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Hallmark Research Collective,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

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Docket No. 21284-21  
Document No. 29

Response to Order that resp. motion for extension of time is granted, and resp. by 6/23/22, shall file his response to petr. motion to vacate. Petr. by 7/22/22, shall file a reply to resp. response.

**SERVED 06/22/22**

**UNITED STATES TAX COURT**

HALLMARK RESEARCH	)	
COLLECTIVE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 21284-21
	)	
COMMISSIONER OF INTERNAL	)	Filed Electronically
REVENUE,	)	
	)	
Respondent.	)	

**RESPONDENT’S RESPONSE TO PETITIONER’S MOTION TO VACATE OR REVISE PURSUANT TO RULE 162, AND THE MEMORANDUM OF LAW IN SUPPORT THEREOF (COLLECTIVELY, PETITIONER’S MOTION)**

In accordance with the Court’s May 3, 2022 Order, respondent responds to petitioner’s May 2, 2022 motion to vacate or revise the Court’s April 1, 2022 Order of Dismissal. Because section 6213(a) is a jurisdictional provision, and the Supreme Court’s recent decision in Boechler, P.C. v. Commissioner, 142 S. Ct. 1493 (2022), is distinguishable from this case, the Court should deny petitioner’s motion.

IN SUPPORT THEREOF, respondent respectfully states:

1. On April 1, 2022, the Court dismissed this case for lack of jurisdiction because petitioner had not filed its petition within the time period prescribed by section 6213(a). In that Order, the Court observed that the U.S. Court of Appeals for the Ninth Circuit, where appeal in this case lies, recently held in Organic Cannabis Found., LLC v. Commissioner, 962 F.3d 1082, 1092-95 (9th Cir. 2020), that the filing deadlines imposed by section 6213(a) are jurisdictional. See Order of Dismissal dated April 1, 2022, at page 4. The Court also denied petitioner's request to delay ruling while the Supreme Court decision in Boechler was pending, explaining that the long-standing precedent collected in Organic Cannabis Found., LLC held that section 6213 is jurisdictional, and that Boechler involved a different statutory provision. Id.

2. The Supreme Court in Boechler held that section 6330(d)(1)'s 30-day time limit to file a petition for review of a collection due process determination is an ordinary, nonjurisdictional deadline subject to equitable tolling.

Section 6330(d)(1) provides:

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).

3. At issue in this case, by contrast, is the time limit to file a petition for review of a notice of deficiency under section 6213. Section 6213(a) provides, in relevant part:

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

4. The Supreme Court did not issue any holding in Boechler regarding section 6213(a), nor did it overturn precedent set by the appellate courts with respect to the jurisdictional limitations of section 6213. The Boechler opinion's holding relates only to filing requirements under section 6330. Although the Court noted in dicta that much of the precedent involving the jurisdictional limitations of

section 6213 had been decided before the Supreme Court tried to “bring some discipline” to the use of the term “jurisdictional,” Boechler, 142 S. Ct. at 1500, the Court did not address section 6213(a) further. The Court based its holding on the language of section 6330(d)(1), concluding that the phrase “such matter” in that provision “lacks a clear antecedent,” and observing that “jurisdiction” is mentioned parenthetically. Id. at 1498. That dispositive textual analysis does not apply to section 6213(a).

5. This case is appealable to the Ninth Circuit and, despite petitioner’s arguments to the contrary, the precedent set by the Ninth Circuit with respect to the jurisdictional limitations contained in section 6213 controls the outcome of this case. See Golsen v. Commissioner, 54 T.C. 742, 756-57 (1970), aff’d, 445 F.2d 985 (10th Cir. 1971).

6. The Ninth Circuit held that section 6213(a) imposes jurisdictional requirements and that, consequently, the Tax Court’s jurisdiction to redetermine a deficiency in tax depends upon a valid notice of deficiency and a timely filed petition. Organic Cannabis Found., LLC v. Commissioner, 962 F.3d 1082, 1092 (9th Cir. 2020) (citing Meruelo v. Commissioner, 691 F.3d 1108, 1115 (9th Cir. 2012); Scar v. Commissioner, 814 F.2d 1363, 1366 (9th Cir. 1987); Healy v. Commissioner, 351 F.2d 602, 603 (9th Cir. 1965); Di Prospero v. Commissioner,

176 F.2d 76, 77 (9th Cir. 1949); Edward Barron Estate Co. v. Commissioner, 93 F.2d 751, 753 (9th Cir. 1937)). The Ninth Circuit therefore affirmed the Tax Court’s dismissal of the untimely petitions in that case for lack of jurisdiction. Id. at 1096.

7. As the Court of Appeals noted in Organic Cannabis, “[o]ther circuits are in accord, some of them for even longer periods of time. See, e.g., Tilden v. Comm’r, 846 F.3d 882, 886 (7th Cir. 2017) (‘For many decades the Tax Court and multiple courts of appeals have deemed § 6213(a) as a whole to be a jurisdictional limit on the Tax Court’s adjudicatory competence.’) (collecting cases); Lewis-Hall Iron Works v. Blair, 23 F.2d 972, 974 (D.C. App. 1928).” Organic Cannabis Found., 962 F.3d at 1092. See also Patmon and Young Professional Corp. v. Commissioner, 55 F.3d 216, 217 (6th Cir. 1995); Keado v. United States, 853 F.2d 1209, 1212, 1218–19 (5th Cir. 1988); Pugsley v. Commissioner, 749 F.2d 691, 692 (11th Cir. 1985); Andrews v. Commissioner, 563 F.2d 365, 366 (8th Cir. 1977); Foster v. Commissioner, 445 F.2d 799, 800 (10th Cir. 1971).

8. When the Ninth Circuit decided Organic Cannabis Found., LLC in 2020, the court expressly recognized in its opinion that “In a series of recent cases the Supreme Court has tried “‘to bring some discipline to the use’ of the term ‘jurisdiction’” Organic Cannabis Found., LLC, 962 F.3d at 1093 (citing Sebelius

v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013) (quoting Henderson v. Shinseki, 562 U.S. 428, 435 (2011)). The Ninth Circuit's holding is consistent with those cases and is well grounded in the specific language and context of section 6213(a).

9. The Ninth Circuit noted that the Supreme Court had clarified that “procedural rules, including time bars, cabin a court's power only if Congress has clearly stated as much.” Organic Cannabis Found., LLC, 962 F.3d at 1093 (citing United States v. Kwai Fun Wong, 575 U.S. 402, 409 (2015)). As noted in Boechler and prior Supreme Court cases, a procedural requirement is jurisdictional only if Congress “clearly states” that it is. Boechler, 142 S. Ct. at 1497 (citing Arbaugh v. Y & H Corp., 546 U. S. 500, 515 (2006)). Boechler also reiterated that Congress need not “incant magic words,” citing Sebelius v. Auburn Regional Medical Center, 568 U. S. 145 at 153 (2013), but that “traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences,” citing United States v. Kwai Fun Wong, 575 U. S. 402, 410 (2015). Boechler, 142 S. Ct. at 1497.

10. The Ninth Circuit held that Congress had indeed done “something special” to “plainly show” that section 6213's time limit is “imbued . . . with jurisdictional consequences.” Organic Cannabis Found., LLC, 962 F.3d at 1093

(citing Kwai Fun Wong, 575 U.S. at 410). The Ninth Circuit based its holding on the language of section 6213(a), the broader statutory context in which section 6213(a) operates, and the courts' long history of reading section 6213(a) as jurisdictional. Id. at 1093-95. The Ninth Circuit first observed that section 6213(a) does indeed employ the word "jurisdiction" to define the Tax Court's power to enjoin assessment or collection made in violation of the restrictions imposed by that provision. The Court of Appeals noted that the statute expressly states that the Tax Court's "jurisdiction" to enter such an injunctive order depends upon the timely filing of a petition and quoted the language providing that "[t]he Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition." (Emphasis by the court.) Id. at 1094. The court reasoned that by specifying that the Tax Court lacks "jurisdiction" to issue such an injunction "unless" a petition has been filed (and then only if the petition is "timely"), section 6213(a) seemed to clearly reflect an understanding that the manner in which the Tax Court acquires jurisdiction over a deficiency dispute is through the filing of a "timely petition." Id.

11. The statutory context confirms that the requirements of section 6213(a) are jurisdictional. In Boechler, the Supreme Court held “the broader statutory context confirms the lack of any clear statement in § 6330(d)(1).” Boechler, 142 S. Ct. at 1498. In contrast, placing section 6213(a) within the broader statutory context and using the traditional tools of statutory construction clearly confirms that it is “imbued with jurisdictional consequences.” Organic Cannabis Found., 962 F.3d at 1093 (citations omitted).

12. The language of a closely related provision, section 6213(c), confirms that the time period prescribed in section 6213(a) is jurisdictional. Section 6213(c) provides, “If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.” (Emphasis added.) This language reinforces the jurisdictional nature of the language in section 6213(a), which prohibits the Tax Court from enjoining any action or proceeding or ordering any refund unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of the petition. If (as petitioners contend) the Tax Court could take jurisdiction to redetermine a deficiency through an untimely filed petition under principles of equitable tolling, it would lead to the incongruous

result that this Court could take no action to enjoin the assessment and collection of the deficiency required to be made by section 6213(c), because its injunction power is dependent on a timely filed petition, but it also would be required to take action under section 6213(a) to determine whether the amount of that assessment and collection is correct based on the merits of the case.

13. Likewise, the Tax Court would also lack jurisdiction to enjoin a district court proceeding in which the United States is seeking to collect that deficiency after the time for assessment has occurred under section 6213(c). By providing in section 6213(c) that the Service shall assess and collect the determined deficiency once the time period in section 6213(a) has passed, Congress has provided statutory context indicating that the Court lacks jurisdiction to redetermine the deficiency once the time for filing a petition has lapsed. It is unreasonable to assume that Congress intended to require assessment and collection of the amount stated in a notice of deficiency if the Court still had jurisdiction to redetermine the deficiency amount determined in that notice.

14. Similarly, section 6215 states “If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary.” Critically, section 6215 also provides that “[n]o

part of the amount . . . disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment.” Yet, section 6213(c) would have required the assessment and collection of the full amount of the deficiency upon the lapse of the period for filing a petition with the Court. These provisions read together establish that Congress intended that only a timely filed petition would be the subject of the Court’s decision so that the prohibition against assessment and collection of disallowed amounts in section 6215 does not conflict with the requirement to assess and collect amounts determined in defaulted notices under section 6213(c).

15. The Ninth Circuit also held that section 6213(a) was imbued with jurisdictional consequences by viewing the provision within the broader statutory context in which section 6213(a) operates. Organic Cannabis Found., LLC, 962 F.3d at 1095. The Ninth Circuit specifically looked at the interplay between section 6213(a) and section 7459(a) for this context.

16. If a taxpayer files a petition with the Tax Court, section 7459(d) provides that “a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court unless the Tax Court cannot determine such amount from the record in

the proceeding, or unless the dismissal is for lack of jurisdiction.” (Emphasis added.) A decision on the merits has preclusive effect, preventing a taxpayer from attempting to litigate its liability in another forum, such as a refund action in district court. See Organic Cannabis Found., LLC, 962 F.3d at 1095; Malat v. Commisioner, 302 F.2d 700, 706 (9th Cir. 1962). In contrast, under section 7459(d), a dismissal on jurisdictional grounds does not result in an adjudication on the merits and accordingly does not have the same preclusive effect.

17. As the Ninth Circuit explained, if the time limit in section 6213(a) were not jurisdictional, the Tax Court's dismissal of a petition as untimely could potentially have the perverse effect under section 7459(d) of barring the taxpayer from later challenging the amount in a refund suit, since that dismissal would result in a decision on the merits that the deficiency is the amount determined by the Secretary. Id. The Ninth Circuit opined that this would result in “precisely the sort of ‘harsh consequence[ ]’ that the Supreme Court's recent “jurisdictional” jurisprudence has sought to avoid.” Id. (citing Kwai Fun Wong, 575 U.S. at 409).

18. That outcome is avoided if section 6213(a) is interpreted as jurisdictional. Under that reading, dismissals for failure to meet section 6213(a)'s timing requirement would fall within section 7459(d)'s safe-harbor denying preclusive effect to Tax Court dismissals “for lack of jurisdiction.” As the Ninth

Circuit stated, “section 7459(d) thus confirms what the language of § 6213(a) already suggests, which is that the timing requirement in the latter section is properly understood to be jurisdictional.” Id.

19. Petitioner concedes that the inability to challenge the liability in a refund suit is a potential outcome if the period in section 6213(a) is treated as non-jurisdictional. See Petitioner’s Memorandum in Support of Petitioner’s Motion to Vacate at 18. Petitioner states that this is something that would need to be addressed by Congress via legislation. Id. The fact that petitioner’s construction of section 6213(a) creates a new problem requiring a new legislative solution demonstrates that petitioner’s approach is erroneous.

20. This troublesome outcome does not exist if sections 6213(a) and 7459(a) are read together under the traditional tools of statutory construction. The “traditional tools of statutory construction” include the rule to read statutory provisions in harmony and not in conflict. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018). Treating section 6213(a) as non-jurisdictional creates an unreasonable conflict with section 7459(d) that is resolved by treating section 6213(a) as jurisdictional.

21. Petitioner further argues that a petition filed after the filing period, but allowed through equitable tolling, should be treated as timely under section

6213(a) for purposes of enjoining assessment and collection, see Petitioner's Memorandum in Support of Petitioner's Motion to Vacate at 12, but such an interpretation would read the word "timely" out of the provision and is unreasonable based on the history of section 6213(a).

22. In the IRS Restructuring and Reform Act of 1998 (RRA'98), Congress amended section 6213(a) to provide that "Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed." Pub. L. No. 105-206, § 3463(b), 112 Stat. 685 (July 22, 1998). In amending section 6213(a), Congress clearly demonstrated that the term "timely" means the period provided in section 6213(a).

23. The legislative history also confirms the jurisdictional nature of this timeliness requirement. In the explanation of RRA'98 section 3463(a), an uncodified provision requiring the IRS to include in notices of deficiency the last date to file a petition, the House conference report explains, "If the petition is not filed within that [90-day] period, the Tax Court does not have jurisdiction to consider the petition." H.R. Conf. Rep. 105-599 at 289. This statement of existing law provides a clear indication that Congress intended the Court's jurisdiction to

redetermine a deficiency to be bound to a petition filed within 90 (or 150) days of the issuance of a statutory notice of deficiency.

24. The “historical treatment” of section 6213(a) lends further support to the conclusion that the time limit is jurisdictional in nature. Organic Cannabis Found., LLC, 962 F.3d at 1095 (citing Musacchio v. United States, 577 U.S. 237, 247 (2016)). As noted above, the courts of appeals have uniformly adopted a jurisdictional reading of section 6213(a) or its predecessors since at least 1928. Id. As the Ninth Circuit noted, “Congress presumptively ‘legislates against the backdrop of existing law,’” id. (citing Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1890 (2019)). Despite multiple amendments to the Code, Congress has never deemed it necessary to disturb this long-settled understanding of section 6213(a). Id. (Cf. Fort Bend County v. Davis, 139 S. Ct. 1843, 1849 (2019) (“[T]he Court has stated it would treat a requirement as jurisdictional when a long line of Supreme Court decisions left undisturbed by Congress attached a jurisdictional label to the prescription.”)). The Ninth Circuit stated that the “jurisdiction” language added to section 6213(a) in 1988 “confirmed the pre-existing jurisdictional understanding of § 6213(a)” (Emphasis by the court). The same reasoning supports the argument that the 1998 amendment to section 6213(a) was viewed by Congress as a jurisdictional provision.

25. As this Court noted in its April 1, 2022 Order of Dismissal, given the long-standing precedent that section 6213(a) is jurisdictional and the fact that Boechler involved a different statutory provision, it declined petitioner's invitation to delay the determination as to whether the Court lacked jurisdiction over this matter until the conclusion of Boechler. The decision in Boechler does not disturb this Court's conclusion that Boechler involved a different and distinguishable statutory provision from the provision at issue here, such that, following the principles of judicial economy and deference established in Golsen v. Commissioner, the long-standing Ninth Circuit precedent holding section 6213(a) as jurisdictional continues to control this case. Golsen v. Commissioner, 54 T.C. 742, 756-57 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971). Even if the "Golsen Rule" did not apply to control the outcome of this issue, the applicable Supreme Court precedent applying the well-established, traditional rules of statutory construction plainly shows that Congress intended section 6213(a) to have jurisdictional consequences.

26. Even assuming, *arguendo*, that the time period prescribed in section 6213(a) is not jurisdictional, it is not subject to equitable tolling. The general presumption in favor of equitable tolling (see Pet. Mem. at 38-39) can be rebutted, and there are sound reasons to conclude that the period in section 6213(a) may not

be tolled. In addition to the linguistic differences between section 6213(a) and section 6330(d)(1), it is important to note that unlike collection due process cases at issue in Boechler, in which the Supreme Court was unconvinced “that the possibility of equitable tolling for the relatively small number of petitions at issue in this case will appreciably add to the uncertainty already present in the process,” Boechler, 142 S. Ct. at 1501, the same can hardly be said in the context of petitions to redetermine a deficiency. In Fiscal Year 2021 (October 1, 2020 through September 30, 2021), more than 28,000 petitions were filed with this Court, representing over \$26.5 billion of tax in dispute. See Information from Court Procedure & Practice Committee presentation at the May 2022 ABA Tax Section Meeting (reported in the “Procedurally Taxing” blog at [ABA Tax Section Court Procedure & Practice Committee May 2022](#)). The overwhelming majority of these petitions seek redetermination of deficiencies determined by respondent under section 6213(a). In contrast, on average fewer than 1,600 collection due process petitions are filed with this Court yearly. The IRS issues over one million statutory notices of deficiency each year, each of which triggers legally required restrictions on assessments and collection activity and correlative suspensions of limitations periods to facilitate the ability of taxpayers to invoke this Court’s prepayment jurisdiction, all of which must be carefully monitored and controlled by the IRS.

27. The injection of claims of equitable tolling to extend by some indefinite or indeterminable period the time parameters governing deficiency procedures and the periods for petitioning this Court will have a significant and adverse impact on tax administration by creating doubt over when limitations periods are suspended or expire, when assessments of deficiencies can or must be made, and when collection action may legally commence. Here, as in United States v. Brockamp, 519 U.S. 347, 352-53 (1997), the nature and potential magnitude of the administrative problem suggests that Congress decided to pay the price of occasional unfairness in individual cases in order to maintain a more workable tax enforcement system. “At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute’s limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.” Brockamp, 519 U.S. at 353 (discussing I.R.C. § 6511). These time parameters and limitations periods enacted by Congress protect both the public by establishing certainty in what actions the government can take and when, and the ability of the government to collect tax legally due. The Court would preserve these important protections and maintain certainty in tax administration by refraining from extending the holding of Boechler to the time limits for petitioning this Court prescribed in section 6213(a).

28. For the reasons stated above, respondent respectfully requests that petitioner's motion be denied.

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Internal Revenue Service

June 22 2022  
Date: \_\_\_\_\_

By:  \_\_\_\_\_

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