

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

**ISOBEL BERRY CULP;  
DAVID R. CULP,**

**Petitioners-Appellants,**

**v.**

**COMMISSIONER OF INTERNAL  
REVENUE,**

**Respondent-Appellee.**

No. 22-1789

**REPLY IN SUPPORT OF  
APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE**

Pursuant to Federal Rule of Appellate Procedure 27 and Local Appellate Rule 27.4, appellee, the Commissioner of Internal Revenue, respectfully files this reply in support of his motion for summary affirmance.

There remains “no substantial question” about the correctness of the Tax Court’s jurisdictional dismissal order. 3d Cir. R. 27.4(a). In their response to the Commissioner’s motion, the Culp’s disclaim any reliance on 26 U.S.C. (I.R.C.) § 6213(a) as a basis for the Tax Court’s jurisdiction. The Culp’s also concede that the IRS issued no notice of

determination concerning collection action—an indisputable predicate to Tax Court jurisdiction in collection-due-process cases. *See* I.R.C. §§ 6320(c) & 6330(d). And the Culps rehash the same fatally flawed theory about the Tax Court’s “refund” jurisdiction, which ignores the plain language of I.R.C. § 6512(b).

At bottom, the Culps seek reversal so that they can pursue statutory remedies unavailable to them in the Tax Court, and their response confirms that both the Supreme Court’s decision in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022), and the doctrine of equitable tolling are irrelevant to this appeal. For these reasons and those stated in the Commissioner’s motion, summary affirmance is warranted.

## ARGUMENT

### **A. The Tax Court can only exercise jurisdiction to the extent that statutes expressly allow it**

The Tax Court “possess[es] only such jurisdiction as is expressly conferred by Congress.” *Sunoco Inc. v. Commissioner*, 663 F.3d 181, 187 (3d Cir. 2011) (citing I.R.C. § 7442); *see also Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *Est. of Smith v. Commissioner*, 638 F.2d

665, 669 (3d Cir. 1981) (“The Tax Court . . . is purely a creature of statute and has only the power given to it by Congress.”).

“The Tax Court’s principal basis for jurisdiction is I.R.C. § 6213(a),” which “gives the Tax Court jurisdiction to determine a ‘deficiency’ in income . . . taxes as to which [i] the IRS has issued a notice of deficiency . . . and [ii] the taxpayer has filed a timely petition for redetermination.” *Sunoco*, 663 F.3d at 187. This Court recently reexamined section 6213(a) and concluded that it “unequivocal[ly]” and “unambiguous[ly]” speaks in “jurisdictional” terms. *Garrett v. Commissioner*, 798 F. App’x 731, 733 (3d Cir. 2019); accord *Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1092 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2596 (2021); *Tilden v. Commissioner*, 846 F.3d 882, 886-87 (7th Cir. 2017); *Edwards v. Commissioner*, 791 F.3d 1, 5-6 (D.C. Cir. 2015); *Mabbett v. Commissioner*, 610 F. App’x 760, 765 & n.7 (10th Cir. 2015).

The Tax Court has jurisdiction to review certain collections-related determinations by the IRS Independent Office of Appeals. But before that jurisdiction arises, the IRS must issue a notice to the taxpayer of its intent to begin a collection action and of the taxpayer’s

right to a collection-due-process hearing from the Office of Appeals, *see* I.R.C. § 6330(a); the taxpayer must request and receive a hearing, *id.* § 6330(b)-(c); the Office of Appeals must decide the disputed issues, *id.* § 6330(c)(3); and the Office of Appeals must notify the taxpayer of its final determination. *See id.* § 6330(d)(1); *accord* I.R.C. § 6320 (adopting a similar framework for liens). While section 6330(d)(1)'s 30-day deadline to seek Tax Court review is not jurisdictional, *see Boechler*, 142 S. Ct. at 1501, section 6330's other predicates remain essential to Tax Court jurisdiction.

As discussed below, the Tax Court correctly dismissed this case for lack of jurisdiction.

**B. The Tax Court lacked jurisdiction to review the notice of deficiency under I.R.C. § 6213(a)**

The Tax Court recognized that the Culps' petition did not challenge a notice of deficiency (*see* Doc. 8 at 2),<sup>1</sup> but the court still considered whether there was jurisdiction under section 6213(a). (*See id.* at 3-4.) The Tax Court correctly held that it lacked jurisdiction to

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<sup>1</sup> "Doc." refers to documents in the original record on appeal (ECF No. 7), as numbered by the Clerk of the Tax Court. The pin cites refer to the page numbers of the docketed PDFs.

redetermine the Culps' 2015 deficiencies under I.R.C. § 6213(a) because the couple filed their petition more than 90 days after the IRS had mailed a notice of deficiency to their last known address. (*Id.* at 4.) In reaching its determination, the Tax Court rejected the Culps' claim that no "Notice was ever issued" (*id.*), reasoning that copies of the notice of deficiency and U.S. Postal Service Form 3877 were attached to the motion to dismiss. (*Id.* at 3-4.) This Court should now affirm because the Tax Court's findings are not clearly erroneous. *See PNC Bancorp, Inc. v. Commissioner*, 212 F.3d 822, 827 (3d Cir. 2000).

Although the Culps' petition did not seek review of a notice of deficiency (*see* Doc. 1 at 2), they have repeatedly denied that the IRS ever mailed them this notice. In opposing the motion to dismiss, the Culps argued that "the facts show that this did not happen," thus "ma[king] it impossible to file a claim with the Tax Court based on [section 6213(a)]." (Doc. 6 at 6.) The Culps also accused the Commissioner of "rel[ying] on facts that do not exist" to challenge jurisdiction under section 6213(a). (*Id.*) And on appeal, the Culps again allege that the IRS "failed to follow its statutory mandate[ ] of sending . . . a Notice of Deficiency," which would "give the U.S. Tax Court

jurisdiction to resolve these matters and disputes.” (Opp. 6; *see also id.* at 7-10.) But if the Tax Court erred in accepting the Commissioner’s proof of mailing over the Culps’ contrary allegations (*see id.* at 10), the error was harmless. If there were no notice of deficiency, the Tax Court could not exercise jurisdiction under section 6213(a) for that reason too. *See, e.g., Edwards*, 791 F.3d at 6.<sup>2</sup>

Finally, the Culps now argue, in the alternative, that “if [the notice of deficiency] was sent, it was later retracted by the IRS” when it sent them a Notice CP 2000 in May 2018.<sup>3</sup> (Opp. 8; *see also id.* at 9 (“or if it was sent, it was withdrawn”); *id.* at 10 (similar).) Because they did not make that argument below, when the Tax Court made its fact-bound jurisdictional findings, the argument should be considered waived. *See Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 416 (3d Cir.

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<sup>2</sup> This court “may affirm on any basis supported by the record, even if it departs from the [lower court’s] rationale.” *Host Int’l, Inc. v. MarketPlace, PHL, LLC*, 32 F.4th 242, 247 n.3 (3d Cir. 2022) (internal quotation marks omitted).

<sup>3</sup> A Notice CP 2000 “notifies the taxpayer of a proposed change to tax liability because of income that is not identifiable or apparently not fully reported on the return[.]” Internal Revenue Manual § 21.3.1.6.52 (Oct. 1, 2011). Such notices are computer-generated. *See id.* § 21.3.1.3 (Oct. 1, 2019). The IRS had previously mailed the Culps a Notice CP 2000 in November 2017. (*See* Doc. 1 at 7; Doc. 6 at 15-19.)

2011). But even if “exceptional circumstances” justified appellate review of this novel argument, *id.* (internal quotation marks omitted), the result would be the same: “[i]f a notice of deficiency is rescinded, the taxpayer has no right to file a petition with the Court based on such a notice.” *Nichols v. Commissioner*, 84 T.C.M. (CCH) 483, 2002 WL 31415492, at \*3 (Oct. 24, 2002) (citing cases). And the Culps correctly concede that a Notice CP 2000 “is not subject to Tax Court jurisdiction” (Opp. 10) because it is not a notice of a deficiency. *See Milligan v. Commissioner*, 108 T.C.M. (CCH) 662, 2014 WL 7398662, at \*2 (Dec. 30, 2014).

**C. The Culps concede that the IRS mailed no notice of determination and, thus, that the Tax Court lacked jurisdiction under I.R.C. § 6320(c) and § 6330(d)**

The Tax Court held that it lacked jurisdiction under I.R.C. § 6320(c) or I.R.C. § 6330(d) because the Office of Appeals had not “issued a notice of determination concerning collection activity for [2015].” (Doc. 8 at 3.) The record supports that conclusion. Beyond checking a box on their form petition, the Culps did not allege (let alone prove) that the IRS had sent them any notice of determination that could support the Tax Court’s collections-related jurisdiction.

The Culps did not merely fail to show that the IRS had issued a notice of determination. They argued affirmatively that the IRS had not done so. In their response to the motion to dismiss, they accused the Commissioner of “ma[king] it impossible to file a claim with the Tax Court” under sections 6320(c) or 6330(d). (Doc. 6 at 6.) Indeed, they alleged that the IRS, “without notice,” had “levied on [their] assets.” (*Id.* at 5; *see also id.* at 7.) And now, in their response to this motion, they similarly allege that “the IRS stole money from [them] without . . . providing the required” notices and thus violated “statutory mandates.” (*Opp.* at 5-6; *see also id.* at 11.)

The Culps’ various filings reflect an earnest belief that the IRS levied on their property without issuing the pre-collection notice required by section 6330(a). Those allegations, if true, might support a damages suit for wrongful collection, which is an “exclusive remedy” that must be brought “in a district court of the United States.” I.R.C. § 7433(a). (*See also* Doc. 1 at 19 (invoking section 7433(a)).) But those allegations do not establish Tax Court jurisdiction under section 6330(d)(1) because they cannot substitute for the predicate “determination” subject to judicial review.



**D. The Tax Court has no freestanding “refund” jurisdiction**

In their response to the Commissioner’s motion, the Culps repeat their erroneous view that the Tax Court has some sort of independent jurisdiction over “refund litigation.” (Opp. 12-13.) Far from granting unbounded power to consider any two-year-old refund claim, section 6512(b) provides only “limited” authority over refunds. *Sunoco*, 663 F.3d at 188 (quoting *Est. of Baumgardner v. Commissioner*, 85 T.C. 445, 452 (1985)). The plain language of the statute simply “expand[s]” the Tax Court’s extant deficiency jurisdiction. *Ax v. Commissioner*, 146 T.C. 153, 160 (2016); accord *Bachner v. Commissioner*, 81 F.3d 1274, 1278 (3d Cir. 1996); see also 14 *Mertens Law of Fed. Tax’n* § 50:20 (May 2022 update) (“[T]he Tax Court’s overpayment jurisdiction arises out of a tax deficiency action.”). Thus, the Tax Court did not err in declining to exercise jurisdiction over the Culps’ “refund” claim.

The Culps could have sued for a refund in either a district court or the Court of Federal Claims, see 28 U.S.C. § 1346(a)(1), if the couple had satisfied the statutory predicates to suit. See I.R.C. §§ 6511(a), 6532(a) & 7422(a). For whatever reason, the Culps chose to file this

petition instead. That choice cannot create jurisdiction that Congress has not granted the Tax Court.

**E. *Boechler v. Commissioner* and the doctrine of equitable tolling are irrelevant to this appeal**

The Culps devote a substantial part of their response to the Supreme Court’s decision in *Boechler v. Commissioner* and the doctrine of equitable tolling. (Opp. at 2, 4-5, 7, 11.) But neither *Boechler* nor the doctrine of equitable tolling affects the outcome here.

First, *Boechler* would not apply even if the Culps were invoking the Tax Court’s deficiency jurisdiction under section 6213(a). In *Boechler*, the Supreme Court held that “Section 6330(d)(1)’s 30-day time limit to file a petition for review of a collection due process determination is an ordinary, nonjurisdictional deadline subject to equitable tolling.” *Boechler*, 142 S. Ct. at 1501. *Boechler* did not involve section 6213(a)’s 90-day deadline.

This and other courts have treated section 6213(a)’s deadline as jurisdictional, *see* p. 3, *supra*, and there is no contrary circuit authority on this question, unlike pre-*Boechler* authority on section 6330(d)(1). *See* Pet. for Writ of Certiorari, *Boechler, P.C. v. Commissioner*, No. 20-1472, 2021 WL 1578098, at \*9-13 (S. Ct. Apr. 16, 2021) (describing the

circuit split). It is thus unsurprising that the Supreme Court denied certiorari in *Organic Cannabis*, 141 S. Ct. at 2596, a case about section 6213(a), yet granted certiorari in *Boechler* just six months later. See *Boechler, P.C. v. Commissioner*, 142 S. Ct. 55 (2021). In any event, this Court has recently declined to apply equitable tolling to section 6213(a) because it is “a jurisdictional filing deadline.” *Garrett*, 798 F. App’x at 734.

Second, *Boechler* does not apply here in the collections-related context because there was no notice of determination and thus no section 6330(d)(1) deadline to toll. The Culps essentially seek to suspend the statute’s notice-of-determination requirement. There is no authority for that extraordinary relief—not even *Boechler*, where the taxpayer filed its petition after the Office of Appeals had issued a final determination sustaining the disputed levy. See 142 S. Ct. at 1497.<sup>4</sup>

Finally, even if equitable tolling were available under section 6213(a) in theory, it would not be available on the facts of this

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<sup>4</sup> If the Office of Appeals had issued a notice of determination to the Culps, and if the Culps had showed that they “did not receive [the] statutory notice of deficiency,” I.R.C. § 6330(c)(2)(B), they could then have belatedly challenged the IRS’s deficiency determination in the administrative proceeding before the Office of Appeals. *Id.*

case. The Culps have not alleged that the IRS, through “misconduct,” “induced or tricked” them “into allowing the[ir] filing deadline to pass.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990). The IRS’s alleged misconduct here comprises the levies beginning in April 2019 (Doc. 1 at 9) and actions by the IRS Taxpayer Advocate Service (TAS) between June 2019 and October 2019. (*Id.* at 10-15, 18-19.) That alleged misconduct occurred long after the Culps’ May 2018 deadline to challenge the notice of deficiency under section 6213(a). The Culps have also never claimed that they decided not to file a Tax Court petition by May 2018 because of anything the IRS said or did to them. And their petition fails to explain why they waited almost two years after the levies began, and 18 months after TAS “went silent” (Doc. 1 at 18), to file this petition in the Tax Court. A “fail[ure] to exercise due diligence in preserving [one’s] legal rights” cannot justify tolling “the time limits imposed by Congress in a suit against the Government[.]” *Irwin*, 498 U.S. at 96.

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## CONCLUSION

This Court should summarily affirm the Tax Court's dismissal order.

Respectfully submitted,

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JUNE 27, 2022

### **CERTIFICATE OF BAR MEMBERSHIP**

Pursuant to Local Rule 28.3(d), it is hereby certified that, because the attorneys on this brief represent the Federal Government, the requirement that at least one attorney must be a member of the Bar of this Court is waived.

/s/ Isaac B. Rosenberg  
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## CERTIFICATE OF COMPLIANCE

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(s) /s/ Isaac B. Rosenberg

Attorney for Appellee

Dated: June 27, 2022

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It is hereby certified that on June 27, 2022: (1) a PDF copy of this motion was electronically filed by CM/ECF; (2) service was made on all parties registered with CM/ECF; and (3) service was made via first-class U.S. mail upon the following addressee(s):

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