No. 15-73819

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP A. DUGGAN,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

On Appeal from the Order of Dismissal for Lack of Jurisdiction Entered By the United States Tax Court on June 26, 2015, as Well as the Denial of a Motion for Reconsideration Entered By the United States Tax Court on September 16, 2015

BRIEF OF *AMICUS CURIAE* LINDA JEAN MATUSZAK IN SUPPORT OF PETITIONER-APPELLANT

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INTEREST OF THE *AMICUS*[1]

Like the appellant, Philip Duggan, Linda Jean Matuszak mailed a Tax Court petition a day late and it was dismissed for lack of jurisdiction. *See* order dated December 29, 2015, in *Matuszak v. Commissioner*, Tax Court Docket No. 471-15 (available at https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=67484 95). Similar to Mr. Duggan, Ms. Matuszak argues that the IRS misled her into filing late. In her case, she alleges an IRS Appeals Officer orally provided a filing date that was two days after the correct date.

A difference between Mr. Duggan's case and Ms. Matuszak's case is that his case is a Collection Due Process ("CDP") case brought under § 6330(d)(1)[2] (allowing 30 days to file), while hers is an innocent spouse case brought under § 6015(e)(1)(A) (allowing 90 days to file). However, both statutes were enacted in the same 1998 legislation and contain similar language. *Pollock v. Commissioner*, 132 T.C. 21, 31 (2009).

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[1] Pursuant to FRAP 29(c)(5), this is to affirm that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The only person who contributed money that was intended to fund preparing or submitting this brief is Harvard University. The views expressed herein are those of *amicus*' counsel, not of Harvard University.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code (26 U.S.C.)

In *Pollock*, the Tax Court held that the 90-day period at § 6015(e)(1)(A) in which to file a Tax Court innocent spouse petition is jurisdictional and not subject to equitable tolling. There, the court relied, in part, on opinions that it had previously issued holding that the 30-day period at § 6330(d)(1) in which to file a Tax Court CDP petition is jurisdictional and not subject to equitable tolling. *Pollock*, *supra*, at 31-32.

In January 2016, Ms. Matuszak timely filed a motion to vacate the order dismissing her case. In an accompanying memorandum of law filed by the undersigned *pro bono* counsel, Ms. Matuszak argued that Supreme Court opinions on jurisdiction and equitable tolling issued after *Pollock* have completely undermined *Pollock*'s reasoning, such that the opinion should be overruled and it should be held that the 90-day period at § 6015(e)(1)(A) is not jurisdictional and is subject to equitable tolling. This argument was not made to the court prior to its order of dismissal, when Ms. Matuszak was *pro se*.

The Tax Court has not yet decided Ms. Matuszak's motion to vacate. However, it is her intention, if she loses that motion, to appeal her case to the Court of Appeals for the Second Circuit. A ruling in this case that the period at § 6330(d)(1) in which to file a Tax Court CDP petition is jurisdictional and not subject to equitable tolling would materially damage Ms. Matuszak's case – particularly as (1) no Court of Appeals has yet expressed a view on whether the

period in § 6015(e)(1)(A) is jurisdictional or subject to equitable tolling and (2) no Court of Appeals has considered how recent Supreme Court opinions on jurisdiction and equitable tolling affect whether the period to file in § 6330(d)(1) is jurisdictional or subject to equitable tolling.

ARGUMENT

In his order dismissing this case for lack of jurisdiction, Tax Court Chief Judge Thornton determined that the jurisdiction of the Tax Court depends, in part, on the timely filing of a petition and that the Tax Court has no authority to extend that period. Therefore, the Tax Court was powerless to take jurisdiction of this case, even if Mr. Duggan had been misled into filing late.

Mr. Duggan, as a *pro se* petitioner, is, in essence, arguing that the time period in which to file a CDP petition is not jurisdictional and is subject to equitable tolling. Effectively, he argues that the time period should be tolled until the 31st day because the IRS, in its notice of determination, misled him as to the correct filing date.

I. The 30-day Period to File a Section 6330(d) Petition in the Tax Court is a Nonjurisdcitional Statute of Limitations.

The opinions relied on by Judge Thornton in his order are Tax Court opinions from 2000 and 2004. However, beginning in 2004, the Supreme Court observed that it and other courts had been too careless in using the word "jurisdictional." The Court wrote:

> "[C]lassify[ing] time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'" can be confounding. *Carlisle* [*v. United States*], 517 U.S. [416] at 434 [(1996)] (Ginsburg, J., concurring). 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.

Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

Subsequent to *Kontrick*, the Supreme Court issued a series of opinions holding that time periods in which to file court suits are only rarely jurisdictional. It also issued several opinions concerning whether non-jurisdictional time periods may be equitably tolled. Neither in Judge Thornton's order nor in any other Tax Court opinion has consideration been given to whether the recent Supreme Court case law impacts the Tax Court's precedent that the period in which to file a CDP petition is jurisdictional and not subject to equitable tolling.

While there have been Circuit Courts of Appeals who have affirmed a Tax Court dismissal of an untimely CDP petition for lack of jurisdiction; *see Gray v. Commissioner*, 723 F.3d 790 (7th Cir. 2013); *Kaplan v. Commissioner*, 552 Fed. Appx. 77 (2d Cir. 2014); *Thompson v. Commissioner*, 486 Fed. Appx. 682 (9th Cir. 2012); *Tschida v. Commissioner*, 57 Fed. Appx. 715 (8th Cir. 2003);[3] none of

[3] There have been a number of Circuit Court opinions where the court has stated, in dicta, that the timely filing of a CDP petition is a jurisdictional requirement. But, in these cases, the Tax Court lacked jurisdiction because no notice of determination had been issued. *See Boyd v. Commissioner*, 451 F.3d 8, 10-11 & n.1 (1st Cir. 2006); *Trivedi v. Commissioner*, 525 Fed. Appx. 587 (9th Cir. 2013); *Hartmann v.*

these opinions discussed the effect of the recent Supreme Court case law on jurisdiction or equitable tolling.

Thus, the issue presented in this case – whether recent Supreme Court opinions dictate that the period to file a CDP petition is not jurisdictional and is subject to equitable tolling – is one of first impression in any court.

A. Under Current Supreme Court Case Law, Filing Deadlines Are Now Only Rarely Jurisdictional.

Since *Kontrick*, the Supreme Court has held that time periods in which to act are almost never jurisdictional. *United States v. Wong*, 135 S. Ct. 1625 (2015). However, the Court acknowledges that time periods are jurisdictional if Congress makes a "clear statement" to that effect. *Id*. at 1632. The Court stated:

> [I]n applying that clear statement rule, we have made plain that most time bars are nonjurisdictional. *See*, e.g., *id*., at ___, 133 S. Ct. 817, 825 (noting the rarity of jurisdictional time limits). Time and again, we have described filing deadlines as "quintessential claim-processing rules," which "seek to promote the orderly progress of litigation," but do not deprive a court of authority to hear a case. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *see Auburn Regional*. 568 U.S., at ___, 133 S. Ct. 817, 825; *Scarborough v. Principi*, 541 U.S. 401, 413 (2004). That is so, contrary to the dissent's suggestion, *see post,* at ___, ___ - ___, 191 L. Ed. 2d, at 551, 554-555, even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so "however

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Commissioner, 417 Fed. Appx. 191 (3d Cir. 2011); *Springer v. Commissioner*, 416 Fed. Appx. 681, 683 & n.1 (10th Cir. 2011); *Mosby v. United States*, 107 Fed. Appx. 778 (9th Cir. 2004); *Rudd v. Commissioner*, 91 Fed. Appx. 699 (1st Cir. 2004). Only one of these opinions even mentions any relevant current Supreme Court opinions: In *Springer* at 683 n.1, the court mentioned *Henderson v. Shinseki*, 562 U.S. 428 (2011), and *Bowles v. Russell*, 551 U.S. 205 (2007), in a footnote.

> emphatic[ally]" expressed those terms may be. *Henderson*, 562 U.S., at 439 (quoting *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81 (2009). Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.

Id.

In *Wong*, the Court also wrote: "This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Id*. at 1633 (citations omitted). Three Supreme Court opinions issued after *Kontrick* have held a time period to be not jurisdictional, both because (1) there was no clear statement otherwise from Congress within the statute and (2) an actual jurisdictional grant in the United States Code was located far away from the stated time period. *Musacchio v. United States*, 136 S. Ct. 709 (2016); *Wong*, *supra*; *Henderson v. Shinseki*, 562 U.S. 428 (2011) (holding the period to file in an Article I Court of Appeals for Veterans Claims not jurisdictional).[4] Since *Kontrick*, only once has the Supreme Court held a time period not jurisdictional, even though the jurisdictional grant was in the same sentence containing that time period. *Sebelius v. Auburn Regional Med. Cntr.*, 133 S. Ct. 817 (2013).

[4] That court is one of limited jurisdiction, like the Tax Court. Yet, the Supreme Court in *Henderson* held that the time limit to file in such court was not jurisdictional. Thus, the observation that the Tax Court is a court of limited jurisdiction is irrelevant in determining whether a filing period in the Tax Court is jurisdictional.

The Court has never yet held, following *Kontrick*, that statutory words clearly stated Congress' intent that a time period be jurisdictional. This makes it especially difficult for lower courts to hold time periods jurisdictional under the clear statement rule, since there are no such examples to consider at this time.

Since *Kontrick*, there have been only two opinions holding that a time period is jurisdictional. But, those holdings were predicated only on *stare decisis*, since for over 100 years, the Supreme Court called those time periods jurisdictional. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007).

B. Under Current Supreme Court Case Law, the 30-day Period to File a CDP Petition is Nonjurisdictional.

Applying current Supreme Court case law, the 30-day period in which to file a petition to the Tax Court under section 6330(d)(1) is not jurisdictional.

As originally enacted by § 3401(b) of the IRS Restructuring and Reform Act of 1998, Pub. L. 105-206, section 6330(d) (1) provided:

> (d) Proceeding After Hearing. –
>
> (1) Judicial review of determination. -- The person may, within 30 days of a determination under this section, appeal such determination-
>
> (A) to the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or
>
> (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

> If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

The legislative history of this section says nothing about whether the time period is jurisdictional. S. Rept. 105-174 at 67-69; H.R. (Conf.) Rept. 105-599 at 263-266.

In 2000, Congress amended section 6330(d)(1) to replace the parenthetical "(and the Tax Court shall have jurisdiction to hear such matter)" with the broader parenthetical "(and the Tax Court shall have jurisdiction with respect to such matter)". Pub. L. 106-554, § 313(d). In the Conference Report on the legislation, this change to the wording is explained merely as one to clarify that a CDP determination of the Tax Court is a decision that is reviewable on appeal in another court. H.R. (Conf.) Rept. 106-1033 at 1024-1025.

In 2006, Congress made the Tax Court the sole venue for appeal of CDP notices of determination involving any tax by shortening section 6330(d)(1) to read: "Judicial review of determination. -- The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." As amended by Pub. L. 109-280, § 855(a). The legislative history of this change does not mention the 30-day period. Joint Committee on Taxation, "Technical Explanation of H.R. 4, the 'Pension Protection Act of 2006', as Passed by the House on July 28, 2006,

and as Considered by the Senate on August 3, 2006" (JCX-38-06), August 3, 2006, at 201-202.

Thus, the final result is a single sentence in section 6330(d)(1) that contains two parts – one providing a filing deadline and another (contained within a parenthetical) granting jurisdiction to the Tax Court.[5]

Under current Supreme Court case law, "most time bars are nonjurisdictional." *Wong*, *supra*, at 1632. However, there are two exceptions to this rule:

One is that the Court will ignore its current "nonjurisdictional" rule if there is a long line of Supreme Court precedent interpreting the exact provision involved as jurisdictional. *Bowles v. Russell*, *supra*; *John R. Sand & Gravel Co. v. United States*, *supra*. This exception does not apply here though, because, in the 17 years since section 6330(d)(1) was enacted, the Supreme Court has never interpreted it.

[5] Although it is not applicable to this suit, *amicus* notes a recent amendment of section 6330(d), enacted by Pub. L. 114-113, Div. Q, § 424. By this amendment, Congress has prospectively (1) changed the wording of the Tax Court CDP proceeding from an "appeal" to a "petition", and (2) inserted a single statutory tolling provision to coordinate the time period with the bankruptcy stay. The legislative history of this provision can be found at: Joint Committee on Taxation, Technical Explanation Of The Protecting Americans From Tax Hikes Act Of 2015, House Amendment #2 To The Senate Amendment To H.R. 2029 (Rules Committee Print 114-40), JCX- 144-15 (Dec. 17, 2015), pp. 255-256. Nothing in that legislative history indicates that the new language is drafted to make the time period jurisdictional. Indeed, quite the contrary: The legislative history refers to the 30-day period as a "period of limitations". *Id*. at 255.

Second, Congress may override the normal nonjurisdictional interpretation by making a clear statement indicating that Congress wants the time period to be jurisdictional. However, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Wong*, *supra*, at 1632.

The Supreme Court opinion most pertinent to interpreting section 6330(d)(1) is its 2013 opinion in *Sebelius v. Auburn Regional Med. Cntr.*, *supra*. That opinion involved the 180-day time period under 42 U.S.C. § 1395*oo*(a)(3) that Medicare providers had to file in an administrative tribunal in order to complain of insufficient reimbursements. In a single, long sentence, subsection (a) of that statute provided that those providers "may" obtain hearings before administrative boards if (1) the providers were dissatisfied with certain administrative reimbursement determinations, (2) the amount in controversy was $10,000 or more, and (3) the providers requested a hearing within 180 days after the determination.

The Supreme Court appointed an *amicus* to argue that the 180-day period was jurisdictional. However, the Court then rejected that argument, writing:

> *Amicus* urges that the three requirements in § 1395*oo*(a) are specifications that together define the limits of the PRRB's jurisdiction. Subsection (a)(1) specifies the claims providers may bring to the Board, and subsection (a)(2) sets forth an amount-in-controversy requirement. These are jurisdictional requirements, *amicus* asserts, so we should read the third

specification, subsection (a)(3)'s 180-day limitation, as also setting a jurisdictional requirement.

Last Term, we rejected a similar proximity-based argument. *Auburn*, 133 S. Ct. at 825.

The Court noted that subsection (a)(3) did not contain words similar to "shall file a notice of appeal" – words insufficient even in *Henderson* to make the time period jurisdictional – but rather contained the much milder words "may obtain a hearing" before the Board if "such provider files a request for a hearing within 180 days after notice of the intermediary's final determination." *Id*. at 824-825. The Court found this did not overcome the usual rule that filing deadlines are not jurisdictional.

As the Court noted, the proximity-based argument made by the *amicus* in *Auburn* was previously made the year before – in *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012). In that case, 28 U.S.C. § 2253 addressed the jurisdiction of district courts in *habeas* review. Section (c)(3) of that statute provided that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." As in *Auburn*, the Court in *Gonzalez* refused to consider the requirement of paragraph (c)(3) jurisdictional, even though it was adjacent to several jurisdiction-related provisions within the same section of the United States Code. The Court reasoned that, "Mere proximity

will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez*, 132 S. Ct. at 651.

Even before *Gonzalez* and *Auburn*, this Court held that a time period was not jurisdictional, despite its being adjacent to a jurisdictional grant in the same sentence. 15 U.S.C. § 1692k authorizes a suit for monetary damages under the Fair Debt Collection Practices Act. Subsection (d) thereof provides: "Jurisdiction: An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs." This Court stated:

> [W]e attach no particular significance to the fact that this statute of limitations appears in the same sentence in which the jurisdiction provision appears. Nothing in the structure of that sentence tells us that the time limitation was also a jurisdictional limitation. In fact, a more natural reading is that parties may bring their action in any "court of competent jurisdiction" and may do so "within one year." 15 U.S.C. § 1692k(d)**.** It is fair to say that parties are faced with a "when" issue and a "what court" issue for every action, but the former does not usually control or affect the latter.

Magnum v. Action Collection Services, Inc., 575 F.3d 935, 940 (9th Cir. 2009).

Similarly to in *Auburn* and *Magnum*, section 6330(d)(1) is a single sentence containing a jurisdictional grant and a time period. But, there is no clear statement that the time period is similarly intended to be jurisdictional. Instead, there is confusion. While it is arguable that "such matter" in the jurisdictional parenthetical refers to (1) the filing of an appeal and (2) rigid compliance with the

30-day requirement, that is only one possible interpretation, not a clear statement. The jurisdictional nature of the filing deadline would be more likely if the jurisdictional grant was expressly contingent on compliance with the filing deadline, such as: "The person may, within 30 days of determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter only if the appeal is brought within such period)".[6]

Combined with the ambiguous language of section 6330(d)(1) in its current form is the original language, which contained a rule governing a situation often raised as a ground for equitable tolling – i.e., timely filing in the wrong forum; *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990); *Burnett v. N.Y. Cent. R.R. Co.,* 380 U.S. 424, 429-430 (1965); *Herb v. Pitcairn*, 325 U.S. 77 (1945); *Oltman v. Holland Am.Line-USA, Inc*., 538 F.3d 1271, 1279-1280 (9th cir. 2008). This strongly suggests that Congress did not think the 30-day period was jurisdictional or otherwise not subject to equitable tolling.

The legislative history of section 6330(d)(1) does not illuminate Congress' thinking as to whether the 30-day period is jurisdictional. However, even if that history did, the Supreme Court in *Wong* expressed doubt that legislative history

[6] The "only if" language in the hypothetical statute is derived from *V.L. v. E.L.*, 2016 U.S. LEXIS 1653 (March 7, 2016) (per curiam)(hypothetical statute would have made a condition jurisdictional if the statute had contained the words "shall have jurisdiction…only if" the condition was met).

alone could provide the clear statement necessary to overcome the usual nonjurisdictional nature of filing deadlines. *Wong*, *supra*, at 1632 ("Finally, even assuming legislative history alone could provide a clear statement (which we doubt), none does so here.")

In sum, under current Supreme Court case law, the 30-day period to file a CDP appeal in the Tax Court is not jurisdictional because there is no clear statement in the statute that the filing deadline is jurisdictional.

II. The 30-day Period to File a CDP Petition in Tax Court is Subject to Equitable Tolling in Appropriate Cases Like This One.

A. While the *Irwin* Presumption in Favor of Equitable Tolling Does Not Apply in All Tribunals, It Should Apply in the Tax Court, Since the Tax Court Has Large Numbers of Individual *Pro Se* Petitioners.

In *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96.

However, the *Auburn* decision held that the *Irwin* presumption does not apply in all tribunals. In *Auburn*, the Court found the 180-day statutory deadline for Medicare providers to file for an administrative hearing is not subject to equitable tolling. *Auburn,* at 828-829. The Court noted that it generally applied the *Irwin* presumption in favor of equitable tolling to filing deadlines in Federal

courts and had never before applied the *Irwin* presumption to an agency's internal appeal deadline. *Id*. at 827. The Court distinguished the statute at issue from the types of "remedial" statutory schemes where the *Irwin* presumption had been applied, including schemes which were "'unusually protective of claimants'" and schemes where "'laymen, unassisted by trained lawyers, initiate the process.'" *Id*. at 828 (citations omitted). Instead, the Court pointed out that the statutory scheme in question involved "'sophisticated' institutional providers assisted by legal counsel" that were "repeat players who elect to participate in the Medicare system . . . ." *Id*. (citation omitted). The Court thus found that the *Irwin* presumption did not apply to "administrative appeals of the kind here considered." *Id*. at 828–29.

It would be a mistake to interpret *Auburn* too broadly. The Court did not hold that *Irwin* never applied in non-Article III entities – just that *Irwin* did not apply in the particular type of administrative body where sophisticated, well-represented, repeat-playing parties elect to participate in the system. That the Court did not intend to create a broad rule is evident from *Wong*, where, in 2015, the Court held that under the Federal Tort Claim Act, the 2-year period in which to file an administrative tort claim with a Federal agency was subject to the *Irwin* presumption. *Wong*, 135 S.Ct. at 1633.

The considerations that caused the *Auburn* Court to find *Irwin* inapplicable do not apply to the Tax Court. *Auburn* may dictate that the *Irwin* presumption

does not apply in certain administrative tribunals where sophisticated, well-represented parties litigate. However, the Tax Court is not that kind of tribunal, as most taxpayers file there *pro se*. Unlike filings with the boards involved in *Auburn*, CDP petitions in the Tax Court are not typically filed by repeat-filing large corporations that are well-represented by counsel. CDP petitions are typically filed by *pro se*, individual taxpayers who have never petitioned the Tax Court previously. Tax Court Special Trial Judge Peter Panuthos reported last year that over 72% of Tax Court petitioners in pending cases were *pro se*. David van den Berg, "ABA Meeting: Low-Income Clinic Representation Levels Constant", Tax Notes Today, 2015 TNT 91-13 (May 12, 2015). Thus, the reasoning in *Auburn* for finding that equitable tolling does not apply in cases involving repeat sophisticated litigants does not prevent this Court from applying the *Irwin* presumption in favor of equitable tolling to the time deadline contained in section 6330(d)(1).

B. *Irwin*'s Presumption Applies Even Without a Private Party Suit Analogue.

Last year, in *Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015), this Court wrote:

> [T]the government argues that, even if § 6532(c) is not jurisdictional, *Irwin*'s presumption may be applied only if the claim asserted against the government is analogous to a claim that could be asserted against a private party. We held that such a requirement exists in *Rouse v. United States Department of State*, 567 F.3d 408, 416 (9th Cir. 2009), relying in part on dicta in *United States v. Brockamp*, 519 U.S. 347, 349-50 (1997).

777 F.3d at 1045. *Rouse* was incorrect, though.

In *Scarborough v. Principi*, 541 U.S. 401 (2004), the Supreme Court had earlier declined to require the existence of a private party suit analogue before the *Irwin* presumption could apply against the government, writing:

> [I]t is hardly clear that *Irwin* demands a precise private analogue. Litigation against the United States exists because Congress has enacted legislation creating rights against the Government, often in matters peculiar to the Government's engagements with private persons – matters such as the administration of benefit programs. Because many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin*'s reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent.

Id. at 422. In its post-*Rouse* opinions in *Holland v. Florida*, 560 U.S. 631 (2010), and *Wong*, the Supreme Court applied the *Irwin* presumption to a *habeas* statute and the time period in which to file a Federal Tort Claims Act claim with a federal agency – all without discussing any requirement (or the possible existence of) any private party suit analogue.

Thus, the *Rouse* requirement is no longer good law (if it ever was), and it is of no moment that *amicus* can identify no private party suit analogue to a CDP suit against the government.

C. Section 6330(d)(1)'s Time Period is More Like the Time Periods Involved in *Holland* and *Volpicelli* Than the Time Period Involved in *Brockamp*.

In *United States v. Brockamp*, 519 U.S. 347 (1997), the Supreme Court faced the issue of whether the 3-year time limit for filing an administrative tax refund claim in section 6511 was subject to equitable tolling. Without discussing whether the time period was jurisdictional, the Court held that, even if the *Irwin* presumption applied to this time period, a combination of factors rebutted any presumption that equitable tolling could apply: (1) the time limits were set forth in an "unusually emphatic form," (2) the statute set forth the limitations in a "highly detailed technical manner," by reiterating the limitations period in multiple subsections, (3) the statute specified numerous exceptions to the filing deadline, which did not include equitable tolling, (4) the granting of equitable tolling would require tolling substantive limitations on the amount of recovery, for which there was no direct precedent, and (5) granting equitable tolling could create serious administrative problems by forcing the IRS to respond to large numbers of late claims. *Brockamp*, at 350-353.

In *Holland v. Florida*, 560 U.S. 631 (2010), the Supreme Court revisited *Brockamp* when addressing whether the 1-year statute of limitations for asking a federal district court to engage in *habeas* review of a state death penalty conviction was subject to equitable tolling. *Holland* at 634. In distinguishing the statute at

issue from the one in *Brockamp*, the Court found that the presumption in favor of equitable tolling was not rebutted because (1) the language of the limitations provision was not unusually emphatic, (2) the statute did not "reiterate" its time limitation, (3) the one exception the statute enunciated (tolling during state collateral review proceedings) was a necessary procedural measure to account for exhaustion of state remedies, (4) the application of equitable tolling would not affect the substance of a *habeas* petitioner's claim, (5) the subject matter at issue, *habeas corpus*, pertains to an area in which equitable considerations often factor, unlike the area of refund claim administration. *Holland* at 635, 646-647. The Court also noted that, although generous limitations periods may factor in overcoming the *Irwin* presumption, *see United States v. Beggerly*, 524 U.S. 38, 48 (1998) (12-year period), the period of one year was not particularly long. *Holland*, at 647. Importantly, the Court also established that a statute enacted post-*Irwin* was subject to a "reinforced" *Irwin* presumption, since Congress was likely aware at enactment that courts would apply the *Irwin* presumption when interpreting the statute. *Id*. at 646 (citation omitted).

Similarly, last year, this Court, in *Volpicelli*, applied the *Brockamp* tests to the 9-month limitations period in which to file a wrongful levy suit in order to determine whether the *Irwin* presumption in favor of equitable tolling was rebutted. *Volpicelli*, 777 F.3d. at 1045-1046. This Court found that the *Irwin*

presumption had not been rebutted because (1) the language of the statute was not unusually emphatic, (2) the statute was not highly detailed or technical, (3) the statute contained only one exception that extended the limitations period, (4) the limitations period had no impact on substantive recovery, and (5) the tax-related nature of the statute was only one factor weighing against equitable tolling, which was overcome by the other factors weighing in favor of tolling. *Id*. at 1045-1046. This Court further noted that the 9-month limitation period was "relatively stingy" compared to the generous period of 12 years in *Beggerly* that the Supreme Court found was a factor in rebutting the *Irwin* presumption. *Volpicelli*, at 1046.

The *Irwin* presumption is not rebutted in the instant case because the 30-day limitation period of section 6330(d)(1) shares more similarities with the statutes in *Holland* and *Volpicelli* than with the statute in *Brockamp*. The *Irwin* presumption is not rebutted because (1) the language of section 6330(d)(1) is not unusually emphatic, due to utilizing the less directive "may," instead of the "shall" used in *Brockamp*, *Holland*, and *Volpicelli*, (2) the statutory language is not "highly technical or detailed" and does not reiterate the limitations period in other sections, (3) the statute contained no exceptions to its limitations period and was therefore more dissimilar from *Brockamp* than both *Holland* and *Volpicelli*, which each had statutes with one exception,[7] (4) the limitations period has no impact on

[7] Of course, as noted above, going forward the statute has one exception.

substantive recovery because the amount of contestable unpaid tax or levy is not linked to the limitations period, unlike in *Brockamp* where the potential recoverable refund was limited to any tax paid within the 3-year limitations period, and (5) if the tax-related nature of section 6330(d)(1) is considered a factor weighing against the *Irwin* presumption, as in *Holland* where the presence of such factor was not dispositive, it should be weighed lightly, since the serious administrative problems envisioned by *Brockamp* are less probable with respect to CDP petitions.

Although the *Brockamp* Court also expressed concern about the IRS managing over 90 million refund claims annually and being overwhelmed if the Court allowed equitable tolling, only a relatively low number of CDP cases are filed in the Tax Court, and an even lower number are dismissed for lack of jurisdiction. In the fiscal year ending September 30, 2008, Chief Counsel statistics indicated that only 1,463 of the 32,193 cases filed in the Tax Court were CDP cases, and a study conducted by counsel for the *amicus* indicated that fewer than 10% (13 out of 154 of the CDP cases in the representative sample from 2008) were dismissed for lack of jurisdiction. *See* Carlton M. Smith & T. Keith Fogg, "Tax Court Collection Due Process Cases Take Too Long", 130 *Tax Notes* 403, 413 (Jan. 24, 2011), 2011 TNT 16-20 (Jan. 25, 2011). Further, CDP cases can be dismissed for lack of jurisdiction either on the ground that (1) no notice of

determination was ever issued after a CDP hearing or (2) the 30-day filing period in section 6330(d)(1) was not met. As such, petitioners alleging extraordinary facts justifying equitable tolling of the 30-day period would likely be only a small subset of that 10%, and would hardly overwhelm the Tax Court.

Additionally, the short deadline of 30 days in section 6330(d)(1) weighs in favor of applying the *Irwin* presumption. This 30-day limitation is in stark contrast to the 12-year period in *Beggerly*. More importantly, the limitations period of 30 days is far less than the 1-year period and 9-month period in *Holland* and *Volpicelli*, respectively, which the courts felt were short.

Further, pursuant to *Holland*, the *Irwin* presumption in favor of equitable tolling for the section 6330(d)(1) period is "reinforced" because the statute was first enacted more than 7 years after the *Irwin* decision. *Holland*, at 646. Therefore, Congress is presumed to have drafted section 6330(d)(1) with the knowledge that courts would apply the *Irwin* presumption in interpreting the statute.

D. The Fact That Section 6330(d)(1) is Found in the Tax Code Does Not Preclude Equitable Tolling.

Following *Brockamp*, the government has routinely argued that there can be no equitable tolling in the Tax Code. Yet, this argument has been impliedly rejected by the Supreme Court in *Holland* and explicitly rejected by this Court.

In *Holland*, the Court noted that because the limitations period at issue was found in an area of law familiar with equitable relief, the *Irwin* presumption was "reinforced". *Holland* at 647. However, the Court did not say that there was no *Irwin* presumption in a non-equitable area. Therefore, even if the presence of section 6330(d)(1) in the Tax Code does not reinforce the *Irwin* presumption, it does not abolish it.

This Court wrote last year:

> The Court may in time decide that Congress did not intend equitable tolling to be available with respect to any tax-related statute of limitations. But that's not what the Court held in *Brockamp.* It instead engaged in a statute-specific analysis of the factors that indicated Congress did not want equitable tolling to be available under § 6511. The Court later made clear in *Holland* that the "'underlying subject matter'" of § 6511—tax law—was only one of those factors. 560 U.S. at 646, 130 S. Ct. 2549 (quoting *Brockamp,* 519 U.S. at 352). As we have explained, the other factors on which the Court relied are not a close enough fit with § 6532(c) to render *Brockamp* controlling here.

Volpicelli, *supra*, at 1046. *Accord Flight Attendants Against UAL Offset v. Comm'r*, 165 F.3d 572, 577 (7th Cir. 1999) (Posner, J.; dicta rejecting the argument that *Brockamp* extends to bar tolling throughout the Tax Code).

Even though many areas of the Tax Code are not equitable, by contrast, CDP is suffused with equitable determinations:

First, CDP requires the Appeals Officer to consider "whether any proposed collection action balances the need for the efficient collection of taxes with the

legitimate concern of the person that any collection action be no more intrusive than necessary." Section 6330(c)(3)(C). This balancing test is essentially an equitable determination.

Second, one of the issues in a CDP hearing may be "appropriate spousal defenses"; section 6330(c)(2)(A)(i); which includes innocent spouse relief from joint and several income tax liabilities under section 6015. Both subsections (b) and (f) of section 6015 provide for such relief only if the taxpayer shows that it would be "inequitable" not to relieve the spouse from joint and several liability.

Third, collection alternatives may be considered at a CDP hearing. Collection alternatives include Offers in Compromise ("OICs"). Section 6330(c)(2)(A)(iii). In 1998, Congress enacted new standards and procedures for OICs under section 7122. § 3462, Pub. L. 105-206. Language in the Conference Committee Report encouraged the IRS to consider "factors such as equity, hardship and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax administration". H.R. (Conf.) Rept. 105-509 at 289. Beyond evaluating these "effective tax administration" OICs for equity, the IRS' evaluation of the much more common "doubt as to collectability" OICs are "characterized by case-specific [considerations] reflecting individualized equities". *Brockamp* at 352. To obtain a doubt as to collectability OIC, a taxpayer must submit and the IRS will consider a Form 433-A(OIC) financial information

statement setting forth the taxpayer's particular income, expenses, and assets. *See* instructions to OIC Form 656.

As noted above, the Supreme Court has said that the *Irwin* presumption is "reinforced" when an area containing the time deadline is equitable. *Holland* at 646 (*habeas corpus*). *Accord Young v. United States*, 535 U.S. 34, 50 (2002) (The Court found that the *Irwin* presumption "is doubly true when [Congress] is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity"). Since CDP is an equitable area, a time period within CDP (like the 30-day filing period here involved) should get a further reinforced *Irwin* presumption beyond the reinforced presumption already due because section 6330(d)(1)'s time limit was enacted after the Supreme Court issued *Irwin*.

E. The Defendant Having Misled the Plaintiff as to a Filing Date is Ordinarily Considered Grounds for a Court to Impose Equitable Tolling.

In *Glus v. Brooklyn*, 359 U.S. 231 (1959), the Supreme Court held that a defendant could be estopped from arguing that the plaintiff had brought his Federal Employers' Liability Act claim late under the statute of limitations if the plaintiff could prove at a hearing that, as he alleged, the defendant or his employees misled the plaintiff into the late filing.

The notice of determination in this case stated: "If you want to dispute this determination in court, you must file a petition with the United States Tax Court

within a 30-day period beginning the day after the date of this letter." (Emphasis added). That is not the statutory language. The statute provides: "The person may, *within 30 days of a determination* under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." Section 6330(d)(1) (emphasis added).

The IRS apparently chose to write a sentence in the notice that conflates the words of the statute with elements of Tax Court Rule 25(a)(1) (discussing how to count days) and 26 C.F.R. § 301.6330-1(f)(1) ("The taxpayer may appeal such determinations made by Appeals within the 30-day period commencing the day after the date of the Notice of Determination to the Tax Court.").[8] However, the IRS failed to alert taxpayers as to the rules it was summarizing or where taxpayers could find examples of how the 30-day rule operated (including omitting any discussion of weekends days).

The ultimate product of what the IRS wrote is probably sufficient language for attorneys who are versed in counting days from extensive experience. But, it is potentially misleading to many *pro se* taxpayers. Indeed, it is because *pro se* taxpayers have difficulty understanding how to count days that, in 1998, Congress specifically required the IRS to place a last date to file on notices of deficiency and

[8] Of course, the IRS cannot by regulation alter the time period to file in the Tax Court unless the time period is not jurisdictional. *Auburn*, *supra*, 133 S. Ct. at 824.

amended section 6213(a) to provide that taxpayers can rely on any incorrect dates shown. § 3463, Pub. L. 105-206.

Mr. Duggan is not the only *pro se* taxpayer recently to have relied on this notice language to his detriment. In a September 14, 2015, objection to an IRS motion to dismiss his case for lack of jurisdiction, William Swanson argued that his CDP petition was timely because the notice indicated that he had 31 days after the date of the notice to file. *Amicus*' counsel has obtained a copy of his objection (Docket entry no. 8 in *Swanson v. Commissioner*, Tax Court Docket No. 14406-15S) from the Tax Court reproduction office, as the objection is not available on line. In an order dated January 14, 2016, Chief Judge Thornton dismissed Swanson's case, holding that the time period in which to file is jurisdictional. *See* https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=67607 82. Likewise, in an order dated March 4, 2016, an identical reading of the notice of determination and dismissal of a *pro se* CDP petition for being filed a day late was rendered in *Pottgen v. Commissioner*, Tax Court Docket No. 1410-15L. *See* https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=67968 20.

In light of the reasonable, if incorrect, construction that Mr. Duggan made of the wording of the notice that the IRS drafted, the IRS should be held to have misled Mr. Duggan into filing late.

CONCLUSION

This Court should hold that the time period in which to file a CDP petition is not jurisdictional and subject to equitable tolling. This Court should instruct the Tax Court to equitably toll the time period because of the misleading language that the IRS used in its notice of determination.

Respectfully submitted,

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Dated: March 16, 2016

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