
No. 15-3838

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

ROBERT H. TILDEN,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

**ON APPEAL FROM THE ORDER OF
THE UNITED STATES TAX COURT
(Docket No. 11089-15; Judge Armen)**

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

	PAGE
Table of contents	i
Table of authorities	ii
Argument:	
Section 6213(a) of the Internal Revenue Code is a jurisdictional statute, not a claims-processing rule	3
A. Introduction.....	3
B. The Supreme Court has established a “clear statement” rule for determining whether time limits on suits against the Government are jurisdictional	4
C. The time limit in I.R.C. § 6213(a) satisfies the “clear statement” rule because the text of the statute, its context, and its historical treatment clearly show that it is a jurisdictional provision	7
1. The text of the statute.....	7
2. The legislative history.....	13
3. The historical treatment of I.R.C. § 6213(a).....	17
Conclusion	24
Certificate of compliance.....	25
Certificate of service.....	26
Statutory Addendum.....	27

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Andrews v. Commissioner</i> , 563 F.2d 365 (8th Cir. 1977)	19
<i>Arbaugh v. Y&H Corp.</i> , 546 U.S. 500 (2006)	4
<i>Athens Pizza of Jaffrey, Inc. v. Commissioner</i> , 134 F.3d 361 (1st Cir. 1998).....	19
<i>Boccutto v. Commissioner</i> , 277 F.2d 549 (3d Cir. 1960).....	19
<i>Briley v. Commissioner</i> , 622 F. App'x 305 (4th Cir. 2015).....	19
<i>Commissioner v. McCoy</i> , 484 U.S. 3 (1987)	3
<i>Corriea v. Commissioner</i> , 58 F.3d 468 (9th Cir. 1995)	18
<i>Edwards v. Commissioner</i> , 791 F.3d 1 (D.C. Cir. 2015)	18
<i>Foster v. Commissioner</i> , 445 F.2d 799 (10th Cir. 1971)	18
<i>Gray v. Commissioner</i> , 723 F.3d 790 (7th Cir. 2013)	3
<i>Gillespie v. United states</i> , No. 15-CV-0434, Order (7th Cir. Nov. 1, 2016)	2
<i>Guralnik v. Commissioner</i> , 146 T.C. No. 15, 2016 WL 3165779 (2016)	20
<i>Gutterman Strauss Co., Appeal of</i> , 1 B.T.A. 243 (1924)	14
<i>Hamilton v. Commissioner</i> , 13 T.C. 747 (1949)	20
<i>Herzog v. Commissioner</i> , 643 F. App'x 942 (11th Cir. 2016).....	18
<i>Hintz v. Commissioner</i> , 712 F.2d 281 (7th Cir. 1983)	3
<i>Hoffenberg v. Commissioner</i> , 905 F.2d 665	19

Cases (cont'd):	Page(s)
<i>Houghton v. Commissioner,</i> 48 T.C. 656 (1967)	20
<i>Hurst, Anthony & Watkins, Appeal of,</i> 1 B.T.A. 26 (1924)	14
<i>John R. Sand & Gravel Co. v. United States,</i> 552 U.S. 130 (2008)	4, 6, 20-22
<i>Johnson v. Commissioner,</i> 611 F.2d 1015 (5th Cir. 1980)	21
<i>Keado v. United States,</i> 853 F.2d 1209 (5th Cir. 1988)	19
<i>Kennedy v. Commissioner,</i> 339 F.2d 335 (7th Cir. 1964)	18
<i>Lewin v. Commissioner,</i> 569 F.2d 444 (7th Cir. 1978)	18
<i>Ming, Estate of v. Commissioner,</i> 62 T.C. 519 (1974)	10
<i>Old Colony Trust Co. v. Commissioner,</i> 279 U.S. 716 (1929)	13
<i>Patmon and Young Professional Corp. v. Commissioner,</i> 55 F.3d 216 (6th Cir. 1995)	19
<i>Patterson v. McLean Credit Union,</i> 491 U.S. 164 (1989)	6
<i>Petrulis v. Commissioner,</i> 938 F.2d 78 (7th Cir. 1991)	1, 18
<i>Pugsley v. Commissioner,</i> 749 F.2d 691 (11th Cir. 1985)	18
<i>Reed Elsevier, Inc. v. Muchnick,</i> 559 U.S. 154 (2010)	4-6, 21, 23
<i>Sanders v. Commissioner,</i> 813 F.2d 859 (7th Cir. 1987)	3, 18
<i>Satovsky, Appeal of, 1 B.T.A. 22 (1924)</i>	20
<i>Sebelius v. Auburn Reg'l Med. Ctr.,</i> 133 S. Ct. 817 (2013)	5

Cases (cont'd):	Page(s)
<i>Shipley v. Commissioner</i> , 572 F.2d 212 (9th Cir. 1977)	19
<i>Smith v. Commissioner</i> , 275 F.3d 912 (10th Cir. 2001)	15
<i>Tadros v. Commissioner</i> , 763 F.2d 89 (2d Cir. 1985).....	19
<i>United States Natl. Bank v. Independent Ins. Agents of Am., Inc.</i> , 508 U.S. 439 (1993)	15
<i>United States v. Josephberg</i> , 562 F.3d 478 (2d Cir. 2009).....	9
<i>United States v. Wong</i> , 135 S.Ct. 1625 (2015)	1, 4-6

Statutes:

Internal Revenue Code (26 U.S.C):

§ 6212(c).....	11-12
§ 6213.....	7, 16
§ 6213(a)	1-4, 7-13, 15, 17-18, 20-23
§ 6213(c).....	11
§ 6512.....	11
§ 6512(a)	12
§ 7442.....	3, 7
§ 7422(a)	2
§ 7459(d)	9-11
§ 7485.....	8

Internal Revenue Restructuring and Reform Act of 1998 (RRA 1998), Pub. L. 105-206, 112 Stat. 685 (1998)

§ 3463.....	14, 15
-------------	--------

Revenue Act of 1924, ch. 234, 43 Stat. 336:

§ 274	14
§ 900.....	14

Statutes (cont'd):	Page(s)
Revenue Act of 1934, ch. 277, 48 Stat. 741:	
§ 501	14
28 U.S.C.:	
§ 2501.....	6
 Miscellaneous:	
Fed. R. App. P.	
Rule 28(j)	2, 20
H.R. Rep. No. 68-179 (1923),	
<i>reprinted in</i> 1939-1 C.B. (pt. 2) 241	13
H.R. Rep. 105-364 pt. 1 (1997),	
<i>reprinted in</i> 1998-3 C.B. 373	16
Walter W. Hammond, <i>United States Board of Tax Appeals</i> ,	
11 Marq. L. Rev. 1 (1926)	14
Dana Latham, <i>Jurisdiction of the United states Board of</i>	
<i>Tax Appeals under the Revenue Act of 1926</i> ,	
15 Cal. L. Rev. 199 (1927).....	14
S. Rep. 105-174 (1998),	
<i>reprinted in</i> 1998-3 C.B. 537	16
S. Rep. No. 68-398 (1923),	
<i>reprinted in</i> 1939-1 C.B. (pt. 2) 266	13

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SUPPLEMENTAL BRIEF FOR THE APPELLEE

This case was argued on October 6, 2016, before Chief Judge Wood and Circuit Judges Easterbook and Manion. At oral argument, the panel raised an issue that was not addressed in the briefs of the parties, *viz.*, whether recent Supreme Court cases (*e.g.*, *United States v. Wong*, 135 S.Ct. 1625, (2015)), would treat the time limit in I.R.C. § 6213(a) as a non-jurisdictional claims-processing rule despite statements to the contrary in this Circuit's prior decisions (*e.g.*, *Petrulis v. Commissioner*, 938 F.2d 78, 79 (7th Cir. 1991)). The few authorities provided to the

panel at argument (and in post-argument letters filed pursuant to Fed. R. App. P. 28(j)) have not fully apprised the panel of all of the authorities relevant to this issue, or of their significance. In addition, a recent decision of this Court indicates that there is uncertainty as to whether time limits in tax statutes should be treated as non-jurisdictional claims-processing rules. *See Gillespie v. United States*, No. 15-CV-0434, Order (7th Cir. Nov. 1, 2016) (expressing the view that doubt has been cast on the line of cases that recognizes that the administrative-claim requirement in I.R.C. § 7422(a) is a jurisdictional requirement). The issue raised by the Court is one of considerable importance to the administration of the tax laws, and, as we discuss at pp. 9-11, 18-20, *infra*, a holding that I.R.C. § 6213(a)'s time limit is a non-jurisdictional rule would be contrary to well-established precedent in all relevant circuits and also may adversely impact taxpayers. Accordingly, we have filed a motion seeking leave to file this supplemental brief.

ARGUMENT

Section 6213(a) of the Internal Revenue Code is a jurisdictional statute, not a claims-processing rule

A. Introduction

The Tax Court, as an Article I court, is a court of limited jurisdiction and may only exercise jurisdiction to the extent authorized by Congress. *Hintz v. Commissioner*, 712 F.2d 281, 285 (7th Cir. 1983); *Sanders v. Commissioner*, 813 F.2d 859, 861 (7th Cir. 1987). It is well established that the Tax Court “lacks general equitable powers.” *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987). Pursuant to I.R.C. § 7442, the Tax Court has “such jurisdiction as is conferred” on it by the Internal Revenue Code. *Gray v. Commissioner*, 723 F.3d 790, 792 (7th Cir. 2013).

The provision of the Code that confers jurisdiction on the Tax Court to review a notice of deficiency is I.R.C. § 6213(a). As is discussed at pp. 18-20, *infra*, the Tax Court and every court of appeals to consider the jurisdictional status of the time limit in this provision has recognized that the time limit is jurisdictional. The panel in this case, however, pointed out at argument that beginning in 2004, the Supreme Court began to question whether procedural rules that previously had

been viewed as jurisdictional were actually jurisdictional. *See, e.g., United States v. Wong*, 135 S.Ct. 1625, 1631 (2015); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). As we demonstrate below, under the Supreme Court’s “clear statement” rule for determining whether a procedural rule is jurisdictional in nature (or merely a non-jurisdictional claims-processing rule), I.R.C. § 6213(a)’s time limit is jurisdictional.

B. The Supreme Court has established a “clear statement” rule for determining whether time limits on suits against the Government are jurisdictional

The Supreme Court has recognized a category of “jurisdictional” statutes whose time limits are “more absolute” than most. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). Courts applying these statutes are “forbid[den]” from considering “whether certain equitable considerations warrant extending [the] limitations period.” *John R. Sand & Gravel Co.*, 552 U.S. at 134. To enable the courts to determine whether a statute containing a time limit is one of those jurisdictional statutes, the Supreme Court has established a “clear statement rule.” *Wong*, 135 S.Ct. at 1632.

Under the clear statement rule, “procedural rules, including time bars, cabin a court’s power only if Congress has ‘clearly state[d]’ as much.” *Id.* (brackets in original) (quoting *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 825 (2013)). Whether Congress has made the required clear statement turns on the “text, context, and relevant historical treatment” of the provision at issue. *Reed Elsevier*, 559 U.S. at 166. *Accord Wong*, 135 S.Ct. at 1632. In other words, “traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.” *Wong*, 135 S.Ct. at 1632.

In analyzing a statute under the clear statement rule, “Congress’s separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.” *Wong*, 135 S.Ct. at 1633. Further, that a statute uses “language [that] is mandatory” to express its time limit has been consistently found to be “of no consequence.” *Id.* at 1632. The clear statement rule, however, does not require that “Congress must incant magic words” in order to speak clearly. *Wong*, 135 S. Ct. at 1632 (quoting *Auburn Regional*, 133 S.Ct. at 824). Rather, the Court

looks to whether the language of the statute “define[s] a federal court’s jurisdiction.” *Id.* at 1633.

Finally, as noted above, the “historical treatment [of a time bar in a statute] as ‘jurisdictional’ is a factor in the analysis.” *Reed Elsevier, Inc.*, 559 U.S. at 169. In an appropriate case, under principles of *stare decisis*, this treatment may be dispositive. *See Wong*, 135 S.Ct. at 1635-36. Most notably, in *John R. Sand & Gravel Co.*, 552 U.S. at 133, a litigant argued that the Supreme Court should overrule its prior holding that 28 U.S.C. § 2501, which concerns the time for filing suit in the Court of Federal Claims, is jurisdictional. *See* 552 U.S. at 139. The Court refused to do so, reasoning that “[s]*tare decisis* in respect to statutory interpretation also has ‘special force’ [for] Congress[] ‘remains free to alter what [the Court has] done.’” *Id.* (*quoting Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). The Court in *John R. Sand & Gravel Co.* further reasoned that “re-examin[ing] * * * well-settled precedent” holding that a limitations period was jurisdictional would “threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.” 552 U.S. at 139.

C. The time limit in I.R.C. § 6213(a) satisfies the “clear statement” rule because the text of the statute, its context, and its historical treatment clearly show that it is a jurisdictional provision

1. The text of the statute

The text of I.R.C. § 6213(a) establishes that its time limit was designed to define a federal court’s jurisdiction. As noted above, I.R.C. § 7442 provides that the Tax Court “shall have jurisdiction as is conferred” by the Internal Revenue Code. The only section of the Code that provides the Tax Court with jurisdiction to redetermine a deficiency determined by the Commissioner is I.R.C. § 6213. Its jurisdictional grant provides, in pertinent part, that “[w]ithin 90 days ... after the notice of deficiency ... is mailed ..., the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.” I.R.C. § 6213(a).¹ The language of the statute authorizes a suit in the Tax Court only if a petition is filed within 90 days of the notice of deficiency. Thus, the time limit is a condition on the Tax Court’s exercise of jurisdiction over the action.

¹ The section also contains a special 150-day period for a notice of deficiency addressed to a person outside the United States. To simplify the discussion, we ignore this exception.

In addition, I.R.C. § 6213(a) provides that, during that 90-day filing period and the subsequent Tax Court proceedings (if a petition is filed),² the IRS is prohibited from making any assessment or attempting to collect the deficiency by levy or court action. I.R.C. § 6213(a). To enforce this prohibition, I.R.C. § 6213(a) provides that an assessment during the prohibition period “may be enjoined by a proceeding in the proper court, including the Tax Court.” I.R.C. § 6213(a). The statute, however, conditions the Tax Court’s jurisdiction to enjoin upon the satisfaction of its time limit for filing suit: “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.” I.R.C. § 6213(a) (emphasis added). This time-limit restriction on the Tax Court’s injunction jurisdiction is another clear expression by Congress of the jurisdictional nature of I.R.C. § 6213(a)’s time limit.

² Section 6213(a) states that the prohibition on assessment continues until the Tax Court’s decision becomes final. Section 7485 of the Code, however, provides that notwithstanding I.R.C. § 6213(a), the assessment is not stayed by an appeal absent the posting of an appropriate bond.

Other sections of the Internal Revenue Code that are integrally related to I.R.C. § 6213(a) reinforce what the text of I.R.C. § 6213(a) makes plain, *viz.*, that its time limit is jurisdictional. To begin with, I.R.C. § 7459(d), which addresses the effect of a Tax Court decision dismissing a petition challenging a notice of deficiency, provides a clear indication that Congress intended that I.R.C. § 6213(a)'s time limit be afforded jurisdictional status. Section 7459(d) provides:

If a petition for a redetermination of a deficiency has been filed by the taxpayer, 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*.

I.R.C. § 7459(d) (emphasis added). Thus, a dismissal (for example) for want of prosecution would result in a decision on the merits determining the amount of the tax liability of a petitioner for the year (or years) petitioned (*see United States v. Josephberg*, 562 F.3d 478, 489-90 (2d Cir. 2009)), and the taxpayer would not have any further opportunity to litigate the merits of his tax liability. But a dismissal for lack of jurisdiction would not have any such preclusive effect.

If I.R.C. § 6213(a)'s time limit is deemed to be non-jurisdictional, however, the normal rule of I.R.C. § 7459(d) – *i.e.*, the first sentence – would apply to a dismissal of a late-filed Tax Court petition (*Estate of Ming v. Commissioner*, 62 T.C. 519, 522-523 (1974)), and a court decision determining the amount of the taxpayer's liability would be entered upon the dismissal even though the taxpayer would have had no opportunity to litigate the merits of his or her tax liability—in the Tax Court or anywhere else. Congress could not have intended this harsh and illogical result.

Moreover, as we have discussed above, under I.R.C. § 6213(a), there are only two prerequisites for Tax Court jurisdiction in a deficiency case: (1) a notice of deficiency, and (2) satisfaction of the 90-day time limit for filing. If the time limit is deemed to be non-jurisdictional, the only situation in which a Tax Court petition could be dismissed for lack of jurisdiction would be the situation where there is no notice of deficiency. And, if there is no notice of deficiency, the amount of the deficiency cannot be determined “from the record in the proceeding” since no notice of deficiency exists. I.R.C. § 7549(d). Thus, if I.R.C. § 6213(a)'s time limit is not jurisdictional, Congress would not

have needed to add the second “unless” clause to the second sentence of Section 7459(d) providing that the normal rule (contained in the first sentence) applies “unless the dismissal is for lack of jurisdiction.” It is only because Congress has provided a jurisdictional time limit in I.R.C. § 6213(a) that it needed to include the second “unless” clause.

Accordingly, I.R.C. § 7459(d) provides unmistakable evidence that Congress intended the time limit in I.R.C. § 6213(a) to be jurisdictional.

Similarly, the text of Code §§ 6213(c), 6512(a), and 6212(c) also provides clear evidence of Congress’ intent that the time limit in I.R.C. § 6213(a) be jurisdictional. Section 6213(c) states that “[i]f the taxpayer does not file a petition ... within the time prescribed in [§ 6213(a)], the deficiency ... shall be assessed” Because an action by a taxpayer under I.R.C. § 6213(a) is for pre-assessment review, Congress’ specification that the assessment shall be made upon the expiration of I.R.C. § 6213(a)’s time limit demonstrates that the time limit serves to cut off jurisdiction in the Tax Court for pre-assessment review.

Section 6512(a), in turn, provides in pertinent part that “if the taxpayer files a petition with the Tax Court within the time prescribed in [§ 6213(a)] ... no suit by the taxpayer for the recovery of any part of

the tax [to which the petition relates] shall be instituted in any court” except for five exceptional situations. Section 6512(a) thus is designed to prevent duplicate litigation in courts that might otherwise have overlapping jurisdiction. In expressing that rule, Congress provided that the Tax Court’s jurisdiction is dependent upon the filing of a petition that satisfied the time limit prescribed in I.R.C. § 6213(a). An untimely petition is not sufficient to provide jurisdiction.

Finally, in I.R.C. § 6212(c), Congress provided a rule that prevents the Commissioner from determining additional income tax deficiencies for a tax year over which the Tax Court has acquired jurisdiction.³ Again, in expressing when the Tax Court has jurisdiction, Congress specified that it is dependent upon “the taxpayer fil[ing] a petition with the Tax Court within the time prescribed in section 6213(a).” Thus, an untimely petition is not sufficient to provide jurisdiction.

³ Section 6212(c) of the Code provides that “If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year”

In sum, the text of I.R.C. § 6213(a) and related provisions of the Internal Revenue Code provide a clear expression of Congress' intent that the time limit in I.R.C. § 6213(a) be jurisdictional.

2. The legislative history

The legislative history also squarely supports the position that I.R.C. § 6213(a) is a jurisdictional provision.

The Board of Tax Appeals (the predecessor of the Tax Court), established by § 900 of the Revenue Act of 1924,⁴ “was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue’s determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the act of 1924, the taxpayer could only contest the Commissioner’s determination of the amount of tax after its payment.” *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 721 (1929). *See* H.R. Rep. No. 68-179, at 7 (1923), *reprinted in* 1939-1 C.B. (pt. 2) 241; S. Rep. No. 68-398, at 8 (1923), *reprinted in* 1939-1 C.B. (pt. 2) 266. The Board of Tax Appeals “was not created for the purpose of *reviewing rulings made by the*

⁴ Revenue Act of 1924, ch. 234, tit. IX, 43 Stat. 336.

Commissioner but was created for the purpose of *determining the correctness of deficiencies in tax.*” *Appeal of Gutterman Strauss Co.*, 1 B.T.A. 243, 245 (1924) (emphasis in original).

Section 274(a) of the Revenue Act of 1924 provided that if the Commissioner determines a deficiency in tax, the taxpayer shall be notified of such deficiency by registered mail and, within 60 days after such notice is mailed, the taxpayer may file an appeal with the Board of Tax Appeals. *See Appeal of Hurst, Anthony & Watkins*, 1 B.T.A. 26, 27 (1924). In 1934, Congress extended the period for filing a petition from 60 days to 90 days. Revenue Act of 1934, ch. 277, § 501, 48 Stat. 741, 755-756. As discussed below, p. 20, the Board of Tax Appeals and the Tax Court have consistently held that the timely filing of a petition is a jurisdictional prerequisite, and an untimely petition must be dismissed for lack of jurisdiction. *See Dana Latham, Jurisdiction of the United States Board of Tax Appeals under the Revenue Act of 1926*, 15 Cal. L. Rev. 199, 222 (1927); Walter W. Hammond, *United States Board of Tax Appeals*, 11 Marq. L. Rev. 1, 7 (1926).

In 1998, Congress enacted Section 3463(a) of the Internal Revenue Restructuring and Reform Act of 1998 (RRA 1998), Pub. L. 105-206, 112

Stat. 685, 767 (1998).⁵ In that section, Congress (1) directed the Commissioner to include in his notices of deficiency the date he has determined to be the last day on which the taxpayer may file a petition in the Tax Court, and (2) amended I.R.C. § 6213(a) to provide that a petition filed in the Tax Court by the date identified by the Commissioner is to be treated as timely filed.

The legislative materials accompanying the passage of Section 3463 reveal that Congress was concerned about taxpayers who, due to miscalculation of the filing period under I.R.C. § 6213(a), would lose their ability to litigate their deficiencies on a prepayment basis by filing their petitions late. In doing so, Congress confirmed that it understood I.R.C. § 6213(a)'s time limit to be jurisdictional.

⁵ Section 3463 of the RRA 1998 has not been incorporated as a provision of the Internal Revenue Code. Nonetheless, the provision has the force of law. *See Smith v. Commissioner*, 275 F.3d 912, 914 n. 1 (10th Cir. 2001); *see also United States Natl. Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (stating that an uncodified provision shall have the force of law as long as the provision is in the Statutes at Large).

The Senate Report for the legislation states:

Present Law

Taxpayers must file a petition with the Tax Court within 90 days after the deficiency notice is mailed (150 days if the person is outside the United States) (sec. 6213). *If the petition is not filed within that time period, the Tax Court does not have jurisdiction to consider the petition.*

Reasons for Change

The Committee believes that taxpayers should receive assistance in determining the time period within which they must file a petition in the Tax Court and that taxpayers should be able to rely on the computation of that period by the IRS.

Explanation of Provision

The provision requires the IRS to include on each deficiency notice the date determined by the IRS as the last day on which the taxpayer may file a petition with the Tax Court. The provision provides that a petition filed with the Tax Court by this date is treated as timely filed.

S. Rep. 105-174, at 90 (1998), *reprinted in* 1998-3 C.B. 537, 626 (emphasis supplied); *see also* H.R. Rep. 105-364 pt. 1, at 71 (1997), *reprinted in* 1998-3 C.B. 373, 443 (same). Both the Senate and House Reports state in unequivocal language that if a petition to the Tax Court is not filed within 90 days after the notice of deficiency is mailed, “the Tax Court does not have jurisdiction to consider the petition.” *Id.*

As discussed above, pp. 9-12, numerous provisions of the Internal Revenue Code relating to tax-deficiency determinations and the availability of Tax Court review are integrally related, and a taxpayer's rights can be adversely affected if a petition is not timely filed. Given the jurisdictional importance of timely filing a Tax Court petition, Congress acted to protect a taxpayer's rights by now requiring the Commissioner to include, on the face of the notice of deficiency, the last day for timely filing a Tax Court petition and by adding a provision to the Code to ensure that even if that date was erroneous, it could be relied upon by the taxpayer and by the Tax Court for jurisdictional purposes. The statements in the congressional reports that if a petition is not timely filed "the Tax Court does not have jurisdiction to consider the petition" provide another clear expression of its intent that the time limit in I.R.C. § 6213(a) be jurisdictional.

3. The historical treatment of I.R.C. § 6213(a)

The historical treatment of I.R.C. § 6213(a) also confirms that its time limit is jurisdictional. Since I.R.C. § 6213(a) was enacted as part of the Internal Revenue Code of 1954, every court of appeals having

jurisdiction over appeals from Tax Court in deficiency cases⁶ has held that the time limit in I.R.C. § 6213(a) is jurisdictional. *Lewin v. Commissioner*, 569 F.2d 444 (7th Cir. 1978) (affirming Tax Court’s dismissal for lack of jurisdiction because the petition was filed late); *Kennedy v. Commissioner*, 339 F.2d 335, 337 (7th Cir. 1964) (holding Tax Court lacked jurisdiction over claim for new tax year asserted in amended complaint filed after I.R.C. § 6213(a)’s time limit expired);⁷ *Edwards v. Commissioner*, 791 F.3d 1, 5 (D.C. Cir. 2015) (holding “[t]he tax court is a court of limited jurisdiction ... and its jurisdiction is predicated on both the issuance of a notice of deficiency and the filing of a timely petition”); *Herzog v. Commissioner*, 643 F. App’x 942, 943 (11th Cir. 2016) (holding that timely filing of a petition “is a jurisdictional prerequisite for a suit in the tax court” (quoting *Pugsley v. Commissioner*, 749 F.2d 691, 692 (11th Cir. 1985)); *Foster v. Commissioner*, 445 F.2d 799 (10th Cir. 1971) (affirming Tax Court’s

⁶ The Federal Circuit does not have jurisdiction over appeals from decisions of the Tax Court in deficiency cases.

⁷ See also *Petrulis v. Commissioner*, 938 F.2d at 79 (recognizing in dicta that “[f]iling the petition within the ninety-day period is ‘a jurisdictional prerequisite for filing suit in the Tax Court.’”) (quoting *Sanders v. Commissioner*, 813 F.2d 859, 861 (7th Cir. 1987)).

dismissal for lack of jurisdiction because the petition was filed late); *Corriea v. Commissioner*, 58 F.3d 468, 469 (9th Cir. 1995) (holding that the timely filing of a petition for redetermination is a jurisdictional requirement (citing *Shipley v. Commissioner*, 572 F.2d 212, 213 (9th Cir. 1977))); *Andrews v. Commissioner*, 563 F.2d 365, 366 (8th Cir. 1977) (holding that “the law is clear that the Tax Court does not have jurisdiction over an untimely petition”); *Patmon and Young Professional Corp. v. Commissioner*, 55 F.3d 216, 217 (6th Cir. 1995) (holding that “[i]n order to invoke the jurisdiction of the Tax Court, a taxpayer must file a petition within 90 days after the mailing of the notice of deficiency”); *Keado v. United States*, 853 F.2d 1209, 1212, 1218-19 (5th Cir. 1988) (holding that “[i]f a taxpayer fails to file a Tax Court petition during [§ 6213(a)’s] . . . ninety-day period, the Tax Court lacks jurisdiction to consider the deficiency”); *Briley v. Commissioner*, 622 F. App’x 305 (4th Cir. 2015) (holding that “[t]he timely filing of a tax court petition is a jurisdictional prerequisite”); *Boccutto v. Commissioner*, 277 F.2d 549 (3d Cir. 1960) (affirming Tax Court’s dismissal for lack of jurisdiction because the petition was filed late); *Hoffenberg v. Commissioner*, 905 F.2d 665, 666 (2d Cir. 1990) (holding that “[a] late

petition will be dismissed for lack of jurisdiction” (citing *Tadros v. Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985)); *Athens Pizza of Jaffrey, Inc. v. Commissioner*, 134 F.3d 361 (1st Cir. 1998) (affirming Tax Court’s dismissal for lack of jurisdiction because the petition was filed late).

Moreover, the Tax Court (and its predecessor, the Board of Tax Appeals) has repeatedly held that its statutorily prescribed filing period for deficiency cases is jurisdictional. *E.g.*, *Houghton v. Commissioner*, 48 T.C. 656, 659, 666 (1967) (“Section 6213(a) has been held to be jurisdictional and this Court has no jurisdiction unless the petition is timely filed”); *Hamilton v. Commissioner*, 13 T.C. 747, 749 (1949); *Appeal of Satovsky*, 1 B.T.A. 22, 24 (1924). And, the Tax Court has recently reconfirmed its long-standing rule, in a unanimous decision of the full court. *Guralnik v. Commissioner*, 146 T.C. No. 15, 2016 WL 3165779, at *5 (2016).

As noted above, the Supreme Court held in *John R. Sand & Gravel*, 552 U.S. at 139, that, in an appropriate case, under principles of *stare decisis*, precedent alone can be dispositive in determining whether a time limit in a statute is jurisdictional. Taxpayer in his response to

our Rule 28(j) letter argued, based upon the concurring opinion of Justice Ginsberg (joined by Justices Stevens and Bryer) in *Reed Elsevier*, 559 U.S. at 171-74, that the holding of *John R. Sand & Gravel* is only applicable where the precedent is that of the Supreme Court. But even if Justice Ginsburg's concurring opinion supports the broad proposition taxpayer advances (and it is not clear that it does), the fact remains that a concurring opinion expressing the views of three justices does not represent a holding of the Court.

In the situation presented here, we think that the reasoning of the Court in *John R. Sand & Gravel Co.* supports our contention that I.R.C. § 6213(a)'s time limit is jurisdictional. As the Court explained in *John R. Sand & Gravel Co.*, “re-examin[ing] ... well-settled precedent” holding that a limitations period is jurisdictional would “threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.” 552 U.S. at 139. Here, more than 35 years ago, the Fifth Circuit aptly described the state of the decisional law, observing that “[i]t cannot now be seriously questioned that the timely filing of the petition for redetermination is jurisdictional.” *Johnson v. Commissioner*, 611 F.2d 1015, 1018 (5th Cir. 1980). And, the absence of

Supreme Court precedent confirming the decisional law of the courts of appeal only reflects the fact that the Supreme Court has had no reason to address the matter. As noted above, since the enactment of I.R.C. § 6213(a) in 1954, the twelve circuit courts that have jurisdiction to review decisions of the Tax Court have held that the statute's time limit is jurisdictional. In these circumstances, there is no meaningful difference between the disruption that would occur from overturning this long-standing appellate court precedent and the disruption that would occur from overturning a Supreme Court precedent. Accordingly, under the Court's reasoning in *John R. Sand & Gravel Co.*, the long-standing and unanimous treatment of I.R.C. § 6213(a)'s time limit by the courts of appeals as jurisdictional should be sustained.

Furthermore, the Court in *John R. Sand & Gravel* also took into account the fact that "Congress remains free to alter what [the Court] ha[s] done." 552 U.S. at 139 (citation omitted). Here, Congress has had ample opportunity to amend I.R.C. § 6213(a) if it disagreed with the unanimous decisions of the judiciary. That it has not done so speaks volumes as to the correctness of those decisions.

At all events, even if it is determined that the historical treatment is not controlling in the situation presented here, that treatment still remains a factor to be considered under the clear statement rule. *Reed Elsevier, Inc.*, 559 U.S. at 169. The historical treatment of I.R.C. § 6213(a) plainly reinforces what is clear from the text and context of I.R.C. § 6213(a) – that its time limit is jurisdictional.

CONCLUSION

Section 6213(a) of the Code is a jurisdictional statute, and the case should be remanded to the Tax Court for it to determine if taxpayer complied with the requirements of that statute.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements of Federal Rule of Appellate Procedure 32(a) and the Practitioner's Handbook for Appeals

Case No. 15-3838

1. This brief complies with the type-volume limitation of the United States Court of Appeals for the Seventh Circuit Practitioner's Handbook for Appeals (2014 Edition) because:

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(s) /s/ Regina S. Moriarty

Attorney for Commissioner of Internal Revenue

Dated: November 10, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Counsel for the appellant was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

It is further certified that: (1) all required privacy redactions have been made; and (2) the ECF submission was scanned for viruses with the System Center Endpoint Protection 2012 (updated daily), and according to the program, is free of viruses.

/s/ Regina S. Moriarty

REGINA S. MORIARTY

Attorney

STATUTORY ADDENDUM**Internal Revenue Code (I.R.C.):****SEC. 6212. NOTICE OF DEFICIENCY.**

* * * *

(c) Further Deficiency Letters Restricted.—

(1) General Rule.—If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 for the same taxable year, of chapter 44 for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments). * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) Time for filing petition and restriction on assessment.—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 (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), 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. * * *

SEC. 6512. LIMITATIONS IN CASE OF PETITION TO TAX COURT.

(a) Effect of Petition to Tax Court.—If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer filed a petition with the Tax Court within the time prescribed in section 6213(a) (or 7481(c) with respect to a determination of statutory interest or section 7481(d) solely with respect to a determination of estate tax by the Tax Court), no credit or refund of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final, and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final, and

(3) As to any amount collected after the period of limitation upon making of levy or beginning a proceeding in court for collection has expired; but in any such claim for

credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive, and

(4) As to overpayments attributable to partnership items, in accordance with subchapter C of chapter 63, and

(5) As to any amount collected within the period during which the Secretary is prohibited from making the assessment or from collecting by levy or through a proceeding in court under the provisions of section 6213(a), and

(6) As to overpayments the Secretary is authorized to refund or credit pending appeal as provided in subsection (b). * * *

SEC. 7442. JURISDICTION.

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 State. 10-87), or by laws enacted subsequent to February 26, 1926.

SEC. 7459. REPORTS AND DECISIONS.

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(d) Effect of Decision Dismissing Petition.—If a petition for redetermination of a deficiency has been filed by the taxpayer, 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.