UNITED STATES TAX COURT

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

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION TO VACATE ORDER OF DISMISSAL FOR LACK OF JURISDICTION

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SUMMARY OF ARGUMENT

Petitioner submitted a deficiency challenge with the Tax Court one day later than the 90-day period prescribed for filing in section 6213(a).[1] On April 1, 2022, this Court issued an order of Dismissal For Lack of Jurisdiction (the Order) premised on the conclusion that section 6213(a) was a jurisdictional requirement Petitioner failed to meet, and thus this Court was powerless to consider whether equitable tolling might apply to allow the tardy petition to be evaluated on its merits.

In *Boechler, P.C. v. Commissioner*, No. 20-1472, slip op. (U.S. April 21, 2022), 596 U.S. ___ (2022), the Supreme Court unanimously concluded that that the 30-day filing deadline in section 6330(d)(1) for Collection Due Process (CDP) cases is not jurisdictional and is subject to equitable tolling. In proper adherence to this Supreme Court mandate, the Tax Court issued an order *sua sponte* on April 26, 2022, in the matter of *Sherman v. Commissioner*, No. 11951-20, which applied *Boechler* and reversed its prior dismissal of a late filing that was governed by section 6330(d).

As detailed below, the Court's reasoning in *Boechler* compels the conclusion that the 90-day filing deadline in section 6213(a) for deficiency cases is not

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code.

jurisdictional, and thus is subject to equitable tolling. This Court should follow its action in *Sherman* by applying the *Boechler* analysis to the filing deadline set forth in section 6213(d), vacating the Order, and requesting submissions from Petitioner and Respondent concerning the potential application of equitable tolling to the facts surrounding Petitioner's submission.

ARGUMENT

I. The 90-day Period to File a Section 6213(a) Petition in This Court is a Nonjurisdictional Statute of Limitations.

A. *Boechler* Furnishes a Clear Standard for Tax Court Statutory Deadlines.

The provision at issue in *Boechler* is section 6330(d)(1), part of a set of rules for Collection Due Process (CDP), regarding notice and opportunity for hearing before levy:

> 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).

The *Boechler* opinion's framework for analyzing section 6330(d)(1) begins with drawing the critical distinction between jurisdictional requirements and procedural requirements, pointing out that "[j]urisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and, as relevant to this case, do not allow for equitable exceptions." *Boechler*, at 3 (citations omitted).

The Supreme Court views *Boechler* as being part of a line of cases beginning with *Kontrick v. Ryan*, 540 U.S. 443 (2004) in which "we have

endeavored 'to bring some discipline' to use of the jurisdictional label. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)." *Id*. at 3. Given the significance of the jurisdictional label, the Court articulates a sensible standard:

> To that end, we treat a procedural requirement as jurisdictional only if Congress clearly states that it is. Congress need not incant magic words, but the traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences. This case therefore turns on whether Congress has clearly stated that § 6330(d)(1)'s deadline to petition for review of a collection due process determination is jurisdictional.

Id. at 3.

Applying this standard, *Boechler* holds that section 6330(d)(1) does not show plainly that Congress intended for its deadline to be jurisdictional, and that "[w]here multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear." *Id.* at 5 (citation omitted).

B. Section 6213(a) Does Not Meet the *Boechler* Standard for Being Clearly Jurisdictional.

Section 6213(a) concerns the time for filing Tax Court deficiency petitions and restrictions 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. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

This Court's Order of Dismissal for Lack of Jurisdiction deferred to *Organic Cannabis Foundation v. Commissioner*, 962 F.3d 1082 (9th Cir. 2020) as the controlling precedent for applying section 6213(a) to Hallmark Research Collective under *Golsen v. Commissioner*, 54 T.C. 742, 756-757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971) since taxpayer has its principal place of business in the Ninth Circuit.

Before discussing the *Organic Cannabis* opinion, a word must be said here about *Golsen*. In *Lawrence v. Commissioner*, 27 T.C. 713 (1957), this Court stated that, even where a court of appeals to which the case is appealable had taken a different view from that of the Tax Court on an issue, the Tax Court, as "a court of national jurisdiction[,] to avoid confusion should follow its own honest beliefs

until the Supreme Court decides the point." *Id*. at 716-717 (footnote omitted). In *Golsen*, this Court overruled *Lawrence* and articulated the replacement rule that this Court would "follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals". *Golsen* at 757. Why the change? *Golsen* cited only "better judicial administration" and "efficient and harmonious judicial administration". *Id*. What is the better judicial administration? Ignoring a contrary opinion directly on point from a Court of Appeals to which the case is appealable is both insulting to the appellate judges and will inevitably result in reversal.

Since *Boechler* has undermined almost every argument on which *Organic Cannabis* relied to hold the deadline in section 6213(a) jurisdictional, it is not likely that appellate judges will feel insulted if this Court, citing the Supreme Court's reasoning as to the CDP petition filing deadline, reverses its position and holds that the deficiency petition filing deadline is not jurisdictional and is subject to equitable tolling. Nor is it clear that the appellate court would inevitably reverse such a Tax Court holding. There is a good chance that the Ninth Circuit will overrule *Organic Cannabis* after it reads the *Boechler* opinion. In *Organic Cannabis*, the panel there wrote:

> As a three-judge panel, we are bound to follow…on-point Ninth Circuit precedent unless intervening authority from the Supreme Court or our en banc court has "undercut the theory or reasoning underlying the prior circuit

> precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 225 F.3d 889, 900 (9th Cir. 2003) (en banc).

962 F.3d at 1092-1093. *Boechler* undercut the theory and reasoning underlying *Organic Cannabis*. The cases are now clearly irreconcilable.

Golsen did not contemplate that the Court of Appeals opinion that this Court feels it should follow might have subsequently been extensively undermined by a closely-related Supreme Court opinion. Indeed, efficient and harmonious judicial administration here would seem to require this Court to review the Supreme Court's *Boechler* opinion and issue a new precedent on the section 6213(a) filing deadline. That new precedent will apply country-wide and will provide the Ninth Circuit with this Court's views on the matter. Even in the *Golsen* opinion, this Court said: "We shall remain able to foster uniformity by giving effect to our own views in cases appealable to courts whose views have not yet been expressed, and, *even where the relevant Court of Appeals has already made its views known*, by explaining why we agree or disagree with the precedent that we feel constrained to follow." *Id*. at 757 (emphasis added). This Court should explain why it agrees or disagrees with the holding of *Organic Cannabis*.

To date, only two Circuits have issued precedential opinions concerning the interaction of section 6213(a)'s filing deadline with the Supreme Court's recent restriction of the use of the term "jurisdictional" to generally exclude filing deadlines. *See Organic Cannabis* and *Tilden v. Commissioner*, 846 F.3d 882, 886-

887 (7th Cir. 2017). And further, as noted below in Part I.B.2., the Supreme Court in *Boechler* cast a cloud over pre-existing section 6213(a) Court of Appeals precedent, which would include those two opinions plus opinions from other Circuits that were issued prior to the change in the Supreme Court's thinking on jurisdiction.

In *Organic Cannabis*, the Ninth Circuit concluded "three features of the statute confirm that its time limit for filing a petition is jurisdictional." *Organic Cannabis*, at 1093.

> First, § 6213(a) does use the magic word "jurisdiction" with respect to *one* aspect of the Tax Court's power concerning deficiency redeterminations, thereby confirming that the provision as a whole should be understood as speaking to the manner in which the Tax Court acquires subject matter jurisdiction in such cases.... Second, the broader statutory "context" in which § 6213(a) operates confirms that it imposes jurisdictional requirements....Third, the historical treatment of the provision at issue further confirms that § 6213(a) imposes a jurisdictional time limit.

Id. at 1093-1095 (emphasis in original, citation omitted).

Boechler clearly and dispositively addresses the first and third points.

1. *Boechler* Overrules the *Organic Cannabis* Holding on the Meaning of "Jurisdiction" in Section 6213(a).

The *Boechler* requirement for finding that a deadline is jurisdictional is straightforward—there must be an unambiguous indication that Congress intended the deadline as jurisdictional. It is not relevant that the Commissioner's interpretation is "plausible" or even better than the taxpayer's interpretation: "...in

this context, better is not enough. To satisfy the clear-statement rule, the jurisdictional condition must be just that: clear." *Id*. at 6.

The 90-day period in section 6213(a) is most certainly not a jurisdictional requirement of a deficiency suit under the clear statement rule. The jurisdictional grant for deficiency suits is in section 6214(a), which provides, in part, that "the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency". Section 6214(a) derives from language originally appearing in sections 274(a) (for income tax) and 308(a) (for estate tax) of the Revenue Act of 1926, ch. 27. *See Dees v. Commissioner*, 148 T.C. No. 1 at *18 (Feb. 2, 2017) (Ashford, J., concurring in the result only) ("Section 6214(a) establishes our deficiency jurisdiction".); *Moyer v. Commissioner*, T.C. Memo. 2016-236 at *1 ("Moyer timely filed a petition under section 6213(a) for redetermination of the deficiency and the penalties. We have jurisdiction under section 6214(a)."). It was in 1926 that Congress first used the word "jurisdiction" in connection with the Board of Tax Appeals. In 1926, Congress made appeals from the Board go directly to the Courts of Appeals and made other changes to make the Board more court-like. "Although Congress was unwilling to transform the Board into a court, an effort was made in the 1926 Act to accord the Board more judicial attributes." H. Dubroff & B. Hellwig, "The United States Tax Court: An Historical Analysis" (2d

Ed. 2014) at 122. No doubt, this explains why a separate provision giving the Board "jurisdiction" was first added to the law in 1926.

Where a taxpayer has overpaid tax, section 6512(b)(1) confers "jurisdiction to determine the amount of such overpayment." Neither of these sections refer to the 90-day deadline or to section 6213(a). *Zipes v. TWA*, 455 U.S. 385, 393-394 (1982) (90-day filing requirement held not to be jurisdictional where the provision granting jurisdiction to the district courts "contains no reference to the timely-filing requirement").

Section 6213(a)'s first sentence (which contains the filing deadline) does not even use the word "jurisdiction". Section 6213(a)'s first sentence derives from sections 274(a) (for income tax) and 308(a) (for estate tax) of the Revenue Act of 1924, ch. 234.

It is notable that in *Boechler*, when the Court sought to give examples of more jurisdictional-sounding Tax Court filing deadlines, it did not mention section 6213(a), but instead wrote:

> Finally, the broader statutory context confirms the lack of any clear statement in §6330(d)(1). Other tax provisions enacted around the same time as §6330(d)(1) much more clearly link their jurisdictional grants to a filing deadline. See 26 U. S. C. §6404(g)(1) (1994 ed., Supp. II) (the Tax Court has "jurisdiction over any action . . . to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, . . . if such action is brought within 180 days"); §6015(e)(1)(A) (1994 ed., Supp. IV) ("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 during the 90-day

> period"). These provisions accentuate the lack of comparable clarity in §6330(d)(1).

Boechler at 5-6.

The remaining sentences in section 6213(a) do nothing to "connect" this 90-day filing period to the jurisdictional grant contained in section 6214(a). *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012) (refusing to find that a statute was jurisdictional even where the section requiring a certificate of appealability contained a cross-reference to the section granting jurisdiction). The second sentence states that the IRS may not assess or collect a deficiency unless a notice of deficiency has been mailed to the taxpayer, and the IRS may not assess or collect a deficiency during the 90-day filing period or while a Tax Court proceeding is pending. The third sentence allows a taxpayer to bring a proceeding to enjoin improper assessment or collection of a deficiency in an appropriate court. The initial predecessors of the second and third sentences (except for authorizing the Tax Court to have injunctive power) derive from the Revenue Act of 1926, sections 274(a) (for income tax) and 308(a) (for estate tax) – i.e., like the predecessor of section 6214(a), they were added two years after the predecessor of the first sentence of what is now section 6213(a). This Court was added as an appropriate court for exercising the injunctive power by adding a phrase to the third sentence and adding the completely-new fourth sentence in 1988 (i.e., more than 60 years after the district courts got injunctive power). Technical and

Miscellaneous Revenue Act of 1988, Pub. L.100-647, § 6243(a). The fourth sentence clarifies that the Tax Court lacks jurisdiction to enjoin a proceeding or order a refund unless a petition is timely filed under the first sentence. Finally, the fifth sentence, enacted in 1998 by Pub. L. 105-206, § 3463(b), provides that any petition filed with the Tax Court on or before the last day specified for filing by the IRS in the notice of deficiency shall be treated as timely filed. None of this language even suggests, let alone clearly dictates, that Congress intended the 90-day filing period to be jurisdictional.

Further, the *Boechler* opinion's analysis of Section 6330(e)(1), a provision that closely resembles section 6213(a), undermines the *Organic Cannabis* interpretation of section 6213(a). *Organic Cannabis* explains at 1094:

> Appellants contend that this [jurisdictional] language in § 6213(a)['s fourth sentence] merely strips the Tax Court of jurisdiction to grant this particular [injunctive] remedy in the case of an untimely petition and does not otherwise address the Tax Court's jurisdiction over the case. We agree with the Seventh Circuit that it is "very hard" to read the language of § 6213(a) that way. *Tilden*, 846 F.3d at 886 . By also specifying that the Tax Court lacks "jurisdiction" to issue such an injunction "unless" a petition has been filed (and then only if the petition is "timely"), § 6213(a) seems clearly to reflect an understanding that the manner in which the Tax Court acquires jurisdiction over a deficiency dispute is through the filing of a "timely petition." I.R.C. § 6213(a) (emphasis added).
>
> This reading of § 6213(a) is strongly confirmed by considering how the statute phrases the no-collection prohibition that this injunctive power is meant to enforce. The IRS is subject to a prohibition on collection proceedings "until such notice [of deficiency] has been mailed to the taxpayer," and thereafter "until the expiration of such

> 90-day or 150-day period, as the case may be," for filing a petition and, "if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final." Id. Under Appellants' nonjurisdictional reading of § 6213(a), this no-collection prohibition would lapse at the end of the 90-day period but would then revive if the Tax Court subsequently decides to accept a late-filed petition. Nothing in the statute suggests that such a discontinuity was contemplated; on the contrary, the three successive "until" clauses in the relevant sentence of § 6213(a) seem unmistakably to refer to a single unbroken time period. See supra note 7 (quoting the full relevant sentence). To make matters worse, Appellants' reading would mean that, having accepted a late-filed petition and having thus re-activated the prohibition on collection, the Tax Court would then unquestionably lack jurisdiction to enjoin violations of that prohibition—thereby necessitating a separate court proceeding in the district court to do so. Nothing in the statute suggests that Congress intended to pointlessly require such a peculiar dual-track mode of procedure. The only sensible reading of the statute is that, when no petition is timely filed, the Tax Court's jurisdiction to enjoin collection ends on day 91 because at that point any possibility of invoking the Tax Court's jurisdiction at all has ended, and with it, so too the underlying temporary prohibition on collection has likewise definitively ended.

Section 6330(e)(1) contains language similar to the second, third, and fourth sentences of section 6213(a) in that it authorizes Tax Court injunctive "jurisdiction" only in the case of a "timely" appeal to the Tax Court of the main action under section 6330(d)(1). The Commissioner in *Boechler* made the same argument about section 6330(e)(1)'s language that the Ninth Circuit itself made with respect to section 6213(a)'s fourth sentence, yet *Boechler* rejects such an argument:

> The Commissioner contends that a neighboring provision clarifies the jurisdictional effect of the filing deadline. Section

> 6330(e)(1) provides that "if a [collection due process] hearing is requested...the levy actions which are the subject of the requested hearing...shall be suspended for the period during which such hearing, and appeals therein, are pending." To enforce that suspension, a "proper court, including the Tax Court," may "enjoi[n]" a "levy or proceeding during the time the suspension...is in force," but "[t]he Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1)." §6330(e)(1).
>
> Section 6330(e)(1) thus plainly conditions the Tax Court's jurisdiction to enjoin a levy on a timely filing under §6330(d)(1). According to the Commissioner, this suggests that §6330(d)(1)'s filing deadline is also jurisdictional. It would be strange, the Commissioner says, to make the deadline a jurisdictional requirement for a particular remedy (an injunction), but not for the underlying merits proceeding itself. If that were so, the Tax Court could accept late-filed petitions but would lack jurisdiction to enjoin collection in such cases. So if the IRS disobeyed §6330(e)(1)'s instruction to suspend the levy during the hearing and any appeal, the taxpayer would have to initiate a new proceeding in district court to make the IRS stop.
>
> We are unmoved—and not only because the scenario the Commissioner posits would arise from the IRS's own recalcitrance. The possibility of dual-track jurisdiction might strengthen the Commissioner's argument that his interpretation is superior to Boechler's. Yet as we have already explained, the Commissioner's interpretation must be not only better, but also clear. And the prospect that §6330(e)(1) deprives the Tax Court of authority to issue an injunction in a subset of appeals (where a petition for review is both filed late and accepted on equitable tolling grounds) does not carry the Commissioner over that line. If anything, §6330(e)(1)'s clear statement—that "[t]he Tax Court shall have no jurisdiction...to enjoin any action or proceeding unless a timely appeal has been filed"—highlights the lack of such clarity in §6330(d)(1).

Boechler at 607.

Section 6213(a) is nonjurisdictional under the *Boechler* clear statement standard, a conclusion that is also demonstrated by the *Boechler* opinion's rejection of the Commissioner's analysis with respect to a statutory provision that is very similar to section 6213(a).

2. *Boechler* Overrules the *Organic Cannabis* Holding on the Historical Treatment of Section 6213(a).

Organic Cannabis advances the argument that:

> [T]he historical treatment of the provision at issue further confirms that § 6213(a) imposes a jurisdictional time limit. As noted earlier, the circuits have uniformly adopted a jurisdictional reading of § 6213(a) or its predecessor since 1928.

Organic Cannabis at 1095.

According to the *Organic Cannabis* opinion, since Congress knew about these precedents when it substantially revised the Internal Revenue Code in 1954 and 1986 and added the fifth sentence to section 6213(a), Congress was implicitly agreeing with a jurisdictional interpretation of the first sentence of section 6213(a).

This assertion was at the heart of one of the Commissioner's arguments in *Boechler*—when Congress enacted section 6330(d)(1), it intended the section 6330(d)(1) deadline to be jurisdictional. This Congressional intent is proven by the fact that "[w]hen Congress enacted section 6330 in 1998, it appreciated that section 6213(a)'s deadline was understood to be jurisdictional." *Boechler*, Commissioner's

brief at 43.[2] This Congressional inaction is particularly probative, the theory continues, because the link between the deadline and jurisdiction is more remote in section 6213(a) than in section 6330(d)(1): "...unlike section 6330(d)(1), section 6213(a) does *not* contain language expressly tying the Tax Court's 'jurisdiction' over the petition itself to the petition's timeliness." *Id.* at 44 (emphasis in original). Since the two provisions are similar, congressional implicit approval of section 6213(a) as jurisdictional carries over to section 6330(d)(1) because there are similarities between the two provisions.

The *Boechler* opinion describes this contention:

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[2] Committee reports describing the need for enacting the final sentence of section 6213(a) stated that the section 6213(a) deadline is jurisdictional. Internal Revenue Service Restructuring and Reform Act of 1998; H. Rep. 105-364, pt 1 at 71(1997); S. Rep. 105-74 at 90 (1998). Those were accurate statements at the time summarizing the holdings of nearly all Courts of Appeal and the Tax Court, but, as noted below, the Supreme Court had never so held. The last sentence of section 6213(a), as adopted by Congress, works, whether or not the filing deadline is jurisdictional. Just like judicial statements from the period that the Supreme Court now calls "drive-by jurisdictional rulings" entitled to no weight because the court making the statement had no reason to consider whether a deadline should be jurisdictional or not because it made no difference in the case; *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998); these Committee report statements should be considered "drive-by" statements, also entitled to no weight. Moreover, such legislative history cannot create a "clear statement" concerning another, predecessor sentence enacted in 1924 (the first sentence of what is now section 6213(a)). Further, the Supreme Court has expressed serious doubt that Committee report statements can supply a clear statement of Congress' intent to make a filing deadline jurisdictional. *United States v. Kwai Fun Wong*, 575 U.S. 402, 412 (2015) ("Finally, even assuming legislative history alone could provide a clear statement (which we doubt), none does so here.").

> The Commissioner's weakest argument is his last: He insists that § 6330(d)(1)'s filing deadline is jurisdictional because at the time the deadline was enacted, lower courts had held that an analogous tax provision [Section 6213(a)] regarding IRS deficiency determinations is jurisdictional....According to the Commissioner, Congress was aware of these lower courts cases and expected § 6330(d)(1)'s time limit to have the same effect.

Boechler at 7-8.

But the Supreme Court is having none of it:

> The Commissioner's argument misses the mark. The cases he cites almost all[[3]] predate this Court's effort to bring some discipline to the use of the term "jurisdictional." And while this Court has been willing to treat a long line of Supreme Court decisions left undisturbed by Congress as a clear indication that a requirement is jurisdictional, no such long line of authority exists here.

Id. at 8 (citations omitted; cleaned up).

The Supreme Court has created a stare decisis exception to its rule that filing deadlines are no longer jurisdictional. The exception is if a long line of Supreme Court authority, stretching back over 100 years, has held the deadline jurisdictional. *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Hamer v. Neighborhood Housing Servs.,* 138 S. Ct. 13, 20 n.9 (2017); *United States v. Kwai Fun Wong*, 575 U.S. 402, 416 (2015); *Sebelius v. Auburn Regional Medical*

[3] The reference to "almost all", rather than "all", is no doubt to account for the existence of *Organic Cannabis* and *Tilden*, whose section 6213(a) opinions post-date the Supreme Court's effort to bring discipline to the use of the word "jurisdictional". That the Supreme Court would not defer to any of that precedent casts further doubt on the correctness of *Organic Cannabis'* jurisdictional ruling.

Center, 568 U.S. 145, 153-154 (2013); *Gonzalez v. Thaler*, 565 U.S. at 142 n. 3; *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010); *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 82 (2009).

The Supreme Court's noting that there were no Supreme Court opinions ever calling the section 6213(a) filing deadline jurisdictional and disparaging and not deferring to any of the Court of Appeals opinions so holding, makes *Organic Cannabis'* reliance on that very section 6213(a) lower court precedent to meet the stare decisis exception unsustainable.

3. While There May Well Be Adverse Theoretical Consequences to Taxpayers Under Section 7459(d) if the Section 6213(a) Deadline is Held Not Jurisdictional, There Are No Practical Adverse Consequences, And There Are Large Adverse Consequences to Taxpayers if that Deadline is Held Jurisdictional.

The *Boechler* opinion does not rebut only one reason cited in *Organic Cannabis* in support of the holding that section 6213(a)'s filing deadline is jurisdictional. The reason has to do with section 7459(d). As the Ninth Circuit wrote:

> [T]he broader statutory "context" in which § 6213(a) operates confirms that it imposes jurisdictional requirements. A taxpayer is not required to file a petition for redetermination of a deficiency in the Tax Court; the taxpayer always has the option of instead paying the disputed sum, filing a claim for a refund, and then (if the refund is denied) filing a suit for refund in the district court. See I.R.C. §§ 6511(a), 6532(a), 7422. But if the taxpayer does file a

> petition in the Tax Court, then a decision "dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the [IRS]," id. § 7459(d), and such decision as to "amount" is entitled to preclusive effect in subsequent proceedings between the taxpayer and the IRS, *See Malat v. Commissioner*, 302 F.2d 700, 706 (9th Cir. 1962). However, there is no such "decision" as to "amount," and no preclusive effect, if the Tax Court's "dismissal *is for lack of jurisdiction*." 26 U.S.C. § 7459(d) (emphasis added). Under Appellants' non-jurisdictional reading of § 6213(a), the Tax Court's dismissal of a petition as untimely could potentially have the perverse effect of barring the taxpayer from later challenging the amount in a refund suit—ironically yielding precisely the sort of "harsh consequence[]" that the Supreme Court's recent "jurisdictional" jurisprudence has sought to avoid. *Kwai Fun Wong*, 575 U.S. at 409. That peculiar outcome is avoided if § 6213(a) is read as being jurisdictional, because then dismissals for failure to meet its timing requirement would fall within § 7459(d)'s safe-harbor denying preclusive effect to Tax Court dismissals "for lack of jurisdiction." Section 7459(d) thus confirms what the language of § 6213(a) already suggests, which is that the timing requirement in the latter section is properly understood to be jurisdictional.

Organic Cannabis at 1095 (emphasis in original).

It is possible that, as the Ninth Circuit predicts, if this Court holds the section 6213(a) filing deadline nonjurisdictional, taxpayers, after filing a late Tax Court petition that is dismissed, could be held by a district court or the Court of Federal Claims to be precluded by res judicata from paying and suing for a refund – though this is by no means certain, and no court has so held yet. However, if this unfortunate res judicata result were to happen, it would be a matter for Congress to consider altering by legislation – perhaps adding "or untimely filing" at the end of

the last sentence of section 7459(d). However, this is a decision for Congress to make, not the IRS or the courts.[4]

In making that judgment call, Congress would no doubt hear that it is extremely rare (perhaps unheard of) for a taxpayer whose deficiency case is dismissed from the Tax Court as untimely to ever later pay that deficiency and sue for a refund—despite the Tax Court's occasionally advising such taxpayers that they may do so.

[4] The National Taxpayer Advocate has repeatedly called for legislation to clarify that Tax Court filing deadlines are nonjurisdictional and subject to equitable tolling. In her legislative recommendation, she has also called for an amendment to section 7459(d) to prevent the consequence the Ninth Circuit feared might happen if the courts made the clarification to section 6213(a)'s filing deadline themselves. National Taxpayer Advocate 2017 Annual Report to Congress, Volume 1, 283-292 (Legislative Recommendation Number 3 – Equitable Doctrines); National Taxpayer Advocate 2018 Annual Report to Congress, 2019 Purple Book, 88-90 (Legislative Recommendation No. 51 – Provide that the Time Limits for Bringing Tax Litigation are Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel and Equitable Tolling); National Taxpayer Advocate 2019 Annual Report to Congress, 2020 Purple Book, 85-87 (Legislative Recommendation No. 47 – Provide that the Time Limits for Bringing Tax Litigation are Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel and Equitable Tolling); National Taxpayer Advocate 2020 Annual Report to Congress, 2021 Purple Book, 85-87 (Legislative Recommendation No. 74 – Provide that the Time Limits for Bringing Tax Litigation are Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel and Equitable Tolling); National Taxpayer Advocate 2021 Annual Report to Congress, 2022 Purple Book, 101-103 (Legislative Recommendation No. 50 – Provide that the Time Limits for Bringing Tax Litigation are Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel and Equitable Tolling).

The DOJ, in its supplemental brief filed after oral argument in *Tilden v. Commissioner*, 846 F.3d 882 (7th Cir. 2017), (at pp. 10-11)[5] and in its brief for appellee in *Organic Cannabis* (at p. 34),[6] argued that, if section 6213(a)'s filing deadline is nonjurisdictional, then the language at the end of section 7459(d) referring to dismissals for lack of jurisdiction would be rendered essentially superfluous, since, absent timely filing, the only other way a dismissal can be for lack of jurisdiction is when no deficiency notice was issued. The DOJ was obviously wrong in both cases – and this may have been why the Seventh Circuit (unlike the Ninth Circuit in *Organic Cannabis*) did not even discuss section 7459(d) in its opinion holding section 6213(a)'s filing deadline jurisdictional.

There are a number of other reasons why a petition may be dismissed for lack of jurisdiction than merely late filing or the lack of a notice of deficiency. For

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[5] "[I]f 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."

[6] "If the time limit were deemed non-jurisdictional, the only situation in which a Tax Court petition could be dismissed for lack of jurisdiction would be where the IRS has failed to issue a notice of deficiency. But if no notice of deficiency has been issued, the amount of the deficiency cannot be determined 'from the record in the proceeding.' If I.R.C. § 6213(a)'s time limit is not jurisdictional, Congress would not have needed to include that the general rule applies 'unless the dismissal is for lack of jurisdiction.' This language only has meaning if a dismissal on timeliness grounds constitutes a dismissal for lack of jurisdiction."

example, the most obvious situation is where a petition is dismissed for lack of jurisdiction because the notice of deficiency was invalid because not sent to the taxpayer's last known address. *See, e.g., Crum v. Commissioner*, 635 F.2d 895 (D.C. Cir. 1980). Other examples include situations where the petition is barred by the automatic stay in bankruptcy, *see, e.g., Halpern v. Commissioner*, 96 T.C. 895 (1991); where a corporation lacks capacity to file the petition at the time; *see, e.g., Vahlco Corp. v. Commissioner*, 97 T.C. 428 (1991) (Texas law); *Condo v. Commissioner,* 69 T.C. 149 (1977) (California law); where the filing fee has not been paid; and where the taxes have been paid before the notice of deficiency was issued. Indeed, it appears that about 2/3 of Tax Court dismissals for lack of jurisdiction are for failing to pay the filing fee or obtain a fee waiver.

Further, neither the DOJ nor the Ninth Circuit has cited any legislative history indicating that Congress enacted the jurisdictional dismissal exception to section 7459(d)'s second sentence with the purposes of preserving the rights of taxpayers who file late in the Tax Court to avoid res judicata in a subsequent refund suit involving the same deficiency. There is no such legislative history.

The original predecessor of both sentences in section 7459(d) is found in the Revenue Act of 1926. Revenue Act of 1926, section 1000 (at 44 Stat. 107), amended Revenue Act of 1924, section 906(c), to read:

> If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall, for the

> purposes of this title and of the Revenue Act of 1926, be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the pleadings.

Section 601 of the Revenue Act of 1928, 45 Stat. 871-872, revised the amended Revenue Act of 1924 section 906(c) to read:

> If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding*, or unless the dismissal is for lack of jurisdiction.* [emphasis added]

The legislative history of the Revenue Act of 1928 contains no discussion of the reason for the addition of "unless the dismissal is for lack of jurisdiction" to the last sentence of the provision. *See* H. Rept. 2, 70th Cong., 1st Sess.; S. Rept. 960, 70th Cong., 1st Sess.; H. Rept. (Conf.) 1882, 70th Cong., 1st Sess. Thus, it is not clear that Congress even wanted section 6213(a)'s filing deadline to be interpreted as jurisdictional when, in 1928, it enacted the exception for jurisdictional dismissals to the predecessor of section 7459(d).

The Ninth Circuit just assumed that taxpayers would benefit more by its interpreting the filing deadline as jurisdictional. But, it is not the province of the courts to interpret sections 6213(a) and 7459(d) together to favor taxpayers, where Congress gave no indication that it wanted that interpretation. Petitioner's interpretation of section 6213(a) as not jurisdictional simply would return

taxpayers to being in the same position as if under the provision that existed in 1926, which did not except jurisdictional dismissals from upholding the deficiency.

Most importantly, why did the Ninth Circuit cite the section 7459(d) issue without considering whether, in fact, there ever exist cases of late filing in the Tax Court followed by full payment of the deficiency and a refund suit? It turns out that the Ninth Circuit's concern is really only of theoretical, not of practical, significance to taxpayers.

To get a sense of the magnitude of the practical potential of the section 7459(d) issue, one first needs an estimate of how many Tax Court deficiency suits each year are dismissed for lack of jurisdiction on account of the late filing of the petition. Because it is too much work to review all such dismissals over an entire year, an attorney assisting petitioner's counsel pro bono has only reviewed such dismissals in the months of February and March 2022. The annual estimate can be made by multiplying the number of the relevant dismissal orders found by 6. Using DAWSON and searching orders for "lack of jurisdiction and timely" uncovered the following orders of dismissal for lack of jurisdiction for late filing:

Name	**Docket No.**	**Date of Dismissal For Late Filing**
Bakey	24184-21S	2/2/22
Vialpando	25187-21S	2/3/22
Vito	14158-20	2/3/22

Aratani	25302-21S	2/4/22
Davis	22112-21	2/7/22
Graves	28299-21S	2/7/22
Sanghvi	11145-20S	2/7/22
Parrott	9927-21S	2/7/22
Ray	11885-20	2/9/22
Thomas	9365-21	2/14/22
Henry	19865-21S	2/15/22
Culp	14054-21	2/15/22
Igielski	27688-21	2/15/22
Roberts	25325-21	2/18/22
Rupert	27539-21	2/18/22
Frederick	11367-20	2/23/22
Martelli	21139-21	2/22/22
Lin	33429-21	2/22/22
Vongphakdy	25779-21	2/22/22
Reed	35601-21	3/1/22
Boker	16185-21	3/3/22
Francis	26269-21	3/3/22
Olsen	9945-21	3/3/22

Anderson	6837-21	3/4/22
Ward	24285-21S	3/4/22
Huckabee	16035-21	3/4/22
Evenson	22059-21S	3/7/22
Potskowski	19265-21	3/7/22
Van Straaten	16921-21	3/7/22
Eslinger	14134-21	3/7/22
Vaughn	13143-21	3/7/22
Sutton	22945-21	3/7/22
Bizarro	14338-21	3/8/22
Berry	16112-21S	3/8/22
Banks	23805-21	3/9/22
Manns	23225-21	3/9/22
McFann	11218-20S	3/9/22
Hunt	16955-21	3/9/22
DeMage	3476-21SL[7]	3/9/22
Erb	10376-21	3/9/22
Calloway	22255-21	3/9/22

[7] Despite the docket number indicating this is a Collection Due Process case, it involved a notice of deficiency, and no CDP notice of determination had ever been issued.

Huckel	36376-21	3/10/22
Winton	29815-21S	3/10/22
Uriarte	26493-21	3/10/22
Smith	18995-21	3/11/22
Garcia	29109-21S	3/11/22
Barajas	24393-21	3/11/22
Brown	14180-20	3/14/22
Miller	33743-21S	3/15/22
Ali	26246-21S	3/16/22
Fogerty	15224-21	3/16/22
Darnell	31155-21S	3/17/22
Bennett	24900-21	3/17/22
Nausha	26850-21	3/17/22
Coulter	19770-21S	3/17/22
Lake	33861-21	3/18/22
Webb	12293-21	3/21/22
Preiss	27715-21	3/21/22
Jones	1494-21	3/21/22
Snyder	6024-21S	3/21/22
Johnson	11464-20	3/22/22

Steidl	25179-21	3/22/22
Means	30655-21S	3/23/22
Hultgren	31309-21	3/23/22
Mullins	31129-21S	3/23/22
Munoz	17390-21S	3/24/22
Anthony	33326-21	3/24/22
Kurz	5777-21S	3/25/22
Murphy	3167-21	3/25/22
Cox	3217-21S	3/25/22
Evans	25040-21S	3/25/22
Guerra	20549-21S	3/25/22
Beck	28529-21	3/25/22
Coburn	28593-21	3/25/22
Cook	11297-20S	3/28/22
Barnabas	20219-21S	3/28/22
Chapparosa	288659-21	3/29/22
Hurley	7188-21	3/30/22
Coe	17047-21	3/30/22
Ganser	11329-20S	3/30/22
Lafond	25435-21S	3/31/22

Stewart	22995-21	3/31/22
Wells	20008-21S	3/31/22

That comes to 103 cases. Multiplying that number by 6 yields an estimated 618 deficiency cases dismissed each year for late filing. All of the dismissed taxpayers could theoretically be adversely impacted if section 7459(d)'s exception for jurisdictional dismissal could not apply, so that res judicata would prohibit their filing later refund suits.

The next step in the analysis is to estimate how many of such 618 taxpayers will, after the dismissal, pay the tax in full, file a refund claim, and eventually file a refund suit. Before making that estimate, one should recognize that only 188 refund suits were brought, under any circumstances, in the Court of Federal Claims and the district courts, combined, in the fiscal year ended September 30, 2020. IRS Data Book 2020 at 67 (Table 29) – a figure typical of pre-COVID-19 pandemic years. Obviously, not all those 188 refund suits were brought by taxpayers who previously filed late deficiency petitions in the Tax Court. Indeed, there is serious doubt that any of those 188 refund suits followed Tax Court deficiency suits dismissed for late filing.

If a refund suit does not result in a published opinion, there is no way to know whether there was a prior Tax Court suit. However, there is no reason to think that refund suits that do not generate opinions present this fact pattern any

more than refund suits that show this fact pattern in cases where an opinion was issued.

To search for the fact pattern in refund suit opinions, an attorney assisting petitioner's counsel pro bono has done LEXIS searches encompassing all opinions issued on any date in 2021 using the search terms "refund and (Tax Court) and dismiss!". Those searches retrieved 29 district court opinions and 15 Court of Federal Claims opinions. Having reviewed all those opinions, none involved the fact pattern of the taxpayer previously having filed a late Tax Court deficiency suit that was dismissed for lack of jurisdiction and the subsequent full payment of the deficiency before a refund suit was brought. *Thus, it appears that taxpayers simply do not bring such refund suits*.[8]

Why are there no refund suits brought after late-filed Tax Court petitions are dismissed?

The primary reason, no doubt, is that so many Tax Court petitions are filed by pro se taxpayers who do not know tax procedure. In the vast majority of orders

[8] The search did uncover a 2021 opinion which cited another opinion from an earlier year in another case in which a taxpayer brought a late deficiency suit in the Tax Court, which suit was dismissed for lack of jurisdiction. The taxpayer then brought a suit in the Court of Federal Claims, but the latter suit was about tax liens, not refunds, and indeed, the court, in the case, noted that it had no refund jurisdiction anyway because the taxpayer had not fully paid the deficiencies involved in the Tax Court suit. *Wall v. United States*, 141 Fed. Cl. 585 (2019).

dismissing a Tax Court deficiency petition for late filing, the Tax Court does not mention that a refund suit may be an alternative possibility.

Only in rare cases –- usually where the taxpayer's response to a motion to dismiss or an order to show cause suggests possible equitable tolling facts – does the Tax Court typically express sympathy with the taxpayer's situation that because the section 6213(a) filing deadline is jurisdictional, the Tax Court is powerless to help, and the Tax Court points the taxpayer to other options.

For example, in *Barnabas v. Commissioner*, Tax Court Docket No. 20219-21S (order dated Mar. 28, 2022), the pro se taxpayer pleaded with the Tax Court to hear the case, arguing that "the late filing of the petition was due to complications caused by the COVID-19 pandemic, which resulted in mail delays and difficulties in communicating with the IRS". She sought equitable tolling.

The Tax Court responded:

> While the Court appreciates petitioner's argument that circumstances outside of petitioner's control are to blame for the late filing of the petition, petitioner's assertion concerning equitable tolling is inapplicable in this Court insofar as the statutory filing period with respect to a notice of deficiency has long explicitly been held to be jurisdictional. . . .
>
> However, although petitioner may not prosecute this case in the Tax Court, petitioner may continue to pursue administrative resolution of the 2017 tax liability directly with the IRS. In addition, another remedy potentially available to petitioner, if feasible, is to pay the determined amount, then file a claim for refund with the IRS. If the claim is denied or not acted on for six months, petitioner may file a suit for refund in the appropriate Federal district court or the U.S. Court of Federal Claims. *See McCormick v. Commissioner*, 55 T.C. 138, 142 n.5 (1970).

Secondly, hardly any taxpayer can afford to pay the full tax, file a refund claim, and sue for a refund.

Against this absence of any taxpayer who would actually be harmed by treating the section 6213(a) Tax Court filing deadline as not jurisdictional, there is real harm to a significant number of taxpayers (and extra work for the Tax Court judges having to screen all cases for untimely filing) if the section 6213(a) filing deadline is held jurisdictional.

There are two kinds of taxpayer who are hurt by a jurisdictional interpretation of the deficiency petition filing deadline: taxpayers who could successfully seek equitable tolling if the deadline were not jurisdictional and taxpayers where the respondent did not notice or care that a deficiency petition was filed late, but where the Tax Court cared and issued an order to show cause why the case should not be dismissed for lack of jurisdiction. If the filing deadline is held not jurisdictional, the Tax Court will cease policing the filing deadline and will no longer be able to issue orders to show cause concerning late filing – most of which orders lead ultimately to dismissals.

How can one estimate the number of potential equitable tolling cases? Well, first, those cases would be a subset of the 618 cases a year estimated above to currently be dismissed for lack of jurisdiction for late filing. A review of the 103 cases in the above table indicates that most taxpayers do not file a response to

either a motion to dismiss for lack of jurisdiction or an order to show cause issued by the Tax Court. Presumably, these taxpayers would not file a response seeking equitable tolling, either, even if they could present a good late-filing excuse. Then, there are a significant number of taxpayers who do respond, but simply argue the merits of the case in their response, giving no excuse for why they filed late. Probably none of these taxpayers would raise equitable tolling, either. It is petitioner's counsel's sense that perhaps only 5% of the 103 dismissal orders in the months of February and March 2022 might present facts that could give rise to equitable tolling. So, say, about 30 cases a year. Then, not even in every case where there are plausible equitable tolling facts will the Tax Court agree that the facts are good enough to qualify for equitable tolling. Still, by construing the section 6213(a) deadline as jurisdictional, this Court regularly denies those taxpayers prepayment deficiency review because they would otherwise get equitable tolling. And we know from above that those taxpayers will never take the second step of a later refund suit.

How does one estimate the number of other taxpayers who end up dismissed from the Tax Court because of an order to show cause that was later made absolute? (Again, if the filing deadline is not jurisdictional, the Court cannot issue orders to show cause why the case should not be dismissed for lack of jurisdiction for late filing.) Using the same DAWSON search of the same orders covering the

months of February and March 2022 revealed the following orders to show cause in possible late-filed deficiency cases.

Name	Docket No.	Date of Order to Show Cause
Casaril	32072-21S	2/1/22
Francisco	2622-21S	2/1/22
Subramanyam	22002-21S	2/1/22
Bernard	8295-21S	2/1/22
Ruiz	10181-21S	2/1/22
Burns	16372-21	2/2/22
Guacelli	18968-21S	2/3/22
Eckert	15682-21S	2/3/22
Brown	2985-21S	2/3/22
Touchton	25396-21S	2/8/22
Snyder	6024-21S	2/8/22
Smith	18995-21	2/9/22
Harris	13069-20S	2/9/22
Scott	31829-21	2/9/22
Kaplan	10709-21S	2/11/22
Saltmarsh	5779-21	2/14/22
Johnson	20047-19	2/16/22

Cook	8467-21S	2/17/22
Moreno	10395-21S	2/18/22
Schubert	4242-21S	2/22/22
Sanchez	110768-20	2/24/22
Todd	6905-21S	3/2/22
Camirand	18282-21S	3/3/22
Wickham	2439-17	3/3/22
Tackett	19948-21S	3/4/22
Coffin	9194-21	3/4/22
Zoltowski	12176-21S	3/7/22
Haynes	27744-21	3/9/22
Espinoza	6039-21	3/14/22
Rhodes	8989-21S	3/18/22
Camarena	17379-21S	3/18/22
Maass	19552-21S	3/18/22
Paschall	20128-21S	3/23/22
Hoffman	9168-21S	3/29/22

Thus, there were 34 orders to show cause in February and March, combined. Annualized (i.e., multiplying 34 x 6), one would expect 204 orders to show cause in late-filed deficiency cases. Of course, not all of these orders to show cause will

end up made absolute. Some will be discharged. It is too soon to know what will happen in the cases of these recent orders, but one can estimate the percentage of orders to show cause that are made absolute (i.e., are followed eventually by a dismissal) by looking at the results of older orders to show cause.

Using the same DAWSON search terms, but only looking at orders to show cause issued in the months of April and May 2021, one finds 14 orders to show cause in late-filed deficiency cases, of which the court has to date ruled on 11. (The months chosen are old enough for most orders to show cause to have been ruled on, but in a period during which the Tax Court was likely issuing abnormally few orders because of restrictions to its work from COVID-19.) See the table below:

Name	**Docket No.**	**Date of OTC**	**Date of Dismissal Order/ (OTC Discharge)**
Peter	2949-19	4/5/21	8/24/21
Sito	8876-20S	4/5/21	5/12/21
Franklin	9959-20	4/5/21	5/18/21
Kanumuri	10852-20S	4/5/21	5/6/21
Walker	10969-20S	4/6/21	(5/4/21)
Bergevin	10980-20S	4/7/21	(4/28/21)
Herrera	3988-20S	4/15/21	(5/14/21)
Edwards	11801-20	5/7/21	1/14/22

Hartz	2663-21S	5/17/21	[no ruling yet]
Shomo	1949-21S	5/21/21	6/9/21
Amgott	14907-20S	5/24/21	[no ruling yet]
Villavicencio	10646-20S	5/24/21	7/15/21
Kroll	11477-20S	5/25/21	[no ruling yet]
Clark	912-21S	5/26/21	6/28/21

Of the 11 orders for which this Court has ruled, in 8 cases (73%), this Court later made the orders absolute and dismissed the cases for lack of jurisdiction. Applying this 73% rate of dismissals to the more typical 204 expected annual orders to show cause in deficiency case in a year not much affected by COVID-19, one would predict that taxpayers would suffer dismissal in 148 cases each year where the respondent would not otherwise bring late filing to the attention of the Court. These are 148 taxpayers each year who will be hurt in that they will be deprived of their prepayment forum only because this Court treats the filing deadline as jurisdictional and so issues orders to show cause.

So, to summarize, citing a section 7459(d) concern in order to preserve a second chance for a late-filing taxpayer to make a judicial challenge to the deficiency (i.e., by way of a refund suit that few taxpayers can afford and perhaps none ever uses in fact after a Tax Court dismissal), the Ninth Circuit in *Organic Cannabis*, by interpreting the section 6213(a) filing deadline as jurisdictional, ends

up each year denying a substantial number of taxpayers their first (Tax Court) chance to challenge the deficiency -- both by (1) prohibiting equitable tolling, and (2) permitting the Tax Court *sua sponte* to issue orders to show cause that lead to the dismissal of cases that the IRS had not itself thought to dismiss. The Ninth Circuit's interpretation helps no taxpayer. Indeed, would not it make more sense for the courts to try to preserve taxpayers' first opportunities to contest deficiencies (in Tax Court) than to try to preserve a late-filing taxpayer's second opportunity to contest deficiencies (by a refund suit)? If it thought about this longer, the Ninth Circuit would likely realize that it has the taxpayer-favorableness quality of its jurisdictional holding completely backwards.

II. Section 6213(a) Is Subject to Equitable Tolling.

A. *Boechler* Compels Equitable Tolling for Section 6213(a).

Because in *Organic Cannabis*, the Ninth Circuit held that the filing deadline is jurisdictional, it had no occasion to consider whether, if the deadline were not jurisdictional, the filing deadline would be subject to equitable tolling. Nor did the Seventh Circuit in *Tilden* consider this. So, this Court must consider, for the first time in any court, whether the filing deadline, if not jurisdictional, is subject to equitable tolling.

The most analogous case law for this court to look to to decide this question are the tax case opinions in *Boechler*, *Volpicelli v. United States*, 777 F.3d 1042

(9th Cir. 2015), and *Myers v. Commissioner*, 928 F.3d 1025, 1033-1037 (D.C. Cir. 2019). In each tax case, the court first found the filing deadline not jurisdictional and so then went on to consider whether the filing deadline is subject to equitable tolling. In each case, the court held the filing deadline subject to equitable tolling.

The reasoning behind *Boechler*'s conclusion that section 6330(d)(1) is subject to equitable tolling applies with equal force to section 6213(a). The opinion's analysis begins by pointing out:

> Equitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitation periods. *Lozano*, 572 U.S., at 10-11. Because we do not understand Congress to alter that backdrop lightly, nonjurisdictional limitations periods are presumptively subject to equitable tolling. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

Boechler at 8.

Applying the *Irwin* presumption to section 6330(d)(1), the opinion finds "nothing to rebut the presumption," making two further points. To begin with, the section 6330(d)(1) time limit is "directed at the taxpayer, not the court." *Id.* at 9.

In addition:

> The deadline also appears in a section of the Tax Code that is "'"unusually protective"'" of taxpayers and a scheme in which "'"laymen, unassisted. by trained lawyer,'" often "'initiate the process.'" [*Sebelius v.*] *Auburn* [*Regional Med. Cntr.*], 568 U.S. [145], at 160 [(2013)]. This context does nothing to rebut the presumption that nonjurisdictional deadlines can be equitable tolled.

Id. at 9.

The Commissioner's main objection to equitable tolling for section 6330(d)(1) is rooted in *United States v. Brockamp*, 519 U.S. 347 (1997), in which the Supreme Court held that equitable tolling did not apply to section 6511's deadline to file refund claims. *Boechler* did not accept that claim:

> But *Brockamp*, which rested on several distinctive features of the statutory deadline, is inapposite. Congress wrote the time limit in unusually emphatic form, and its detailed technical language could not easily be read as containing implicit exceptions. The statute also reiterated the deadline several times in several different ways. And the statute explicitly listed numerous (six) exceptions to the deadline. The nature of the subject matter—tax collection—underscored the linguistic point. That was because of the administrative problem of allowing equitable tolling when the IRS processed more than 200 million tax returns and issued more than 90 million refunds each year.
>
> Section 6330(d)(1)'s deadline is a far cry from the one in *Brockamp*. The deadline is not written in emphatic form or with detailed and technical language, nor is it reiterated multiple times. The deadline admits of a single exception (as opposed to *Brockamp's* six), which applies if a taxpayer is prohibited from filing a petition with the Tax Court because of a bankruptcy proceeding. § 6330(d)(2). That makes this case less like *Brockamp* and more like *Holland v. Florida*, 560 U.S. 631 (2010), in which we applied equitable tolling to a deadline with a single statutory exception. And it bears emphasis that *Brockamp* does not control simply because it also dealt with a statute relating to tax collection. In this case, any concerns about the administrability of applying equitable tolling to § 6330(d)(1) pale in comparison to those at issue in *Brockamp*, which dealt with a central provision of tax law.

Id. at 9-10 (cleaned up).

Under *Irwin*, statutory time limits involving the federal government and courts are presumptively subject to equitable tolling. There is nothing in

the text of section 6213(a) that precludes equitable tolling. Section 6213(a) is similar to section 6330(d)(1) in the attributes cited above—there is no emphatic language ("the taxpayer may file a petition"), whereas section 6511 uses "shall" throughout. The only exception to the section 6213(a) filing deadline is identical to the only exception to the filing deadline in section 6330(d)(2), section 6213(f), both of which apply if a bankruptcy filing precludes the timely filing of a Tax Court petition. As with *Boechler*, there is nothing to rebut the *Irwin* presumption.

As to whether the deficiency procedures are "unusually protective" of taxpayers (what the Supreme Court concluded as to CDP in *Boechler*), first, it should be noted that the Supreme Court never held that it is a but for requirement of equitable tolling that procedures involved must be unusually protective of taxpayers. In *Holland v. Florida*, 560 U.S. 631, 646 (2010), the Court only stated that the strength of the presumption in favor of equitable tolling against the federal government provided by *Irwin* "is reinforced by the fact that equitable principles have traditionally governed the substantive law of habeas corpus". *Id*. at (cleaned up; citations omitted).

Second, in *Myers*, where the D.C. Circuit held that the Tax Court section 7623(b)(4) whistleblower award filing deadline is not jurisdictional and is subject to equitable tolling, the court wrote:

The IRS maintains equitable tolling is not a realistic assessment of legislative intent with regard to § 7623(b)(4), citing the Supreme Court's decision in *Auburn*. There the Supreme Court denied the presumption to the 180-day limit for appealing a Medicare reimbursement determination to an administrative review board, in part because "unlike the remedial statutes at issue in many of th[e] Court's equitable-tolling decisions," the statutory scheme is "not designed to be unusually protective of claimants." 568 U.S. at 159-160. The IRS therefore argues that the "whistleblower statute providing for an 'award' is not a remedial provision" "designed to be unusually protective of claimants."

Indeed it is not, but the Court in *Auburn* did not rest its evaluation of legislative intent on this factor alone. The Court began its analysis by saying, "[w]e have never applied the *Irwin* presumption to an agency's internal appeal deadline." *Id*. at 159. It then explained that the Secretary of the Department of Health and Human Services, pursuant to its rulemaking authority, had expressly prohibited the review board from extending the filing deadline. *Id*. at 159; *see* 42 C.F.R. § 405.1841(b)(2007). Because the Congress had amended the statute six times, "each time leaving untouched the 180-day administrative appeal provision and the Secretary's rulemaking authority," the Court inferred that the Congress approved of the regulation. *Id*. at 159. Finally, it noted the statutory scheme is not "one in which laymen, unassisted by trained lawyers, initiate the process"; instead, providers are "sophisticated" "repeat players" who are "assisted by legal counsel." *Id*. at 160.

None of these other indicators of legislative intent is present in this case: The Tax Court is not an "internal" "administrative body" and Tax Court petitioners are typically pro se, individual taxpayers who have never petitioned the Tax Court before. Moreover, the IRS points to no regulation or history of legislative revision that might contradict the *Irwin* presumption. *That the whistleblower award statute is not unusually protective of claimants is the only consideration on the IRS side of the ledger. Without more, we are not persuaded to set aside a presumption that has been so consistently applied*. *See, e.g. Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling") (cleaned up).

Myers at 1036-1037 (emphasis added). Thus, even if one were erroneously to conclude that the deficiency procedures were not unusually protective of taxpayers, under *Myers*, the Tax Court deficiency petition filing deadline should still be subject to equitable tolling.

However, the deficiency procedures are, like the CDP procedures, unusually protective of taxpayers. The Supreme Court has held that that Due Process does not require that taxpayers have prepayment judicial review rights. *Phillips v. Commissioner*, 283 U.S. 589, 594-601 (1931). *Phillips* involved the Board of Tax Appeals' jurisdiction to consider transferee liability issues, and the transferee estate in the case, having declined the option of paying the deficiency and suing for a refund, was upset that it might have to pay the tax before it could pursue a Court of Appeals appeal from the Board of Tax Appeals (though there was a provision for putting up a bond during that appeal). In *Phillips*, the Court wrote:

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied….
>
> The procedure provided in § 280(a)(1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee. He may contest his liability by bringing an action, either against the United States or the collector, to recover the amount paid. This remedy is available where the transferee does not appeal from the determination of the Commissioner, and the latter makes an assessment and enforces payment by distraint; or where the transferee voluntarily pays the tax and is thereafter denied administrative relief. Or the transferee may avail

> himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals, since all provisions governing this mode of review are made applicable by § 280….
>
> It is argued that such review by the Board of Tax Appeals and Circuit Court of Appeals is constitutionally inadequate because of the conditions and limitations imposed. Specific objection is made to the provision that collection will not be stayed while the case is pending before the Circuit Court of Appeals, unless a bond is filed…. [I]t has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount. The privilege of delaying payment pending immediate judicial review, by filing a bond, was granted by the sovereign as a matter of grace solely for the convenience of the taxpayer.

Id. at 596-599 (footnotes and citations omitted). Thus, the ability of taxpayers to contest deficiencies by paying them and suing for a refund – the procedure before the Board of Tax Appeals was created in 1924 – is enough to satisfy Due Process. When taxpayers argued to Congress about the harshness of these refund suit procedures with respect to the relatively-new income and estate taxes, Congress created the Board of Tax Appeals as a prepayment forum to contest deficiencies – more than was required by Due Process. CDP is simply a 1998 update providing taxpayers additional protective features before the IRS can levy to collect deficiencies and other tax liabilities and allowing taxpayers to challenge the underlying liability where they did not received the notice of deficiency or otherwise have a right to previously contest the liability.

Next, petitioner expects respondent to argue that *Boechler* only allowed the CDP filing deadline to be equitably tolled because, unlike section 6511, CDP is not

a central provision of tax law and the administrative problems would be relatively small. Petitioner expects respondent to argue, by contrast, that (1) the deficiency procedures are central, not ancillary, provisions of the tax law and (2) the administrative problems if the deficiency filing deadline were subject to equitable tolling are at least an order of magnitude larger than the problems in CDP.

The Solicitor General made the argument in *Boechler* that administrative problems if the CDP filing deadline were subject to equitable tolling rebutted the *Irwin* presumption, just as that presumption was, in part, rebutted by administrative problems in *Brockamp*. Here is from the *Boechler* opinion rejecting those arguments:

> And it bears emphasis that *Brockamp* does not control simply because it also dealt with a statute relating to tax collection. In this case, *any concerns about the administrability of applying equitable tolling to §6330(d)(1) pale in comparison to those at issue in Brockamp*, which dealt with a central provision of tax law. The deadline here serves a far more limited and ancillary role in the tax collection system. If anything, the differences between the statute at issue in *Brockamp* and this one underscore the reasons why equitable tolling applies to §6330(d)(1).
>
> The Commissioner protests that if equitable tolling is available, the IRS will not know whether it can proceed with a collection action after §6330(d)(1)'s deadline passes. The Commissioner acknowledges that the deadline is already subject to tolling provisions found elsewhere in the Tax Code—for example, tolling is available to taxpayers located in a combat zone or disaster area. Tr. of Oral Arg. 37–40. But he says that the IRS can easily account for these contingencies because it continuously monitors whether any taxpayer is in a combat zone or disaster area. *Ibid*. Tolling the §6330(d)(1) deadline outside these circumstances, the Commissioner insists,

> would create much more uncertainty. *Id*., at 37–38. *We are not convinced that the possibility of equitable tolling for the relatively small number of petitions at issue in this case will appreciably add to the uncertainty already present in the process.* To take the most obvious example, petitions for review are considered filed when mailed. 26 U. S. C. §7502(a)(1). The 30-day deadline thus may come and go before a petition "filed" within that time comes to the IRS's attention. Presumably, the IRS does not monitor when petitions for review are mailed. So it is not as if the IRS can confidently rush to seize property on day 31 anyway.

Id. at 10-11 (emphasis added).

In *Boechler*, the Supreme Court gave no definition of which provisions of tax law are "central" or "ancillary". But, it is clear that the Supreme Court did not rely exclusively on the ancillary nature of the Tax Court CDP filing deadline as a but for requirement to allow equitable tolling. So, it may only weaken the *Irwin* presumption a bit if the deficiency filing deadline is central, not ancillary, to the tax law.

In any case, the Tax Court deficiency jurisdiction filing deadline involves far fewer taxpayers than does the section 6511(a) filing deadline considered in *Brockamp*. So, the deficiency suit filing deadline is more usefully classified as comparatively ancillary. In *Brockamp*, the Supreme Court noted:

> The IRS processes more than 200 million tax returns each year. It issues more than 90 million refunds. *See* Dept. of Treasury, Internal Revenue Service, 1995 Data Book 8-9. To read an "equitable tolling" exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of

> late claims, accompanied by requests for "equitable tolling" which, upon close inspection, might turn out to lack sufficient equitable justification.

519 U.S. at 352. *Brockamp* did not make a central/ancillary distinction about tax law provisions. The *Boechler* opinion noted the same figures at slip opinion page 9.

Brockamp was decided 25 years ago, and the filing of tax returns and issuance of refunds has only increased. For the fiscal year ended September 30, 2020, taxpayers filed 240 million returns, and the IRS issued 303 million refunds (perhaps the number of refunds exceeding the number of returns filed because of refundable credits created in response to the COVID-19 pandemic). IRS Data Book 2020, Table 2 (Number of Returns and Other Forms Filed), Table 7 (Number of Refunds Issued). In the same fiscal year, taxpayers filed 16,119 deficiency petitions and 770 CDP petitions; United States Tax Court, Congressional Budget Justification Fiscal Year 2022, 21; with both numbers probably about 40% below normal because of the pandemic. There were thus 21 deficiency petitions for every CDP petition – i.e., 16,119/770. Petition filings are higher in 2021 and early 2022, but there is little reason to think this ration of 21 to 1 has changed at all. Thus, while deficiency petitions are certainly at least one order of magnitude larger than CDP petitions, tax return filings and refund issued are four orders of

magnitude larger than deficiency petitions – i.e., there were 12,656 tax returns filed for every deficiency petition (240,000,000/16,119). In the scheme of things, the Tax Court's deficiency deadline is not central to the tax law, especially when taxpayers have the alternative route of paying the tax and suing for a refund.

Moreover, in *Boechler*, the attorney for the Solicitor General, Mr. Bond, informed the Court that there might be 300 cases that would be affected by a ruling that the CDP filing deadline is not jurisdictional, though he made no estimate of in how may of such cases the taxpayers would ever argue for equitable tolling.

Here's the exchange:

> JUSTICE THOMAS: Okay. And -- and how much -- if -- if we rule against you, how will that number change? Not the universe, but those numbers -- the 1100[9]?
>
> MR. BOND: So,of the 11- or 1200 petitions that are filed each year, roughly 22 percent or so, around 300 of them, are dismissed for lack of jurisdiction. So that universe of cases would be affected by Petitioner's -- that's a five-year average -- would be affected by Petitioner's rule that tolling is available in those -- in those cases.

Transcript of Oral Argument at 72, *Boechler.*

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[9] In its merits brief to the Supreme Court, the taxpayer wrote: "In 2020, there were about 28,000 requests for CDP hearings and about 1,200 CDP petitions to the Tax Court. See [National Taxpayer Advocate] Annual Report to Congress 2020, at 185." Brief for Petitioner at 45 n. 11, *Boechler, P.C. v. Commissioner,* No. 20-1472 (U.S. April 22, 2022), 596 U.S. ___ (2022).

The 300 figure for CDP petitions dismissed for lack of jurisdiction is a great overstatement of the CDP cases that could be affected each year by a *Boechler* ruling. Based on the research of the attorney assisting the petitioner's counsel, it appears that 2/3 of cases dismissed for lack of jurisdiction in the Tax Court are dismissed for failure to pay the filing fee or seek a fee waiver, with only about a third being dismissed for lack of jurisdiction for late filing. So, the correct number was only about 100 CDP cases annually that are dismissed for lack of jurisdiction for late filing, in which few cases would present equitable tolling excuse arguments.

The important figure is 300, since that is the number of CDP cases that the Supreme Court was assuming in which equitable tolling arguments might be made.

But research into deficiency case dismissals for lack of jurisdiction for late filing in February and March 2022 (discussed above) suggests that, annually, there are expected to be only 600 such deficiency cases dismissed for lack of jurisdiction for late filing each year. And equitable tolling would likely be asserted in perhaps 30 of such deficiency cases a year – a figure even below what the Supreme Court thought was no big administrative problem for the IRS to deal with for CDP.

Nor do the types of administrative problems alleged by the IRS in deficiency cases differ by one whit from the same problems discussed and dismissed in the *Boechler* opinion.

In sum, *Boechler* and *Myers* greatly support a holding that the section 6213(a) filing deadline is subject to equitable tolling.

B. Applicable Ninth Circuit Precedent Supports Equitable Tolling.

There is another opinion in the Ninth Circuit that effectively supports a ruling that equitable tolling of the deficiency filing deadline should be allowed. *Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015), holds that the filing deadline under section 6532(c) for a third party to bring a wrongful levy suit is not jurisdictional and is subject to equitable tolling. Citing the *Irwin* presumption as well as two prior Ninth Circuit cases holding that section 6532(c) is subject to equitable tolling, *Supermail Cargo v. United States*, 68 F.3d 1204 (9th Cir. 1995), and *Capital Tracing v. United States*, 63 F.3d 859 (9th Cir. 1995), *Volpicelli* remands the case to the District Court to determine whether there are grounds for equitable tolling.

Notably, *Volpicelli* does not discuss whether the third-party plaintiff in this case should benefit from the "unusually protective" standard (although the plaintiff, an 18-year-old boy, appeared pro se in the District Court proceeding). It is hard to see how, generally, giving a third party a post-levy right to pursue a suit

for wrongful levy is especially protective of the third party, as Due Process surely requires some sort of post-deprivation suit. In fact, the opinion rejects the government's contention that *Brockamp* stands for the unavailability of equitable tolling in tax cases:

> 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 that 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.

Volpicelli at 1046 (citations omitted).

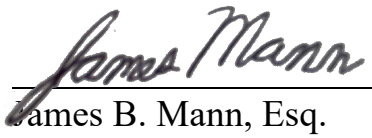
There is thus strong support in the Ninth Circuit for holding that section 6213(a) is subject to equitable tolling.

CONCLUSION

This Court was wrong to dismiss this case for lack of jurisdiction on account of late filing. The filing deadline at section 6213(a) is not jurisdictional and is subject to equitable tolling. The order dismissing this case should be vacated, and the parties should be allowed to proceed in this case as if the filing deadline is a mere statute of limitations. The parties should next be expected, if they desire, to file an amended answer asserting a statute of limitations defense, and a reply asserting an equitable tolling defense to the statute of limitations defense. This is not time for this Court to actually decide whether the petitioner has presented facts

enough to justify equitable tolling. A sufficient factual record has not yet been presented to this Court on which it could make an equitable tolling ruling.

Respectfully submitted,



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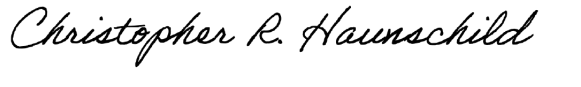

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Dated: May 2, 2022