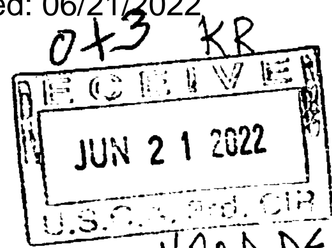


Docket No. 22-1789

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ISOBEL BERRY CULP & DAVID CULP,

Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS DAVID CULP AND ISOBEL BERRY CULP'S RESPONSE TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

IRS's Motion for Summary Affirmance is a not-very-subtle attempt to subvert and minimize the process in the Third Circuit in order to strangle the ability of the Culps and the Harvard Center for Taxpayer Rights as Amicus Curiae to present this case in full to the Third Circuit.

The Motion for Summary Affirmance presents several factual

misstatements and without an analysis of the law and cases that support the Culps' case, totally ignoring the recent Supreme Court *Boechler* decision, which is one of the guideposts for this case. In many instances, the Motion misconstrues the facts set forth in the Culps' Petition/Complaint to the Tax Court and supportive Exhibits. (*See* Appendix, at P1-P24 (Petition) and P25-117 (Exhibits to the Petition/Complaint).

For instance, IRS's Motion sets forth that the Culps "sued to recover income taxes they had allegedly already paid" to the IRS for 2015. "The couple disputes the IRS's underlying determination that they failed to report certain taxable income for 2015 and underpaid their taxes that year." (Appellee's Motion, at p. 1, 2) "Over several years the Culps allegedly paid all the additional income taxes and penalties that they owed for 2015." (*Id.* at p. 3) "TAS allegedly stopped communicating with the Culps in late 2019 without having resolved their disputes with the IRS." (*Id.* at p.4) The words "allegedly" are misplaced, as the facts are clear, as set out in the Culps' Petition, see Appendix, at P7-P24.) The facts are clear that TAS and the Culps reached agreement, as set forth clearly in the Petition, and that TAS, in bad faith, simply refused to honor its agreement. These facts and evidence of TAS's malfeasance and negligence lend weight to the equitable tolling of the statutes, as set forth in the *Boechler* decision.

The statements above mask and distort the facts presented by the Culps in

their Petition filed with the Tax Court. (*See* Appendix, at P7-24, which discusses the bad faith and malfeasance of TAS and their agreement that the levy on the Culps Social Security payments would be reversed and the money returned to them if the Culps would obtain a letter from Sean Corgan, counsel for LaSalle University, explaining that the payments to the Culps in 2015 was not for "self-employment" income but was compensation for "emotional distress, pain, and suffering," pertaining to an employment-related law suit. (*See* Appendix, pages P-13-P15, para's 19-24, and P-106-P107.) Emotional distress damages are not taxable as self-employment income. In addition, the Culps had already paid income taxes on the emotional distress compensation. They owed no taxes. No one disputes that. On September 3, 2019, Corgan delivered the letter to TAS. (Appendix, P102). Nevertheless, despite reaching an agreement, TAS in bad faith went silent, and in late 2019, the levies on the Culps began again, again without the proper notice, as required by statute. The Culps did exactly as instructed within the IRS system, and TAS assured the Culps that it may take two months for the matter to be rectified, and to be patient, and to look in their bank statements for the refund to be deposited. Despite doing exactly what had been asked of them, the levies on the Culps resumed, without forewarning, in violation of statutory mandates covering the IRS process. (*See* Appendix, Petition, P1-24.)

These facts go to the issue of equitable tolling, as set forth in the *Boechler* case and discussed in the Amicus Brief filed by the Harvard Center for Taxpayer Rights and as ignored by the IRS defense team.

The Motion for Summary Affirmance totally ignores the issue of equitable tolling, as discussed and set forth in the Supreme Court opinion in *Boechler, P.C. v. Commissioner*, 221 L. Ed. 524 (April 21, 2022), decided by a unanimous Supreme Court. Appellee IRS ignores this momentous case and the effect it has on the Culps' case before the Third Circuit. There is not one sentence mentioning this ground-breaking case on equitable tolling, even though the facts in the Culps' case, as discussed *supra*, fit within the four corners of "equitable tolling."

The IRS totally ignores the *Boechler* case. That alone is sufficient reason to deny the IRS defense team's Motion for Summary Affirmance, which would then allow the Culps and the Amicus, the Harvard Center for Taxpayer Rights, to fully discuss the issues in this case, as the page limitation of 20 pages would shift to 30 pages, and this would allow the Culps and the Center for Taxpayer Rights to more fully and adequately brief this case. And the Culps and the Center would also have a right to file a Reply Brief. What the IRS has done is to attempt to thwart the normal process for an appeal. This case is not a frivolous case, and the Motion to deny full briefing is simply an effort to keep the Culps and the Harvard Center for Taxpayer Rights from fully presenting their case to the Third Circuit. It is an

attempt to derail the presentation of this case and to derail this Honorable Court.

On or about June 13, 2022, T. Keith Fogg, Esq. and Audrey Patten, Esq. for the Center for Taxpayer Rights, Tax Clinic at the Legal Services Center of Harvard Law School, filed an Amicus Brief on behalf of the Culps in the Third Circuit. In a flagrant attempt to block full discourse on the legal and factual issues in the Culps' case, the IRS has moved to strike the Brief, attempting to deny the Third Circuit and the Culps the benefit of the Harvard Tax Clinic's expertise and insight. It is an attempt to block discourse on the issues in the Culps' case before this Honorable Court.

IRS's Motion for Summary Affirmance is a fear of the truth--that the IRS stole money from the Culps without, as discussed *infra*, providing the required statutory Notice of a Deficiency, Notice of a Determination, and Notice of the Intent to Levy, all notices required by statute. A fear that failure to provide these statutory notices gives the U.S. Tax Court jurisdiction over these cases, based on the doctrine of equitable tolling, since otherwise IRS's negligence and failures would deny the taxpayer the right to file in the U.S. Tax Court for redress, as provided by statute.

This case is simply too complex factually and legally for abbreviated briefing, as called for in a Motion for Summary Affirmance (20 pages). Instead of a full brief, the IRS wants a mini-brief, in the hope perhaps that the Court will

never get to the facts, which are egregious and are laid out in depth in the 45 paragraph Petition, which the IRS referenced but did not attach to their Motion for Summary Affirmance. (*See* Appendix, P1-P24, the Petition, and P25-117, supporting documents.)

A full reading of those documents and the full brief in opposition to the Motion for Summary Judgment, and any Reply Brief filed by the Culps, the Culps believe will support their case and call for a refund of the money inappropriately taken from the Culps by the actions of the IRS, TAS, and the United States Tax Court. The facts, as discussed supra, and as set forth in detail in the Culp Complaint filed in the U.S. Tax Court, are egregious and disturbing. It shows a failure of the IRS system to be just or ethical and the failure of the IRS system to right the wrongs they perpetrate on taxpayers, in this case, the Culps.

In this case, the IRS failed to follow its statutory mandates of sending the taxpayer a Notice of a Deficiency, a Notice of Determination, and a Notice of the Intent to Levy, all of which give the U.S. Tax Court jurisdiction to resolve these matters and disputes. Without notice, the IRS just levied.

The IRS levied on the Culps' Social Security payments in April and May 2019 to pay taxes allegedly and falsely owed on their 2015 1040 taxes. (*See* Complaint, Appendix, P-10-P12, at para's 7-14.) David Culp is 79 and his wife, Isobel, is 76. They have worked most of their lives and they have always counted

on their Social Security being there for their retirement. (Appendix, P12 para. 14.) On June 4, 2019, David Culp went to the Taxpayer's Advocate Service (hereinafter, TAS) Office in Philadelphia to seek representation on two cases wherein the Culps believed that the IRS had improperly taxed Petitioners David and Isobel Culp, on their 2015 1040 tax return and Berry and Culp, P.C.'s 2016 1120S return. The 2015 1040 tax case is the present case on appeal to the Third Circuit. The Berry and Culp, P.C. 2016 1120S return is still pending in the U.S. Tax Court and is not the subject of this appeal.

The taxpayer, by federal statute, has a right to bring these matters to the U.S. Tax Court. By failing to comply with its statutory obligations to give proper notices, the IRS has sought to deny the Culps the right to bring their case in the U.S. Tax Court, which has jurisdiction over such matters. This is a Catch-22 for the taxpayer, and it subverts the U.S. Tax Court's legislative mandates, and it is a case ripe for equitable tolling as set forth in the *Boechler* case.

This case is a poster child for equitable tolling and should not be dismissed in a Motion for Summary Judgment, as its issues transcend to Congressional mandates and taxpayers' rights to a fair and just tax system.

In its Motion for Summary Affirmance, the IRS alleges that the Culps received a "Notice of Deficiency" letter in February 2018, giving the Culps 90 days to file with the U.S. Tax Court. And that the Culps ignored the letter and did not

file suit in the U.S. Tax Court until 2021. And, therefore, the U.S. Tax Court did not have jurisdiction because the Culps did not file a claim with the U.S. Tax Court within 90 days of receiving the Notice of Deficiency in February 2018. This is the center point of IRS's case: It was the basis for the IRS counsel to file a Motion to Dismiss this case before the U.S. Tax Court. And it was the basis for the U.S. Tax Court Judge Choi dismissing the case in the U.S. Tax Court. And it is the basis, the centerpiece, of IRS counsel's filing this Motion for Summary Affirmance in the Third Circuit. The only problem with this argument is that the facts are clearly wrong.

The evidence clearly shows one of two things: That the February 5, 2018 Notice of Deficiency letter was never sent, or if it was sent, it was later retracted by the IRS when the IRS sent a new "Proposal" of taxes owed, reducing the amount of taxes owed for the taxable year from $4,684 to $2,087. The facts are set out below.

On November 13, 2017 the Ogden, Utah IRS office sent the Culps a CP2000 Notice setting forth that the "Proposed Amount Due" and owing on the Culps' 2015 1040 taxes was $4,981, including a "self-employment tax" assessed against the Culps in the amount of $1,247, even though the Culps were not and have never been self-employed. (*See* Appendix, Complaint, P10, at para. 9, and P32.)

On January 5, 2018, the Culps wrote a letter to the Ogden IRS office,

addressing the erroneous proposed changes set forth in the IRS November 13, 2017 letter to the Culps. This letter explains that the Culps did not receive any self-employment income, as the Culps both work for a corporation, Berry and Culp, P.C., and both teach at the university level, for which they are paid by the university as employees. In fact, the Culps owed no further taxes on their 1040 2015 IRS return. (*See* the Complaint filed in the U.S. Tax Court, Appendix, at P11-12, para. 10.)

In the IRS Motion to Dismiss the Culps' Tax Court case, IRS counsel argued that on February 5, 2018, the Ogden IRS sent the Culps a "Notice of Deficiency" letter setting forth that the Culps owed the IRS a $4,684 tax deficiency and failure to pay penalty, as set forth in the IRS November 13, 2017 "proposal" to the Culps. And that the Culps failed to file a claim in the U.S. Tax Court within 90 days as required by law, and the Culps' case therefore should be dismissed. This letter was not received by the Culps and was almost assuredly never sent, or if it was sent, it was withdrawn, as set forth below.

On May 7, 2018, the Ogden IRS office sent its second CP2000 notice to the Culps, revising the first estimate and setting forth a new "proposal," stating that the "Proposed amount due" was "$2,087," not the $4,981 the Ogden office had proposed in its CP2000 notice sent to the Culps in November 2017. In addition, the IRS wrote: "Thank you for your response to our previous notice. Based on

your response, we've determined you owe $2087 (including interest) . . . ." (*See* Appendix, P55-57.) The Culps' "previous response" was their January 5, 2018 letter. Thus, the May 7, 2018 "Proposal" overrides the purported February "Notice of Deficiency."

The May 7, 2018 "Proposed Amount Due" letter was the last letter the Culps received from the IRS before the IRS levied on the Culps' Social Security income in April and May 2019. (Appendix, at P10-P12, para. 7-14)

That the Culps never received the IRS February 5, 2018 Notice of Deficiency letter is clear. The letter was sent, the IRS argues, by certified mail on February 5, 2018 to the Culps at their Montrose, Pa. address. (*See* Appendix, P141.) Although the IRS argues that this Notice of Deficiency letter was sent by certified mail, the IRS has not produced a signed certification nor have they argued that they believe the Culps received this letter. (Appendix, P124-125.) In addition, the February 5, 2018 letter, if it was sent, was sent by the Ogden, Utah IRS office, an office the Culps had dealt with, writing them, for example on January 5, 2018, from the Culp's Philadelphia address. And the Culps certify to this Honorable Court that they never received the alleged February 5, 2018 letter. The Notice of Deficiency letter was likely never sent to the Culps, or even if it was sent, the Notice of Deficiency was retracted by the IRS and replaced with a "Proposal." A "proposal" is not subject to Tax Court jurisdiction.

If the Culps are denied "equitable tolling," what this potentially does is to block the U.S. Tax Court from exercising jurisdiction over cases that are within its jurisdiction, such as Notice of Deficiency cases, or Determination cases, or Notice of Intent to Levy cases. If the IRS fails to carry out its statutory duties, and fails, for example, as in the present case before the Third Circuit, to send a Notice of Deficiency to a taxpayer, or a Notice of Determination, or a Notice of Intent to Levy, the taxpayer could lose, without equitable tolling, his/her statutory right to file a suit in the U.S. Tax Court. It would deny the Tax Court its jurisdictional base. It would subvert , as in the present case, congressional mandates.

In spite of the actual facts, IRS's argument is that the Culps received the February 5, 2018 IRS Notice of Deficiency giving them 90 days to file a suit in the U.S. Tax Court, and that the Culps, both of whom are attorneys, ignored the warning and sat on their rights even though they were being assessed taxes they knew they did not owe. But yet the same couple who sat on their rights nevertheless fought this erroneous IRS assessment after levy through the Philadelphia Taxpayer Advocate Service, and later filed suit in the U.S. Tax Court and later filed an appeal to the Third Circuit Court of Appeals. These are the same people who the IRS argues sat on their rights after they received a Notice of Deficiency, giving them 90 days to file suit in the U.S. Tax Court. Really?

The actions of the Culps in this case show that if they had received a Notice

of Deficiency they would have brought a suit in the U.S. Tax Court. Their actions show that they have doggedly fought to right the wrong inflicted on them, as they have been relentless in pursuing their rights on this case. The steal by the IRS, and IRS's failure to right this wrong (including fighting this case in the Third Circuit instead of returning the money unlawfully and knowingly taken—stolen—from the Culps), and the malfeasance and negligence of TAS and the failure of the Tax Court to address these issues, and the continued failure of the IRS to right the wrong they inflicted on the Culps, is mind-boggling. Everyone understands what the IRS did. It is chronicled in great depth in the Culps' Petition and documents in support of the petition. (Appendix, P1-24, P25-165)

In addition to jurisdiction in the Tax Court based on equitable tolling, the U.S. Tax Court also has jurisdiction over the Culps' 2015 1040 tax case based on the court's jurisdiction over refund litigation, as set forth and discussed in the Petition (Appendix, P20-P23). In this regard, see para. 4 of the Petition re. 26 IRC 7442, and para. 43 of the Petition re. IRC section 6512(b), and paragraph 44 of the Petition re. IRC Sections 6532, 6512(b)(3) and 6511(b)(2)(B). Although the U.S. Tax Court's jurisdiction often centers around appeals from IRS determinations or IRS notice of deficiencies, and does not require the taxpayer to pay the tax assessment prior to filing suit, the U.S. Tax court also adjudicates 200 to 300 cases a year based on refund litigation. (Petition, P149-P150) In addition, IRC Sections

6532, 6512(b)(3), and 6511(b)(2)(B) set forth that there is a two-year Lookback Rule for refund litigation filed in the U.S. Tax Court. (*See* Appendix, Petition, para. 44) In addition, the bad faith actions of TAS in secreting information from the Culps and undermining their claims against the IRS, as discussed in depth in the Petition to the Tax Court, expand the time frames for filing an action and affect equitable tolling. *See* discussion of the Taxpayer Advocates Office and their malfeasance. (Appendix, at para's 19-36 of the Petition, Appendix, P13-P19) For months, TAS misled the Culps, who believed that TAS was working on their tax issues to reverse the IRS determinations on the 2015 1040 return. (P-!50) "TAS's purported representation of the Culps" "was in bad faith, fraudulent, and a sham." (Appendix, P-150, and Petition, P-18, para. 33)

The Taxpayers' Bill of Rights sets out 10 fundamental rights that taxpayers have and that cannot be violated by the IRS or the IRS Taxpayer Advocate Service, Among those rights are The Right to be Informed, the Right to Quality Service, The Right to Pay No More than the Correct Amount of Tax, The Right to challenge the IRS's Position and Be Heard, The Right to Retain Representation, the Right to a Fair and Just Tax System. (IRC Section 13.1.16.4.6) (Petition, at para's 40, 41, 41a, 41b, 41c, 41d, and 42, P-21-P22, sets forth these statutory standards TAS is required to live by. In addition, IRC Section 13.1.16.12 provides statutory authority for TAS to reopen closed cases, thus supporting

equitable tolling of tax statutes in the interests of justice, such as here, in the Culps' 2015 1040 case, wherein the Culps did everything they were asked to do by the IRS, and wherein there is no dispute, not an iota, as to whether they were inappropriately taxed and paid money they did not owe, and have spent hundreds of dollars to try to get someone to listen and correct the record. On that basis, Isobel Berry Culp and David R. Culp respectfully requests that IRS's Motion for Summary Affirmance be denied, and that judgment be entered for Isobel Berry Culp and David Culp.

CONCLUSION

The Motion for Summary Affirmance should be denied.

Respectfully submitted,

Isobel Berry Culp

Isobel Berry Culp
Appellant
Pro Se

David R. Culp

David R. Culp
Appellant
Pro Se

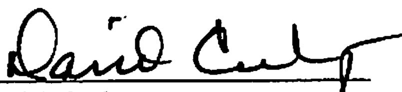
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This response complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because this response contains 5,086 words.

2. This response complies with Federal Rule of Appellate Procedure 27(d)(1)(E), the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: June 21, 2022

Respectfully submitted,



David Culp
Appellant

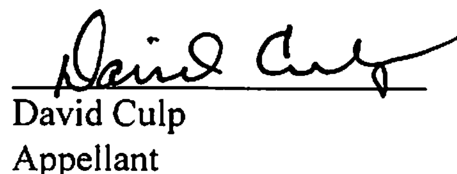
CERTIFICATE OF SERVICE

This is to certify that a copy of this response was served on counsel for the appellee, Joan I. Oppenheimer and Isaac B. Rosenberg, Esqs., by mailing the same on June 21, 2022 in a postage-paid wrapper addressed to them at United States Department of Justice, Tax Division, 950 Pennsylvania Avenue, N.W., P.O. Box 502, Washington, D.C. 20044.

This is also to certify that two copies of this response were served on counsel for the amicus Center for Taxpayer Rights, Keith Fogg, Audrey Patten, and Carlton M. Smith, Esqs. On June 21, 2022, one copy was mailed in a postage-paid wrapper addressed to Mr. Fogg and Ms. Patten at Tax Clinic of the Legal Services Center of Harvard Law School, 122 Boylston Street, Jamaica Plain, MA 02130. On June 21, 2022, one copy was mailed in a postage-paid wrapper addressed to Mr. Smith at 255 W. 23rd Street #4AW, New York, NY 10011.

Dated: June 21, 2022

Respectfully submitted,



David Culp
Appellant