA. 90.
[165] Further, the IRS has not and cannot prove that she owes the taxes at issue. The normal presumption of correctness does not apply to the IRS audit notices based solely on third party reporting. I.R.C. § 6201(d) (if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return, i.e. forms 1099-K, the Secretary shall have the burden of producing reasonable and probative information concerning such tax deficiency). *See also*, *Portillo v. Commissioner*, 932 F.2d 1128, 1134 (5th Cir. 1991); IRC § 7491.

CONCLUSION

For the reasons stated above, this Court should reverse the Tax Court and hold that the Tax Court had jurisdiction to hear Ms. Castillo's case.

Dated: October 22, 2020
New York, NY

Respectfully Submitted,

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Dated: October 22, 2020

(s) /s/ Elizabeth Maresca

Attorney for Petitioner-Appellant

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This is to certify that a copy of this amicus brief was served on counsel for the Respondent-Appellee and Amicus through filing the same with the CM/ECF system on October 22, 2020. All counsel in the case are registered with the CM/ECF system.

Dated: October 22, 2020

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