Docket No. 22-1789

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ISOBEL BERRY CULP & DAVID CULP,

Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

On Appeal from the United States Tax Court (No. 14054-21)
Honorable Eunkyong Choi, Special Trial Judge

BRIEF OF THE CENTER FOR TAXPAYER RIGHTS AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

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INTEREST OF THE AMICUS[1]

The Center for Taxpayer Rights ("the Center") is a § 501(c)(3)[2] non-profit organization dedicated to furthering taxpayers' awareness of and access to taxpayer rights. The Center accomplishes its mission, in part, by educating the public and government officials about the role taxpayer rights plays in promoting compliance and trust in systems of taxation. Nina E. Olson is the Executive Director of the Center. From 2001 through 2019, she served as the IRS National Taxpayer Advocate, appointed under § 7803(c)(1)(B).

Counsel for the Center is the Tax Clinic at the Legal Services Center of Harvard Law School, which represents low-income taxpayers before the IRS and in the courts.

Pro se low-income taxpayers occasionally file late Tax Court petitions with good excuses for late filing. Such taxpayers would generally benefit from the deficiency petition filing deadline being non-jurisdictional and subject to equitable tolling.

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[1] Pursuant to FRAP 29(a)(4)(E), this is to affirm that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The only non-party who contributed monetarily to this brief is Harvard University, which paid the costs of printing. The Tax Clinic at the Legal Services Center of Harvard Law School is a component of Harvard University. The parties have consented to the filing of this brief.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code, Title 26.

SUMMARY OF ARGUMENT

The Culps contend that they did not receive the IRS notice of deficiency within the 90-day deadline of § 6213(a) to file a Tax Court petition. They filed their petition late – belatedly learning of the mailing during the Tax Court case. The Tax Court viewed the filing deadline as jurisdictional and not subject to equitable tolling, so it dismissed the petition for lack of jurisdiction.

The Supreme Court has recently held that the deadline in § 6330(d)(1) to file a Tax Court "Collection Due Process" ("CDP") petition is not jurisdictional and is subject to equitable tolling. *Boechler, P.C. v. Commissioner*, 212 L. Ed. 2d 524 (April 21, 2022). The reasoning in *Boechler* compels lower courts to now hold that the deadline in § 6213(a) is also not jurisdictional and is subject to equitable tolling. In response to an argument in that case referring to § 6213(a), the Supreme Court disparaged and specifically gave no deference to prior appellate court holdings that § 6213(a)'s filing deadline is jurisdictional. *Id.* at 533.

Congress has not spoken clearly that the § 6213(a) deadline is jurisdictional, nor has the presumption in favor of equitable tolling of statutes of limitations laid down in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), been rebutted.

ARGUMENT

I. The Deadline in § 6213(a) to File a Deficiency Petition in the Tax Court Is Not Jurisdictional.

A. This Court's Precedent Holding the Filing Deadline Jurisdictional Has Been Undermined by *Boechler*.

Beginning in 2004, the Supreme Court narrowed the term "jurisdictional". *Kontrick v. Ryan*, 540 U.S. 443 (2004).

As *Boechler* points out, since *Kontrick*, a filing deadline is not jurisdictional, unless Congress "clearly states" that it wants the filing deadline to be jurisdictional. 212 L. Ed. 2d at 530.

Further, where there exists a "long line" of Supreme Court opinions holding a deadline jurisdictional, the Court will continue to so hold, despite the lack of a clear statement. *Boechler*, *supra*, at 533; *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019).

This Circuit and many other Circuits (but not the Supreme Court) have long had case law holding the § 6213(a) filing deadline jurisdictional. For this Circuit, *see, e.g., Sunoco Inc. v. Commissioner*, 663 F.3d 181, 187 (3d Cir. 2010). But most such cases were decided either (1) before 2004 or (2), like *Sunoco*, without discussion of the Supreme Court's recent limitations on what can make a filing deadline jurisdictional.

The most recent published appellate opinion considering whether the § 6213(a) filing deadline is jurisdictional under the Supreme Court's new thinking is *Organic Cannabis Foundation v. Commissioner*, 962 F.3d 1082 (9th Cir. 2020). There, the Ninth Circuit considered every possible argument that the government could make under the new Supreme Court thinking and confirmed the Ninth Circuit's pre-*Kontrick* precedent holding that the filing deadline in § 6213(a) is jurisdictional. *See also Tilden v. Commissioner*, 846 F.3d 882, 886-887 (7th Cir. 2017) (same); *Garrett v. Commissioner*, 798 Fed. Appx. 731, 733 (3d Cir. 2019) (same). Of all opinions holding the filing deadline in § 6213(a) or its predecessors jurisdictional, only *Organic Cannabis*, *Tilden*, and *Garrett* attempted to consider the question under the Supreme Court's current thinking. This brief will not discuss *Tilden* and *Garrett* further, since their rationales included only some of the rationales articulated in *Organic Cannabis*.

Boechler has completely undermined all but one of the rationales articulated by the Ninth Circuit in *Organic Cannabis*.

For example, in the course of holding the filing deadline of § 6330(d)(1) not to be jurisdictional, the Court in *Boechler* disparaged opinions from lower courts holding the § 6213(a) filing deadline jurisdictional – opinions cited in *Organic Cannabis*:

> 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 [§ 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.
>
> The Commissioner's argument misses the mark. The cases he cites almost all 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*.

212 L. Ed. 2d at 533 (citations omitted; cleaned up; emphasis added).

B. Congress Did Not Clearly State in § 6213(a) that the Filing Deadline Therein Is Jurisdictional.

Section 6213(a) provides, in relevant part:

> [1] Within 90 days . . . after the notice of deficiency authorized in section 6212 is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. [2] 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 . . . period, . . . nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. [3] 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. . . . [4] The Tax Court shall have no jurisdiction to enjoin any action or proceeding . . . 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. . . .

In *Organic Cannabis*, the Ninth Circuit also cited the clear statement exception and the statutory context of § 6213(a) in support of its holding the filing

deadline in that section jurisdictional. *Boechler* undermines *Organic Cannabis*' holding that the "clear statement" exception applies to hold the filing deadline jurisdictional.

The relevant comparable language from § 6330 in CDP to that quoted above from § 6213(a) is:

> (d)(1) 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).
>
> . . . .
>
> (e)(1) [I]f a hearing is requested [at the IRS Independent Office of Appeals] under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. . . .[3] Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The 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) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

This is an easier case than *Boechler* as to the clear statement exception. In *Boechler*, a possible problem was created by the explicit grant of Tax Court jurisdiction within the same sentence providing the filing deadline. However, the

[3] A parallel suspension of the statutes of limitations on assessment and collection in deficiency cases appears at § 6503(a)(1).

Court concluded that there were multiple possible readings of § 6330(d)(1), so Congress had not made a clear jurisdictional statement as to the deadline.

The Court had previously noted the separation of a filing deadline from a jurisdictional grant as evidence that Congress did not consider a filing deadline jurisdictional; *Zipes v. TWA*, 455 U.S. 385, 393-394 (1982); but the Court has also said that "[m]ere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012).

The 90-day period in § 6213(a) is most certainly not a jurisdictional requirement of a deficiency suit under the clear statement exception.

First, the jurisdictional grant for deficiency suits is in § 6214(a), which provides, in part, that "the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency". *See Dees v. Commissioner*, 148 T.C. 1, 13 (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).").

Section 6213(a)'s first sentence does not even contain the word "jurisdiction". That sentence speaks to taxpayers, not the Tax Court. "What matters . . . is that [28 U.S.C.] § 2401(b) does not speak in jurisdictional terms or

refer in any way to the jurisdiction of the district courts." *United States v. Kwai Fun Wong*, 575 U.S. 402, (2015) (citation omitted; cleaned up).

Even if § 6213(a), not § 6214(a), contains the jurisdictional grant to redetermine deficiencies, § 6213(a) provides only an implicit grant of jurisdiction, and implicit grant words are not enough to provide a clear statement that a filing deadline in such a sentence is jurisdictional. In *Sebelius v. Auburn Regional Med. Cntr*., 568 U.S. 145 (2013), a single sentence that did not use the word "jurisdiction" and contained a filing deadline was held not to create a jurisdictional filing deadline, even though a Court-appointed amicus argued that parts of the sentence other than the filing deadline were jurisdictional. The Court did not disagree with the argument that some parts of the sentence created jurisdictional conditions.

In *Boechler*, when the Court sought to give examples of more jurisdictional-sounding Tax Court filing deadlines, it did not mention § 6213(a), but instead cited the language in § 6404(g)(1) (for interest abatement actions) and § 6015(e)(1)(A) (for "innocent spouse" actions) – both of which have jurisdictional grants and the word "if" within the same sentence that gives the filing deadline – writing that "[t]hese provisions accentuate the lack of comparable clarity in §6330(d)(1)." *Boechler* at 532.

The remaining sentences in § 6213(a) do nothing to "connect" this 90-day filing period to the jurisdictional grant contained in § 6214(a).

The courts in *Tilden*, *Organic Cannabis*, and *Garrett* all noted the "magic word"[4] "jurisdiction" in the fourth sentence of § 6213(a) and thought this somehow indicated that the filing deadline for the main action (not just the injunctive action) is jurisdictional. Further, the *Organic Cannabis* court thought it was unlikely that, in a situation where a taxpayer filed a late deficiency petition, but could be granted equitable tolling, Congress meant to prevent the Tax Court from having injunctive jurisdiction to stop IRS collection because the main action did not involve a "timely petition", so a taxpayer would have to go to district court to obtain an injunction. *Id*. at 1094.

Section 6330(e)(1) contains virtually the same language limiting the Tax Court's injunctive "jurisdiction" to the case of a "timely appeal" to the Tax Court under § 6330(d)(1). The Court in *Boechler* thought that the word "jurisdiction" in § 6330(e)(1) could not create a clear statement that the § 6330(d)(1) filing deadline is jurisdictional and saw no incongruity in making the taxpayer who filed a late petition (but one made timely through equitable tolling) go to a district court for an injunction to prohibit further collection of the taxes during the course of the Tax

[4] *Auburn*, 568 U.S. at 153 ("This is not to say that Congress must incant magic words in order to speak clearly.").

Court case. "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 533. This same reasoning applies to the § 6213(a) injunctive provisions. They do not create a clear statement in the first sentence of § 6213(a) that its filing deadline is jurisdictional.

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

There is one reason cited in *Organic Cannabis* in support of the holding that § 6213(a)'s filing deadline is jurisdictional that is not discussed in *Boechler*. The reason has to do with § 7459(d), which only applies to deficiency cases. As the Ninth Circuit wrote:

> [I]f the taxpayer does file a deficiency 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).[5] 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—

[5] *Malat* was not a deficiency case dismissed for lack of jurisdiction for late filing.

> 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."

Organic Cannabis at 1095 (emphasis in original).

It is possible that, as the Ninth Circuit predicts, if this Court holds the § 6213(a) filing deadline not jurisdictional, taxpayers in this Circuit, 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. However, if this unfortunate res judicata result were to happen, it would be a matter for Congress to consider altering by legislation, not the IRS or the courts.

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 in full and sue for a refund.

The DOJ, in its supplemental brief filed after oral argument in *Tilden* at pp. 10-11 and in its brief for appellee in *Organic Cannabis* at p. 34, argued that, if § 6213(a)'s filing deadline is not jurisdictional, then the language at the end of § 7459(d) referring to dismissals for lack of jurisdiction would be rendered

essentially superfluous, since, absent untimely filing, the only other way a dismissal can be for lack of jurisdiction is when no deficiency notice was issued. The DOJ was wrong.

The Tax Court may dismiss a case for lack of jurisdiction not merely for late filing or for the lack of a notice of deficiency. For 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., Condo v. Commissioner*, 69 T.C. 149 (1977); where the filing fee has not been paid or a fee waiver obtained; 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 § 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 § 7459(d) is found in the Revenue Act of 1926. Revenue Act of 1926, § 1000 (at 44 Stat. 107), amended Revenue Act of 1924, § 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, § 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 § 6213(a)'s filing deadline to be interpreted as jurisdictional when, in 1928, it added the exception for jurisdictional dismissals to the predecessor of § 7459(d).

The Ninth Circuit just assumed that taxpayers would benefit more by its interpreting the filing deadline as jurisdictional. But, the interpretation of § 6213(a)'s filing deadline as not jurisdictional simply would return late-petitioning 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 § 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 significance to taxpayers.

To get a sense of the magnitude of the practical potential of the § 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. To review all such dismissals over an entire year is a substantial undertaking; thus, the undersigned reviewed such dismissals only 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 the Tax Court website's DAWSON function and searching orders for "lack of jurisdiction and timely" uncovered 103 dismissal orders. 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 § 7459(d)'s exception for

jurisdictional dismissal could not apply, so that res judicata would prohibit their filing later refund suits.

But, 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? 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). Obviously, not all those suits were brought by taxpayers who had 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, the undersigned did 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. 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*.

The primary reason why no subsequent refund suits are brought, no doubt, is that so many Tax Court petitions are filed by pro se taxpayers who do not know their other tax procedure options. Secondly, very few taxpayers can afford or are willing to pay the full tax and sue for a refund.

Against this absence of any taxpayers who would actually be harmed by treating the § 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 § 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 IRS did not notice or care that the deficiency petitions were filed late, but where the Tax Court noticed and cared and issued orders to show cause why the cases 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.

The number of potential equitable tolling 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 mentioned above 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. Then, there are a significant number of taxpayers who do respond, but simply argue the merits of the case, giving no late filing excuse. Probably none of these taxpayers would raise equitable tolling. It is the undersigned's sense that perhaps only 5% of the 103 dismissal orders in the months of February and March 2022 might plausibly present facts that could give rise to equitable tolling. So, say, about 30 cases a year will plausibly raise equitable tolling. Then, not in every case where equitable tolling is argued for will the Tax Court agree that the facts are good enough to qualify for equitable tolling. By construing the § 6213(a) deadline as jurisdictional, the Tax Court regularly denies those taxpayers who would otherwise get equitable tolling prepayment deficiency review.

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? The same DAWSON search of the same orders covering the months of

February and March 2022 revealed 34 orders to show cause in possible late-filed deficiency cases.

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. It is too soon to know what will happen in the cases of these recent orders to show cause, but a similar review of cases in which there were such orders to show cause issued in April and May 2021, shows that 73% of the orders that have been ruled on were later made absolute.

Applying this 73% rate of dismissals to the estimated 204 annual orders to show cause in deficiency case indicates that taxpayers would suffer dismissal in 148 cases each year where the IRS would not otherwise bring late filing to the attention of the Tax Court. These are 148 taxpayers each year who will be hurt in that they will be deprived of their prepayment forum only because the Tax Court treats the filing deadline as jurisdictional and so issues orders to show cause.

So, to summarize, citing a theoretical § 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), the Ninth Circuit in *Organic Cannabis*, by interpreting the § 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 has the taxpayer-favorableness quality of its jurisdictional holding completely backwards. It is the Ninth Circuit's jurisdictional ruling that imposes the harsher consequences that the court deplores.

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

Boechler and *Myers v. Commissioner*, 928 F.3d 1025, 1033-1037 (D.C. Cir. 2019), provide analogous guidance as to whether the deficiency petition filing deadline is subject to equitable tolling. In both cases, the courts first found a Tax Court filing deadline not jurisdictional and then found it subject to equitable tolling.

The reasoning behind *Boechler*'s conclusion that § 6330(d)(1)'s deadline is subject to equitable tolling applies with equal force to § 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 534.

Applying the *Irwin* presumption to § 6330(d)(1), the *Boechler* Court finds "nothing to rebut the presumption." *Boechler* at 534. The Court notes that § 6330(d)(1) time limit is "directed at the taxpayer, not the court"; *id.*; then observes:

> 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.'" *Auburn*, 568 U.S., at 160 [(2013)]. This context does nothing to rebut the presumption that nonjurisdictional deadlines can be equitable tolled.

Id.

In *Boechler*, the government's main objection to equitable tolling for § 6330(d)(1) was rooted in *United States v. Brockamp,* 519 U.S. 347 (1997), where the Supreme Court held that equitable tolling did not apply to § 6511's deadline to file refund claims. However, in *Boechler*, the Court found that § 6330(d)(1)'s filing deadline was more like the filing deadline held eligible for to equitable tolling in *Holland v. Florida*, 560 U.S. 631 (2010), than in *Brockamp*. *Boechler* at 534. Section 6213(a) is similar to § 6330(d)(1) in each of the attributes that the Supreme Court found in *Boechler* to allow equitable tolling.

As to whether the deficiency procedures are "unusually protective" of taxpayers, first, the Supreme Court never held that it is a but for requirement of equitable tolling that the procedures involved must be unusually protective of taxpayers. In *Holland*, the Court only stated that the strength of the *Irwin* presumption "is reinforced by the fact that equitable principles

have traditionally governed the substantive law of habeas corpus". 560 U.S. at 646 (cleaned up; citations omitted).

Second, in *Myers*, where the D.C. Circuit held that the Tax Court § 7623(b)(4) whistleblower award filing deadline is not jurisdictional and is subject to equitable tolling, the court wrote: "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." *Myers* at 1036-1037 (citation omitted).

However, in contrast to the whistleblower provisions, the deficiency procedures are, like the CDP procedures, unusually protective of taxpayers. The Supreme Court has held that constitutional procedural due process does not require that taxpayers have prepayment judicial review rights. *Phillips v. Commissioner*, 283 U.S. 589, 594-601 (1931). 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 constitutional procedural 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 constitutional procedural due

process. The Board of Tax Appeals procedure was especially protective of largely-unrepresented middle- and low-income taxpayers who lacked the funds to pay the proposed deficiency in full and sue for a refund or to hire attorneys. CDP is a 1998 extension of the deficiency procedures to the collection area, 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 receive the notice of deficiency or otherwise have a right to previously contest the liability. Congress enacted the deficiency and CDP provisions knowing that both were not required by constitutional procedural due process, but the provisions were required to ensure that taxpayers viewed the tax system as fair and so be willing to comply with the law. The opportunity to make one's case for equitable tolling furthers these especially-protective provisions, especially for the 81% of Tax Court petitioners who are pro se.[6] United States Tax Court, Congressional Budget Justification Fiscal Year 2023 at 22.

Next, amicus expects the government to argue 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.

[6] Congress also enacted the "Taxpayer Bill of Rights" at § 7803(a)(3), which, among other things, at subparagraph (E), accords taxpayers "the right to appeal a decision of the Internal Revenue Service in an independent forum".

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. The *Boechler* opinion rejected those arguments:

> 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.

Boechler at 535 (emphasis added).

In *Boechler*, the Supreme Court gave no definition of which provisions of tax law are "central" or "ancillary". However, 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 § 6511 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 534.

Brockamp was decided 25 years ago. For the fiscal year ended September 30, 2020, taxpayers filed 240 million returns, and the IRS issued

303 million refunds. IRS Data Book 2020, at 4 (Table 2) and 16 (Table 7). 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, at 21. Thus, there were 21 deficiency petitions for every CDP petition – i.e., 16,119/770. While the number of deficiency petitions is certainly at least one order of magnitude larger than the number of CDP petitions, tax return filings and refunds issued are four orders of magnitude larger than the number of deficiency petitions – i.e., there were 12,656 tax returns filed for every deficiency petition (240,000,000/16,119). In quantitative terms, the Tax Court's deficiency deadline is not "central" to tax law.

Moreover, in *Boechler*, the arguing attorney for the Solicitor General informed the Court that there might be 300 cases that would be affected by a ruling that the CDP filing deadline is not jurisdictional and is subject to equitable tolling. *Boechler*, Transcript of S. Ct. Oral Argument at 72. This was no doubt a great overstatement, since he included in the 300 all CDP cases dismissed for lack of jurisdiction on any grounds, whereas about 2/3 of all dismissals for lack of jurisdiction are for failure to pay the filing fee or obtain a fee waiver.

Deficiency case dismissals for late filing in February and March 2022 (discussed above) suggests that, annually, there will be only 600 such cases dismissed 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 § 6213(a) filing deadline is subject to equitable tolling.

CONCLUSION

The Tax Court wrongly dismissed this case for lack of jurisdiction for late filing. The filing deadline at § 6213(a) is not jurisdictional and is subject to equitable tolling.

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Dated: June 13, 2022

CERTIFICATE OF SERVICE

This is to certify that two copies of the brief for amicus were served on appellants on June 13, 2022, by mailing the same in a postage-paid wrapper addressed to them at Berry & Culp, 7000 Crittenden Street, Philadelphia, PA 19119.

This is to certify that a copy of the brief for amicus was served on counsel for the appellee, Joan I. Oppenheimer and Isaac B. Rosenberg, Esqs., by filing it with the CM/ECF system on June 13, 2022, of which they are both members.

Dated: June 13, 2022

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that all counsel for Amicus are members of the bar of the United States Court of Appeals for the Third Circuit.

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Dated: June 13, 2022

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Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies.

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