

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**ISOBEL BERRY CULP;
DAVID R. CULP,**

Petitioners-Appellants,

v.

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent-Appellee.

No. 22-1789

APPELLEE’S MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Federal Rule of Appellate Procedure 27 and Local Appellate Rule 27.4, appellee, the Commissioner of Internal Revenue, respectfully moves this Court to summarily affirm the United States Tax Court’s order of dismissal. (Doc. 8.)¹

This case purports to be “a refund case.” (Doc. 1 at 3.) Isobel Berry Culp and her husband, David Culp, sued to recover income taxes they had allegedly already paid to the Internal Revenue Service for

¹ “Doc.” refers to documents in the original record on appeal (ECF No. 7), as numbered by the Clerk of the Tax Court. The pin cites refer to the page numbers of the docketed PDFs.

2015. The couple disputes the IRS's underlying determination that they failed to report certain taxable income for 2015 and underpaid their taxes for that year.

The Tax Court dismissed the Culps' case for lack of jurisdiction, chiefly because they filed their petition more than 90 days after the IRS had mailed them a statutory notice of deficiency. (*See* Doc. 8 at 3–4 (discussing 26 U.S.C. (I.R.C.) §§ 6212–14, 7502).) There is “no substantial question” about the correctness of that ruling. 3d Cir. R. 27.4(a). The Tax Court has no power to order refunds unless it first has jurisdiction to “find[] that there is no deficiency.” I.R.C. § 6512(b). The Tax Court indisputably lacked deficiency jurisdiction here. Summary action is therefore warranted.

BACKGROUND

The Culps filed a joint income tax return for 2015, reporting \$106,686 of taxable income and \$3,232 of taxes owed. (Doc. 6 at 35.) On February 5, 2018, the IRS sent them a statutory notice of deficiency, reflecting a \$3,363 underpayment of taxes for 2015, plus a \$1,324 penalty under I.R.C. § 6651(a). (Doc. 4 at 11–20.) The underpayment comprised \$2,116 of income taxes and \$1,247 of self-employment taxes.

(Doc. 4 at 16.) Based on a Form 1099-MISC sent to the IRS by La Salle University, the IRS determined that the Culpes had failed to report \$8,826 of what the IRS considered “[n]onemployee compensation” paid to David by the school in 2015. (Doc. 4 at 16–17.) The IRS sent the notice to the Culpes by certified mail at their last known address—a post office box in Montrose, Pennsylvania, and the same address the couple had used on their 2015 return. (*Compare* Doc. 4 at 11, 22, *with* Doc. 6 at 34.)

Over several years, the Culpes allegedly paid all the additional income taxes and penalties that they owed for 2015. (*See* Doc. 1 at 17.) They paid \$201.98 by check in May 2017. (*See* Doc. 1 at 7; Doc. 6 at 20.) In early 2019, the IRS levied on the Culpes’ social security benefits payments in the amount of \$950.10. (*See* Doc. 1 at 9; Doc. 6 at 39–42.) In June 2019, the IRS levied on David’s 2018 income tax refund in the amount of \$851.17. (*See* Doc. 1 at 15; Doc. 6 at 82.)

In the spring of 2019, the Culpes enlisted the help of the IRS’s Taxpayer Advocate Service (TAS).² (*See* Doc. 1 at 10.) The couple

² TAS is “an independent organization within the IRS” that “helps taxpayers resolve problems with the IRS and recommends changes to
(continued...) ”

provided TAS with (among other things) a letter from La Salle University confirming that it had paid David the \$8,826 to settle his employment-related lawsuit and as compensation for “emotional distress, pain and suffering, and related damages.” (Doc. 1 at 12; Doc. 6 at 77.) TAS allegedly stopped communicating with the Culps in late 2019 without having resolved their disputes with the IRS. (*See* Doc. 1 at 15.)

The Culps filed this petition in April 2021. (Doc. 1.) They claimed “a right to a refund of all payments made under protest, or levied on, or executed on by the IRS as to the[ir] . . . 2015 tax return.” (Doc. 1 at 17.) They also alleged that the IRS and TAS had acted negligently, recklessly, and in bad faith (*id.* at 18–19) and sought damages for wrongful collection under I.R.C. § 7433(a) and for failure to release a lien under I.R.C. § 7432.³ (*Id.* at 19.)

prevent future problems.” Internal Revenue Manual § 13.1.7.3(1) (Sept. 21, 2021).

³ The petition also discussed a separate and unrelated dispute involving their law firm, Berry and Culp, P.C. (*See* Doc. 1 at 1, 6–7, 9–11, 20.) When they filed this suit, the Culps also filed a second Tax Court case for their firm using an apparently identical petition. (*See* Doc. 4 at 7; *see generally* *Berry & Culp PC v. Commissioner*, No. 14058-21 (Tax Ct.).)

The petition asserted that the Tax Court had jurisdiction to hear the case under I.R.C. § 6512(b) because the Culps sought a refund of payments they had made within the preceding two years. (Doc. 1 at 20; *see also id.* at 21.) Their petition did not dispute the February 2018 notice of deficiency but instead purported to challenge a “Notice of Determination Concerning Collection Action.” (Doc. 1 at 2.) The Culps failed to include this required notice with their petition. *See Tax Ct. R.* 331(b)(8).

The Commissioner moved to dismiss the petition for lack of jurisdiction. (Doc. 4.) He argued that the petition was untimely to the extent the Culps sought a redetermination of their 2015 taxes (*id.* at 5–6) and unripe to the extent they purported to challenge a notice of determination concerning collection action (*id.* at 4–5). The Commissioner offered proof that the IRS had mailed the notice of deficiency to the Culps’ last known address in February 2018, almost three years before their petition. (*Id.* at 22.) And he confirmed that the IRS had no record of mailing the Culps any notice of determination concerning collection action for 2015. (*Id.* at 5.)

The Tax Court granted the Commissioner's motion (Doc. 8) over the Culps' objections (Doc. 6). The court explained that its jurisdiction was limited by statute and that it was the Culps' burden to establish jurisdiction. (Doc. 8 at 2.) The court added that its jurisdiction in the collection-due-process context "depends upon the issuance of a valid notice of determination and the timely filing of a petition." (*Id.*) The court found that the couple had "failed to demonstrate that [the Commissioner] ha[d] issued a notice of determination concerning collection activity for [2015]," *e.g.*, by rebutting the Commissioner's no-records statement with a copy of a notice. (*Id.* at 3.) Thus, there was no determination for the court to review, and no basis for its jurisdiction under I.R.C. § 6330(d). (*Id.*) The Court also found that the Commissioner had mailed a notice of deficiency to the Culps' "last known address" on February 5, 2018, and that the couple filed their petition long after their 90-day period to do so had expired in May 2018. (*Id.* at 4.) The Court therefore dismissed the case for lack of jurisdiction.⁴ (*Id.* at 5.)

⁴ The court also held that it lacked jurisdiction over the Culps' unrelated claims involving Berry & Culp, P.C. (Doc. 8 at 5.)

The Culps filed their notice of appeal on April 25, 2022. (Doc. 9.) Because they did so within 90 days of the Tax Court’s February 2022 dismissal order, their appeal is timely, and this Court has jurisdiction. *See* I.R.C. §§ 7482(a)(1), 7483.

ARGUMENT

The Court may summarily affirm a lower court’s decision when the appeal presents “no substantial question.” 3d Cir. R. 27.4(a); *see, e.g., Kennedy v. Commissioner*, 749 F. App’x 100, 101 (3d Cir. 2019) (*per curiam*). The Culps appeal from the Tax Court’s dismissal order. When reviewing such orders, this Court “exercise[s] plenary review over the Tax Court’s conclusions of law and review[s] its factual findings for clear error.” *Kennedy*, 749 F. App’x at 101 (citing *PNC Bancorp, Inc. v. Commissioner*, 212 F.3d 822, 827 (3d Cir. 2000)). The Court “may affirm on any basis supported by the record, even if it departs from the [lower court’s] rationale.” *Host Int’l, Inc. v. MarketPlace, PHL, LLC*, 32 F.4th 242, 247 n.3 (3d Cir. 2022) (internal quotation marks omitted).

This appeal presents no substantial questions. The Culps failed to establish the Tax Court’s jurisdiction in any respect. Their “refund”

jurisdiction theory is fatally flawed. This Court should summarily affirm the order below.

A. The Tax Court lacked jurisdiction to redetermine the Culps' deficiencies for 2015 and thus had no jurisdiction over their "refund" claim

Taxpayers have two paths to challenge an IRS deficiency determination. *See Toner v. Commissioner*, 629 F.2d 899, 902 n.1 (3d Cir. 1980). They can defer paying their disputed taxes and file a timely petition in the Tax Court. *See* I.R.C. § 6213(a). Or they can pay the disputed taxes and then bring a refund suit in a district court or the Court of Federal Claims. *See* I.R.C. § 7422(a); 28 U.S.C. § 1346(a)(1).

The Culps supposedly paid their disputed taxes yet brought their deficiency challenge in the Tax Court. The Tax Court, however, "possess[es] only such jurisdiction as is expressly conferred by Congress." *Sunoco, Inc. v. Commissioner*, 663 F.3d 181, 187 (3d Cir. 2011). So the Culps had to establish some statutory basis for the Tax Court's jurisdiction. They did not do so.

"The Tax Court's principal basis for jurisdiction is I.R.C. § 6213(a)," which "gives the Tax Court jurisdiction to determine a 'deficiency' in income . . . taxes as to which [i] the IRS has issued a

notice of deficiency . . . and [ii] the taxpayer has filed a timely petition for redetermination.” *Sunoco*, 663 F.3d at 187; *see also Garrett v. Commissioner*, 798 F. App’x 731, 732–33 (3d Cir. 2019) (reaffirming that “Section 6213(a) is jurisdictional” (footnote omitted)).

The Tax Court has very “limited” authority with respect to refunds. *Sunoco*, 663 F.3d at 188 (quoting *Est. of Baumgardner v. Commissioner*, 85 T.C. 445, 452 (1985)). Under I.R.C. § 6512(b), the court has “jurisdiction to determine the amount of [an] overpayment” once it “finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income taxes for the same taxable year.” I.R.C. § 6512(b)(1). “[W]hen the decision of the Tax Court has become final,” the overpayment must then “be credited or refunded to the taxpayer.” *Id.* And if the Commissioner does not timely refund an overpayment, the Tax Court obtains jurisdiction “upon motion by the taxpayers . . . to order the refund of such overpayment.” *Id.* § 6512(b)(2). Beyond these two avenues, refund jurisdiction “generally lies with the federal district courts and the Court of Federal Claims.” *Sunoco*, 663 F.3d at 188.

Simply put, the Tax Court’s “refund” jurisdiction hinges on the existence of the court’s jurisdiction to “determine” the underlying tax dispute. *See Winn-Dixie Stores, Inc. v. Commissioner*, 110 T.C. 291, 295 (1998) (citing *Barton v. Commissioner*, 97 T.C. 548, 552 (1991)); *see, e.g., Pope v. Commissioner*, 119 T.C.M. (CCH) 1415, 2020 WL 2520638, at *4 (May 18, 2020). Section 6512(b) merely “expand[s]” the Tax Court’s extant deficiency jurisdiction. *Ax v. Commissioner*, 146 T.C. 153, 160 (2016); *see also* 14 *Mertens Law of Fed. Tax’n* § 50:20 (May 2022 update) (“[T]he Tax Court’s overpayment jurisdiction arises out of a tax deficiency action.”). As this Court has explained, “[A] Tax Court *determination* of overpayment is a prerequisite to any award of the amount of such overpayment where a notice of deficiency has been issued and a redetermination sought in the Tax Court.” *Bachner v. Commissioner*, 81 F.3d 1274, 1278 (3d Cir. 1996) (emphasis added).

Here, the Tax Court found that the IRS had properly issued a notice of deficiency to the Culps in February 2018. (Doc. 8 at 3–4.) The court further found that the couple filed their petition in April 2021, nearly three years too late to establish the court’s deficiency

jurisdiction. (*Id.* at 4.) These findings are not clearly erroneous, and they are dispositive.

None of the Culps' contrary jurisdictional arguments has merit. The Culps argued that the Tax Court had jurisdiction to decide their refund claim because they sought the return of payments made within "a two-year Lookback Rule for refund litigation filed in the U.S. Tax Court." (Doc. 6 at 8 (discussing I.R.C. §§ 6511(b)(2)(B), 6512(b)(3)).) But that two-year look-back period simply constrains the IRS's power to *award* refunds; it has nothing to do with the Tax Court's power to determine if the taxpayer made an overpayment in the relevant tax year. *See Commissioner v. Lundy*, 516 U.S. 235, 240–41 (1996) (distinguishing between "the restrictions governing the Tax Court's authority to award a refund" and "the filing deadline from § 6511").

The Culps also contended that the jurisdictional 90-day deadline does not apply here because they never received the notice of deficiency and doubt whether the IRS even mailed one. (*See* Doc. 6 at 3, 6.) But jurisdiction turns on when the statutory notice "is mailed," I.R.C. § 6213(a), not on whether a taxpayer received the notice. The courts uniformly hold that "the IRS satisfies its obligation to mail a notice of

deficiency if the notice is sent to the taxpayer's last known address, even if the taxpayer does not actually receive the notice." *Guthrie v. Sawyer*, 970 F.2d 733, 737 (10th Cir. 1992). *Accord United States v. Goldston*, 324 F. App'x 835, 837 (11th Cir. 2009) (per curiam) (citing cases); *see generally* 14 *Mertens Law of Fed. Tax'n* § 50:52 (May 2022 update). The Tax Court here found that the IRS had mailed the notice to the Culps, and there is no dispute that the IRS used their "last known address," as required by I.R.C. § 6212(b)(1).

Finally, the Culps erred in suggesting that they were entitled to equitable tolling of the jurisdictional 90-day deadline because of TAS's alleged "malfeasance." (Doc. 6 at 8.) Because section 6213(a) is jurisdictional, no "equitable exceptions, such as equitable tolling and waiver[,] . . . may be applied." *Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1092 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2596 (2021); *see, e.g., Garrett*, 798 F. App'x at 734 ("[E]xamining the equities of individual circumstances . . . runs contrary to the purpose of a jurisdictional filing deadline." (footnote omitted)).

B. The Culps failed to establish any other basis for the Tax Court's jurisdiction

In their Tax Court petition, the Culps checked the box for “Notice of Determination Concerning Collection Action” to show which IRS action they challenged. (Doc. 1 at 2.) A notice of determination is issued following a collection-due-process hearing—a hearing that, if requested by the taxpayer, precedes tax collection and gives the taxpayer the opportunity to raise “any relevant issue relating to the unpaid tax or the proposed levy,” including “challenges to the appropriateness of collection actions” and “offers of collection alternatives.” I.R.C. § 6330(c)(2)(A)(ii) & (iii). The taxpayer “may, within 30 days of a [notice of] determination . . . , petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).” *Id.* § 6330(d)(1).

Here, beyond checking a box on their form petition, the Culps neither alleged nor proved that the IRS had sent them a notice of determination concerning collection action. Indeed, nothing in the Culps’ petition or the record even suggests that they requested and received a collection-due-process hearing before filing their petition. The Tax Court found that the IRS had not issued a notice of

determination concerning collection action to the Culps. (Doc. 8 at 3.) That finding is sound, and it forecloses this separate statutory basis for Tax Court jurisdiction.

The Culps also sought damages under I.R.C. §§ 7432 and 7433 for the IRS's and TAS's alleged misconduct. (Doc. 1 at 19–20.) Although the Tax Court did not directly address those claims, it lacked jurisdiction to consider them. Taxpayers cannot recover damages under section 7432 unless they “bring a civil action . . . against the United States in a district court of the United States.” I.R.C. § 7432(a). Claims under section 7433 likewise must be brought “against the United States in a district court of the United States.” I.R.C. § 7433(a). The Tax Court, therefore, had no jurisdiction to consider these claims.⁵

⁵ In their concise summary of the case, the Culps expressed their intention to renew their argument that the Commissioner did not timely move to dismiss. (ECF No. 3 at 2; *see also* Doc. 6 at 9 (citing Tax Ct. R. 36(a)).) But as the Tax Court correctly held, the parties or the court “may raise jurisdiction at any time.” (Doc. 8 at 2 (citing cases).) *Accord Galluzzo v. Commissioner*, 564 F. App'x 656, 659–60 (3d Cir. 2014).

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CONCLUSION

This Court should summarily affirm the Tax Court's dismissal order.

Respectfully submitted,

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JUNE 7, 2022

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rule 28.3(d), it is hereby certified that, because the attorneys on this brief represent the Federal Government, the requirement that at least one attorney must be a member of the Bar of this Court is waived.

/s/ Isaac B. Rosenberg
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CERTIFICATE OF COMPLIANCE

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(s) /s/ Isaac B. Rosenberg

Attorney for Appellee

Dated: June 7, 2022

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CERTIFICATE OF SERVICE

It is hereby certified that on June 7, 2022: (1) a PDF copy of this motion was electronically filed by CM/ECF; and (2) service was made via first-class U.S. mail upon the following addressee(s):

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