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Paul Andrew Frutiger,
Petitioner

v.

Commissioner of Internal Revenue
Respondent

Electronically Filed
Docket No. 31153-21
Document No. 23

First Supplement to Response to Order that jurisdiction is retained by Judge Buch Case is stricken from the trial session. Respondent by October 21, 2022 file a response to this Order. Petitioner shall file a response to this Order by November 18, 2022. Any motion for leave to file an amicus brief in support of either party must be filed by November 18, 2022. The proposed amicus brief must be lodged at the time the motion is filed. Respondent may file a further response to this Order by December 9, 2022. All papers filed in response to this Order shall be filed only in Docket No. 31153-21.

SERVED 10/21/22

UNITED STATES TAX COURT

PAUL ANDREW FRUTIGER,)	
)	
Petitioner,)	
)	
v.)	Docket No. 31153-21
)	
)	
COMMISSIONER OF INTERNAL REVENUE,)	Filed Electronically
)	
Respondent.)	

SUPPLEMENT TO RESPONDENT’S RESPONSE TO ORDER

PURSUANT to the Court’s order dated September 7, 2022, the following is a supplement to respondent’s response:

1. As set forth in our prior response, a Notice of Determination Concerning Relief from Joint and Several Liability under Section 6105 was sent via certified mail to petitioner’s last known address on June 16, 2021. The 90-day period for filing a timely petition under section 6015(e)(1)(A) expired on September 14, 2021. The postmark on the envelope attached to the petition reflects that petitioner mailed his petition on September 16, 2021, two days after the statutory deadline.

2. Nothing in the recent decision in *Boechler v. Commissioner*, 142 S. Ct. 1493 (2022), changes the conclusion as held in *Pollock v. Commissioner*, 132 T.C. 21 (2009), and numerous other cases, that section 6015(e)(1)(A) establishes a jurisdictional time limit and this court is without jurisdiction to

consider petitioner's untimely petition. The discussion in *Boechler*, in fact, supports the holdings that section 6015(e)(1)(A) establishes such jurisdictional time limit.

The Time Limit of Section 6015(e) is Jurisdictional

3. The Tax Court is a court of limited jurisdiction: it can only exercise jurisdiction to the extent authorized by Congress. *Estate of Branson v. Commissioner*, 264 F.3d 904, 908 (9th Cir. 2001).

4. While all filing deadlines are not necessarily jurisdictional, Congress can make them so. *Henderson v. Shinseki*, 562 U.S. 428, 439 (2011). In determining whether a statutory limitation is jurisdictional, courts examine whether Congress has “clearly state[d]” that it is. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). This does not require “magic words” so long as the “traditional tools of statutory construction . . . plainly show that Congress imbued a procedural bar with jurisdictional consequences.” *United States v. Kwai Fun Wong*, 575 U.S. 402, 409-10 (2015). Courts will also consider the context and relevant historical treatment of the provision at issue. *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016); *but see Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (noting that courts “do not resort to legislative history to cloud a statutory text that is clear”).

5. The plain text of section 6015(e)(1)(A) makes clear that the 90-day time limit to petition the Tax Court from a notice of determination is jurisdictional.

In pertinent part, section 6015(e)(1)(A) states:

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 . . . not later than the close of the 90th day after the date [the IRS issues its final notice of determination, or six months after the date the request was made].

6. In this text, Congress explicitly uses the word “jurisdiction,” showing that it intended to address the power of the Tax Court to hear and decide a petition under this subsection. Congress followed that invocation with two qualifications: one limiting the scope of jurisdiction (*i.e.*, “to determine the appropriate relief”) and one requiring a timely petition to invoke that jurisdiction (*i.e.*, “if such petition is filed” within the 90-day period).

7. Every court to consider the issue, including the Tax Court, has concluded that the 90-day period provided in section 6015(e)(1)(A) is clearly jurisdictional. *Pollock v. Commissioner*, 132 T.C. 21 (2009); *Naufflett v. Commissioner*, 892 F.3d 649 (4th Cir. 2018); *Rubel v. Commissioner*, 856 F.3d 301 (3rd Cir. 2017); *Matuszak v. Commissioner*, 862 F.3d 192, 196 (2d Cir. 2017) (per curiam).

8. In analyzing the statutory text of section 6015(e)(1)(A), the Tax Court explained that statutes that grant “a court ‘jurisdiction’ if a case is filed by a stated

deadline look more like jurisdictional time limits.” *Pollock*, 132 T.C. at 30 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982)). Ultimately, the Tax Court held that 6015(e)(1)(A) was jurisdictional and noted that it was not a “close case.” *Id.* at 32. The Tax Court has consistently applied that decision ever since. *See, e.g., Gormley v. Commissioner*, T.C. Memo. 2009-252; *Sykes v. Commissioner*, T.C. Memo. 2009-197.

9. The three courts of appeals having considered the issue directly have similarly held that the statutory language of section 6015(e)(1)(A) is clear that the 90-day period is jurisdictional.¹ In *Naufflett*, the Fourth Circuit held that it need not look beyond the language of the statute because Congress had “uttered ‘magic words,’ expressly conditioning the Tax Court’s power on the timely filing of a petition.” 892 F.3d at 652. In *Rubel*, the Third Circuit held the language of section 6015(e)(1)(A) contained an “explicit” statement that the 90-day period was jurisdictional. 856 F.3d at 305 (“Congress’s explicit statement that § 6015(e)(1)(A)’s time limit is jurisdictional means that it is and that the Tax Court lacks authority to consider untimely petitions.”). In *Matuszak*, the Second Circuit held the language was “clear.” 862 F.3d at 196 (“Not only did Congress place the grant of jurisdiction and the time limitation in the same sentence and subsection, it

¹ This case is appealable to the Ninth Circuit, which has not directly addressed whether the 90-day time bar of section 6015(e)(1)(A) is jurisdictional.

expressly conditioned the Tax Court’s jurisdiction on the timely filing of a petition: ‘the Tax Court shall have jurisdiction . . . if [the] petition is filed’ within the specified period.”).

10. Other courts have suggested the same result, either implicitly or in dicta. *See Terrell v. Commissioner*, 625 F.3d 254, 258 (5th Cir. 2010); *Adkison v. Commissioner*, 592 F.3d 1050, 1052-53 (9th Cir. 2010); *United States v. Hirsch*, 2014 WL 4385839, at *6-7 (E.D.N.Y. Sept. 4, 2014); *see also Langley v. IRS*, 612 F. App’x 585 (11th Cir. 2015) (affirming the dismissal of an untimely innocent-spouse petition); *Nunez v. Commissioner*, 599 F. App’x 629, 630 (9th Cir. 2015) (noting that a petitioner “invoked the Tax Court’s jurisdiction when she filed her petition within 90 days of the date the Commissioner issued a notice of final determination”). No court has held to the contrary.

Boechler

11. The Supreme Court’s recent opinion in *Boechler v. United States*, 142 S. Ct. 1493 (2022), does not warrant revisiting the court’s prior holding in *Pollock* and is consistent with the analysis used by the circuit courts in each of the decisions in holding the time limit of section 6015(e)(1)(A) is jurisdictional. If anything, the Court’s opinion in *Boechler* strengthens the conclusion that the time limit of section 6015(e)(1)(A) is jurisdictional.

12. In *Boechler*, the Supreme Court considered the deadline in section 6330(d)(1) to petition the Tax Court for a review of a collection due process determination. The Court’s textual analysis only relates to the CDP filing requirements set forth in section 6330(d)(1), which provides that “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).”

13. The Court began its analysis noting the recent cases in which it has tried to “bring some discipline to the use of the term jurisdiction[.]” 142 S. Ct. at 1497 (citing *Henderson*, 562 U.S. 428). The Court explained that a procedural requirement is only treated as jurisdictional if “Congress clearly states that it is.” *Id.* at 1497 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)). Additionally, the Court reiterated that Congress need not “incant magic words,” (citing *Sebelius*, 568 U.S. 145), but that “traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences,” (citing *Wong*, 575 U.S. 402). *Id.* at 1497.

14. In applying this more disciplined standard, the Supreme Court noted that the only jurisdictional language in the text of section 6330(d)(1) was in the parenthetical and that it was unclear whether “such matter” referred to “such determination” or the entire first clause. *Id.* at 1498. In light of the ambiguity of

that phrase and the lack of any means to clarify it, the Court concluded that the text did not clearly link jurisdiction with the 30-day time bar. *Id.*

15. In confirming the lack of jurisdictional clarity in section 6330(d)(1), the Court also looked to the broader statutory context and compared section 6330(d)(1) with other tax provisions enacted around the same time, including section 6015(e)(1)(A) and section 6404(g)(1). *Id.* at 1498-99. The Court explained that these other provisions “much more clearly link their jurisdictional grants to a filing deadline.” *Id.*

16. Nothing in the analysis of section 6330(d)(1) in *Boechler* undermines the conclusions reached in *Nauflett*, *Matuszak*, and *Rubel* with respect to the clarity of the jurisdictional deadline set forth in section 6015. Each of the Second, Third and Fourth Circuits expressly recognized the Supreme Court’s efforts, as recounted in *Boechler*, to bring discipline to the use of the term jurisdiction, and each applied the bright-line rule utilized in *Boechler* that a statute is jurisdictional only when “Congress has clearly stated that” it is. *Nauflett*, 892 F.3d at 652 (citing *Sebelius* and *Wong* to conclude the plain text of 6015(e)(1)(A) is jurisdictional); *Matuszak*, 862 F.3d at 196 (citing *Sebelius*, *Wong*, and *Arbaugh* in concluding that the 90-day deadline of 6015(e)(1)(A) was one of the “rare” statutory periods that speaks in clear jurisdictional terms); *Rubel*, 856 F.3d at 304 (citing *Wong* and *Arbaugh* and

concluding Congress was “explicit” that section 6015(e)(1)(A) was a jurisdictional time limit).

17. In short, *Boechler* itself acknowledges the clarity of the jurisdictional time limit of section 6015(e)(1)(A) and can only be read to strengthen the conclusion of *Pollock*, and every court having considered the issue, that section 6015(e)(1)(A)’s deadline is jurisdictional.

18. Because section 6015(e)(1)(A) clearly links between the jurisdictional grant and the 90-day time bar, the Court should continue to hold that the time bar is jurisdictional.

The Context of Section 6015(e)(1)(A) Confirms a Jurisdictional Time Limit

19. While the plain text of section 6015(e)(1)(A) is dispositive, the statutory context of the statute further demonstrates that the time limit is jurisdictional. *See Matuszak*, 862 F.3d at 196-97; *Rubel*, 856 F.3d at 305. Under section 6015(e)(1)(B), respondent is prohibited from collecting on a taxpayer’s liability subject to a request for innocent-spouse relief until the 90-day period for petitioning the Tax Court in section 6015(e)(1)(A) expires, or, if the taxpayer files a petition, until the Tax Court’s decision becomes final. Section 6015(e)(1)(B) authorizes “the proper court, including the Tax Court,” to enjoin premature collection actions. In doing so, § 6015(e)(1)(B) provides that “[t]he Tax Court shall have no jurisdiction to enjoin any [collection] action or proceeding unless a timely

petition has been filed under subparagraph (A).” Thus, the court cannot entertain an untimely petition (per section 6015(e)(1)(A)) and cannot enjoin collection actions if the petition is untimely (per 6015(e)(1)(B)). As the Second Circuit held, section 6015(e)(1)(A) taken together with (B) accordingly represents “[t]he most obvious example’ of a jurisdictional rule, because Congress clearly and repeatedly expressed that it imposes a jurisdictional limit on the Tax Court’s authority.”

Matuszak, 862 F.3d at 197.

Conclusion

20. Considering the text, context, and history of section 6015(e)(1)(A), the time bar is clearly jurisdictional. Accordingly, the Court should reaffirm its conclusion from *Pollock*. And because the petition in this case is untimely, the Court should dismiss it for lack of jurisdiction.

ACCORDINGLY, respondent prays that the Court dismiss the petition for lack of jurisdiction.

DRITA TONUZI
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Date: 10/21/2022

By: _____

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