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.

On Appeal from the United States Tax Court (No. 14054-21),

Honorable Eunkyong Choi, Special Trial Judge

# BRIEF FOR APPELLANTS DAVID CULP AND ISOBEL BERRY CULP

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## JURISDICTIONAL STATEMENT

On April 22, 2021, Isobel Berry Culp and David Culp (the Culps) filed a petition in the U.S. Tax Court seeking a refund of 2015 income taxes taken by levy, without forewarning or notice of IRS's "intent to levy on property" of the Culps, in violation of Congressional mandates. (*See* the Petition, APPENDIX-P7-P24)

On February 15, 2022, Special Trial Judge Eunkyong Choi entered an order dismissing the case for lack of jurisdiction on the ground that, for taxable year 2015, (1) the IRS had issued no notice of determination after a "Collective Due Process" hearing under Sec. 6330(d)(1) and (2) the IRS had mailed to the Culps on February 5, 2018 a notice of deficiency, but the Culps had filed a late Tax Court petition under Sec. 6213(a) (APPENDIX, hereinafter "A," at P155-P159)

On April 25, 2022, the Culps filed a timely Notice of Appeal to the Third Circuit Court of Appeals from the 2/15/22 order of dismissal. (A-P155-P159 and A-P161-P162)

This Court has jurisdiction under Sec. 7482(a)(1). Venue is proper in this Court, since the Culps resided in Pennsylvania on the date that they filed their Tax Court petition. Sec. 7482(b)(1)

The petition filed with the U.S. Tax Court should be read in light of the fact that at the time the petition was filed, the Culps had not received or seen a copy of

any notice of deficiency, whether or not such a notice had been mailed to their last known address. The Petition stated, in part:

> The Tax Court has jurisdiction under IRC 6512(b) over "refunds" of taxes paid by the taxpayer. On this and other statutory bases, Petitioners request a refund of all taxes paid by Petitioners that are the subject matter of this law suit.
>
> Petitioners' claims are timely filed with the U.S. Tax Court. 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. In addition, the actions of TAS [(the IRS Taxpayer Advocate Service)] in hiding information from the Petitioners and undermining their claims against the IRS expand the time frames for filing an action.

(A-P43-P44)

The IRS filed a motion to dismiss the Tax Court petition for late filing, arguing that the IRS had mailed to the taxpayers a notice of deficiency on February 5, 2018. The IRS attached to its motion a copy of the purported notice and proof of mailing. (A-P122-P142)

In their response to the motion, the Culps argued that the IRS had never sent them the notice of deficiency, writing: "Petitioners note that this notice was never received by them nor do they believe it was ever sent in view of IRS's actions around this time period." (A-P145-P147)

Judge Choi's order dismissing the Tax Court case did not mention the Tax Court's jurisdiction concerning overpayments under § 6512(b). (A-P155-P159) That subsection provides, in relevant part:

> [I]f the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year . . . in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

Section 6512(b)(3) limits the amount of overpayment the Tax Court can determine and provides, in relevant part:

> No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—
> (A) after the mailing of the notice of deficiency, [or]
> (B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment. . . .

All of the payments that the Culps want refunded were made between April 2019 (when the Social Security levies started) and November 18, 2019 (when the IRS applied $851.57 of the Culps' 2018 overpayment to complete full payment of the assessed 2015 deficiency in the amount of $3,367). (A-P12, para. 14, and A-P18, para. 32) Thus, if the IRS did properly issue a notice of deficiency on February 5, 2018, all payments were made "after the mailing of the notice of deficiency," within the limit of § 6512(b)(3)(A).

IRC Sec. 6512(b) overpayment jurisdiction assumes a predicate timely filed deficiency suit. Although the Culps had in their petition sought an expansion of the time frame for filing the Tax Court suit – in essence, equitable tolling – Judge

Choi did not reach those issues presumably because she believed that jurisdictional time deadlines cannot be equitably tolled.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether the Culps' case against the IRS in the U.S. Tax Court is subject to the principle of "equitable tolling," as set forth and analyzed in the United States Supreme Court case, *Boechler, P.C .v. Commissioner of Internal Revenue,* handed down on April 21, 2022, by a unanimous Court, giving the U.S. Tax Court jurisdiction over the Culps' 2015 1040 tax case.

2a. Whether the IRS mailed a notice of deficiency to the Culps on February 5, 2018.

b. If the IRS did mail a notice of deficiency on February 5, 2018, whether the Tax Court has jurisdiction under 6512(b) to find that there is no deficiency, but there is an overpayment in the taxable year 2015.

c. If the IRS did mail a notice of deficiency on February 5, 2018, whether the 90-day period in Sec. 6213(a) in which to file a Tax Court deficiency petition is jurisdictional or is subject to equitable tolling.

d. If the IRS did mail a notice of deficiency on February 5, 2018, whether the facts in this case justify deeming the Culps' petition timely under equitable tolling.

3. If the IRS did not mail a notice of deficiency on February 5, 2018, or did not send a Notice of Determination, or a Notice of IRS's intention to Levy, whether those facts justify equitable tolling of the statutes setting forth the time frames for filing suit in the U.S. Tax Court, since to do otherwise would allow the IRS, through their negligence or their malfeasance, to subvert the jurisdiction of the U.S. Tax Court and the congressional mandates under which it operates.

4. Whether the Tax Court has abused its discretion by applying a double standard, applying one standard to the Culps, and overlooking IRS's untimely Motion to Dismiss this case and overlooking the failures of the IRS in failing to send the Culps proper notices of its intent, as required by statute. Whether the IRS has flagrantly violated its own requirements by law as to notice to the taxpayer and whether this justifies equitable tolling, as set forth in the recent Supreme Court decision in *Boechler, P.C .v. Commissioner of Internal Revenue*.

5. Whether TAS violated in this case its own statutory mandated Congressional standards, as set forth in "The Taxpayer Bill of Rights" in IRC Section 7803(a)(3), and as set forth in Internal Revenue Manual Section 13.1.16.12, which provides authority for TAS to reopen closed cases—thus embracing the concept of equitable tolling. (*See* Petition, A-P21-P23, at para's 41-44.)

6. Whether the Tax Court also has jurisdiction over this case based on the

Tax Court's jurisdiction over "refund litigation," as set forth and discussed in the Culps' 45-paragraph Petition to the Tax Court and in their Response to IRS's Motion to Dismiss the case, an issue ignored by the Tax Court.

7. Whether the Tax Court abused its discretion by failing to address any of the arguments made by the Culps in their 45-paragraph Petition and in their ' response to IRS's Motion to Dismiss the case filed with the Tax Court.

8. Whether the Tax Court abused its discretion in ignoring IRS's untimely Motion to Dismiss but then dismissed the Culps' petition on the basis it was untimely filed, when the facts are strikingly clear that IRS's tax assessment on the Culps' 1040 2015 return was wrong and proven to be wrong, as set forth in the 9/3/19 letter from LaSalle University counsel requested by the Taxpayer's Advocate Service (hereinafter, TAS).

## STATEMENT OF RELATED CASES

On April 28, 2021, David Culp and Isobel Berry Culp, husband and wife, filed with the U.S. Tax Court two cases against the IRS. The first was a law suit regarding their 2015 1040 and IRS's failure and the Taxpayer Advocate's Office failure and malfeasance to remedy the obvious errors in the IRS tax assessment. This case, U.S. Tax Court case #14054-21 is the subject of this appeal to the Third Circuit Court of Appeals, Third Circuit Case #22-1789.

The second case filed April 28, 2021, with the U.S. Tax Court, U.S. Tax Court

case, No. 14058-21 (2016 1120S), against the IRS was in regard to the 2016 1120S return for Berry and Culp, P.C., of which Isobel is the President and sole shareholder, and her request to the IRS for an abatement of interest and penalties for late filing for the year 2016 based on serious continuing health issues suffered by Isobel during this time period and supported by her treating physician. The common denominator in these two cases is the malfeasance and failure of TAS to carry out its duties as set forth by IRS legislation or to carry out its duties in good faith. This case, No. 14058-21, has not been decided by the U.S. Tax Court, and this case is not on appeal to the Third Circuit. The case is related to the first case by TAS's malfeasance and dereliction of its statutory duties in both cases.

In *Boechler, P.C. v. Commissioner,*221 L. Ed.524 (April 21, 2022) a unanimous Supreme Court overruled the Eighth Circuit (and effectively the Tax Court and several other circuits) and held that the deadline in Sec. 6330(d)(1) to file a Tax Court "Collection Due Process" petition is not jurisdictional and is subject to equitable tolling. This case and the doctrine of equitable tolling is applicable to the Culps' present case in the Third Circuit, Case #22-1789.

**STATEMENT OF THE CASE**

Appellants Isobel Berry Culp and David Culp, both retired attorneys, brought an action against the IRS in U.S. Tax Court for the IRS's failing to correct an error

the IRS made as to the Culps' 2015 1040 tax return wherein the IRS, without any legal basis, informed the Culps by Notice dated November 3, 2017, that the "proposed amount" of additional taxes owed for 2015 was in the amount of $4,981, including a $1,247 "self-employment tax" the IRS assessed, even though the Culps did not, and do not, receive any self-employment income, as both of them worked for a corporation, Berry and Culp, P.C., and both taught at the university level, for which they were paid by the university as employees. On January 5, 2018, they wrote the IRS Ogden office explaining this and waited for IRS's response to their letter. On May 7, 2018 the Ogden IRS office sent a CP2000 notice to the Culps, revising the first estimate and informing the Culps/proposing to them that they owed $2,087 in taxes on the 2015 1040 return and not $4,981 as previously calculated, but still including, without basis, a $1,247 "self-employment tax" as an assessment against the Culps. The Culps waited for the IRS to respond to the facts set out in their letter of January 5, wherein they explain clearly that they did not receive any self-employment income in 2015 (Petition, A-P10-P12, at para. 7-14) When they did not hear further from the Ogden IRS office, the Culps thought this matter had been resolved.

Instead, without the IRS providing notice of the intent to levy on the Culps' property, as required by federal statutes governing the IRS, the IRS nevertheless began a levy on David Culp's and Isobel Culp's Social Security

income in April and May 2019 for taxes allegedly owed on their 2015 1040 tax return. (A-P10-P20, Tax Court Complaint, para's 7-14, 19-37.)

The IRS, without forewarning, simply levied on the Social Security payments to David Culp and Isobel Berry Culp for the months of April and May 2019. On June 4, 2019, the Culps sought the services of the Taxpayer Advocates Service (TAS) in Philadelphia to represent the Culps on this case (re. the 2015 1040 tax return) and on a second case, Berry and Culp's 1120S return for 2016. The 2016 1120S case is still pending in the U.S. Tax Court. TAS said they had stopped further IRS levies on the 2015 tax matter while this matter was being processed. The Culps provided TAS with the documentation they requested to resolve the 2015 1040 tax matter in favor of the Culps, including a letter that TAS requested from the LaSalle University counsel, Sean Corgan, to show that the payments made to the Culps were not for "self-employment" income, but were "compensation for 'emotional distress, pain and suffering, and related damages' pertaining to an employment-related law suit." (A-P106-P107, letter from Associate General Counsel Sean Corgan sent to the Taxpayer Advocate Service in Philadelphia at TAS's request on September 3, 2019 by certified mail.)

This resolved the tax issue, and TAS informed the Culps that it may take a couple of months for this to be processed, and they were told to be patient, and that they should check their bank statements to see when they receive the refund

checks. (A-P17-P19, para's 29-33, 37.)

The Culps send letters to TAS on September 10 and October 10, 2019, to ask about the status of the refund. (A-P18, para. 30) But the letters are met with silence from TAS. (A-P18, para. 31-33.)

And although the levies on the Culps' Social Security payments were apparently stopped shortly after they engaged the services of TAS, the IRS on November 19, 2019, offset $851.57 of the Culps' 2018 income tax overpayment in full payment of the remaining balance the IRS said they owed on the 2015 1040 taxes, plus interest and penalties. (A-P18, para. 32.) "Although the TAS office had in their possession documents showing that these taxes were not owed, TAS and the IRS in bad faith nevertheless allowed the liens to go forward for payment of a debt not owed to the IRS." (A-P18, para. 32, 33.)

As set forth in the petition, TAS consistently represented to the Culps that the matter had been satisfied and that the Social Security money levied upon would be returned to the Culps. The money still has not been returned.

The Culps' 2015 1040 tax case was filed with the U.S. Tax Court on April 22, 2021. The Petition was served on the IRS on July 13, 2021. ( A, P-5) On September 1, 2021, fifty days after service of the Petition, the IRS electronically filed with the Court a Motion to Dismiss the case, in violation of U.S. Tax Rule 36, which gives a Respondent 45 days from the date of service within which to file a

Motion to Dismiss. Thus, IRS's Motion to Dismiss was untimely filed.

Nevertheless, in its Motion to Dismiss, the IRS argued that David and Isobel Culp's case as to IRS's improperly taxing the Culps on their 2015 1040 return should be dismissed because the Culps did not timely file their claim in the U.S. Tax Court, setting a double standard, one set of rules for the IRS and a different set for the taxpayer. As is discussed *infra,* the merits in the Culps' argument that they were inappropriately taxed on money not owed is irrefutable, and no one within the IRS has argued otherwise.

As set out in the Culps' Petition and Complaint filed with the Tax Court, the Culps have addressed the malfeasance and negligence of the IRS and TAS and their failure to rectify their error, but despite the Culps providing TAS and the IRS with documentation of IRS's error, as they had requested, they did nothing, in violation of IRS's and the Taxpayer Advocates Office's statutory responsibilities.

The evidence shows that the U.S. Tax Court has abused its discretion in dismissing this case, based on the facts of this case and the failure of the IRS to send to the Culps, as required by statute, proper notices of their rights as taxpayers to invoke the jurisdiction of the U.S. Tax Court. The failure of the IRS to abide by the mandates of Congressional legislation is used by the IRS and the U.S. Tax Court to justify dismissing this case on the basis the Culps did not timely file with the U.S. Tax Court, when, in fact, they were prevented, by IRS's failures, from

doing so, in violation of their statutory rights. The statutes on filing deadlines should be equitably tolled under the circumstances and facts of this case.

In addition, the federal statutes and case law support jurisdiction in this matter based on federal statutes governing the Tax Court. And if there is an issue in this case regarding "notice" and filing with the U.S. Tax Court in a timely manner, the statute of limitations should be equitably tolled based on the malfeasance and negligence of TAS and the IRS and based on the facts which clearly show that the Culps were inappropriately assessed taxes for "self-employment" income, when they were not "self-employed," as set out in the letter from LaSalle University attorney Sean Corgan, written to TAS at the request of TAS, to resolve this matter. (A-P106-P107)

In December 2021, Chief Justice Foley of the U.S. Tax Court appointed the Honorable Eunkyong Choi to serve as a special judge for small tax cases filed in the U.S. Tax Court. Judge Choi had for the previous four-plus years been employed with the Taxpayer Advocate Services for the Department of Finance in New York. (U.S. Tax Court web site.) On January 9, 2022, Judge Foley assigned the Culps' case, Tax Court #14054-21, to Judge Choi. (A-P165)

On January 15, 2022, Judge Choi dismissed the case on the basis it had been untimely filed, thus avoiding the merits of the case. (A-P155-P159)

It is not at all clear that the Court even read the Culps' 18 page, 45-paragraph

Petition, filed with the Tax Court, which discusses the facts and equitable arguments, and sets forth the statutory basis for the Tax Court having jurisdiction over this matter. (A-P7-P24) Nor is it clear that the Court read the Culps' Response to IRS's Motion to Dismiss. (A-P144-P153)

Instead of addressing the Culps' statement of facts, arguments, and basis for statutory authority, such as the Tax Court's jurisdiction over refund litigation as set out by statute, the Court cuts and pastes from IRS's Motion to Dismiss the Case, and in so doing, makes the same errors as the IRS made in its Motion to dismiss Tax Court Case #14054-21 commingling the two cases before the Tax Court. This mistake should have been apparent to the Court if the Court had read the "Response of Petitioners David Culp and Isobel Culp to Respondents' Motion to Dismiss" Case #14054-21 (2015 1040)(*See* A-P144-P153.) In the Court's opinion dismissing the case, there is no mention of the arguments made by the Culps and no discussion of the statutory authority or cases they cite for jurisdiction. (A-P155-P159)

The Court simply ignores the issues and facts set out in the Culps' 45 paragraph Petition filed with the U.S. Tax Court, presumably based on the Court's belief that filing on the basis of a Notice of Deficiency is jurisdictional and not subject to equitable tolling. That reasoning has no merit as a result of the Supreme Court's recent opinion and holding in the *Boechler* decision.

## SUMMARY OF ARGUMENT

The centerpiece for the Culps' case in the Third Circuit is the unanimous Supreme Court opinion in *Boechler* and the doctrine of equitable tolling and its applicability to the Culps' case before the Third Circuit, discussed *infra.*

But even without the direction of the *Boechler* case, the Culps' case is built on IRS congressional mandates to attempt to insure a fair and just tax system, and the Congressional statutes themselves call out for equitable tolling, when necessary, to achieve that goal. For instance, after the IRS, without notice, began a levy on the Culps' SSA payments, the Culps immediately sought the services of the Philadelphia Taxpayer Advocate Services (TAS) to represent them. (A-P8-P9) As to TAS's responsibilities and jurisdiction, Internal Revenue Manual Section 13.1.16.12 provides 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' 1040 2015 case.

The facts are so very clear here that, as discussed, the IRS had erroneously assessed tax liability against the Culps for not having paid income taxes in 2015 for "self-employment income," when in fact, they are not and have never been self-employed, that they both work for a corporation, Berry and Culp, P.C. and both teach for a university, for which they are paid a salary. And this fact was confirmed by LaSalle University Counsel Corgan's letter, to TAS,

sent at TAS's request. (A-P106-P107) And yet despite the clear mistake made by the IRS, the IRS has done nothing to remedy this wrong. Under these circumstances, it is an abuse of the U.S. Tax Court's discretion to not do what is fair and just, and instead to apply a double standard—throw out the Culps' Petition as being untimely but allow IRS's Motion to Dismiss even though it is untimely, and even though the taxes assessed are clearly unwarranted and without any basis, and no one has or can dispute that.

In addition, the issue of the timeliness of the Culps' petition in the U.S. Tax Court is subject to equitable tolling, and the facts show that the Culps have been diligent in pressing their objection and argument to the IRS, and TAS, and to the U.S. Tax Court, and that these taxes for "self-employment income" are without basis in fact. The Tax Court has abused its discretion.

The Tax Court has also abused its discretion by failing to address any of the arguments made by the Culps in their 45 paragraph petition and in the Culp's Response to IRS's Motion to Dismiss, including the Tax Court's failure to discuss whether the Tax Court has jurisdiction over the Culp's case based on the court's jurisdiction over refund litigation.

The Culps did everything they were asked to do by the IRS, and there is no dispute, not an iota, as to whether they were inappropriately taxed and paid money they did not owe. As discussed *infra*, TAS failed to follow through on

its promises to the Culps, and their representation "was in bad faith, fraudulent, and a sham." (A-P18, para. 33) Thus, TAS has violated its statutory responsibilities and subjects the IRS to standards of "equitable tolling."

## ARGUMENT

### 1. The IRS Did Not Mail a Notice of Deficiency to the Culps on February 5, 2018.

The Tax Court's ruling on whether the IRS mailed a notice of deficiency to taxpayers at their last known address is an issue of fact that this Court reviews for clear error." *Berger v. Commissioner*, 404 F.2d 668, 672 (3d Cir. 1968). In its Motion for Summary Affirmance, the IRS alleged that the Culps

were sent 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.

The evidence shows one of two things: That the February 5, 2018 Notice of Deficiency letter was never sent, or if it was sent, it was never received by the Culps and 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 Culps would not have ignored the Notice of Deficiency letter if they had received it, as shown by their diligence to rectify the tax error the IRS made

once they had knowledge of the error, from seeking representation by TAS within days of their receipt of notice that their social security benefits had been levied on, to filing suit in the U.S. Tax Court, to filing an appeal to the Third Circuit. The Culps have been diligent in trying to reverse the tax error. The IRS has not. 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. (A-P10, at para. 9, and A-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" for 2015, and, in fact, the Culps owed no further taxes on their 1040 2015 IRS return. (Petition, A-P11-P12, 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 likely never sent.

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) . . . ." (A-P55-P57.) 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. (A-P10-P12, para. 7-14)

The IRS February 5, 2018 Notice of Deficiency letter was sent, the IRS argues, by certified mail on February 5, 2018 to the Culps at their Montrose, Pa. address. (A-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 has it argued that it believes the Culps received this letter. (A-P124-P125.) 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. As noted *supra,* the Notice of Deficiency letter was likely never sent to the Culps, or if sent was later retracted by the IRS and replaced with a "Proposal." The implication of IRS's defense is that the Culps were mailed and received a "Notice of Deficiency" letter and sat on their rights.

On pages 11-12 of its Motion for Summary Affirmance in this case, the government wrote: "The courts uniformly hold that the IRS satisfies its obligation on to mail a notice of deficiency if the notice is sent to the taxpayer's last known address, even if the taxpayer does not receive the notice." *Guthrie v. Sawyer*, 970 F.2d 733, 737 (10th Cir. 1992) *Accord, United States v. Goldston,* 24 F. App'x 835, 837 (11th Cir. 2009) Such case law from other circuits was issued in a period in which the circuits held that the filing deadline in Sec. 6213(a) is jurisdictional and not subject to equitable tolling. This Court should not follow such precedents in an era in which the filing deadline is held to be non-jurisdictional and subject to equitable tolling if one ground for equitable tolling is non-receipt of the notice of deficiency during the 90-day period.

In addition, the Culps never received a Notice of Intent to Levy for the 2015 income taxes, which is a predicate to the IRS legally levying (IRC Sec. 6331(d)),

and which notice would have entitled the Culps to request a "Collection Due Process" hearing at the IRS Independent Office of Appeals prior to any Social Security levies. (IRC Sec. 6330)

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.

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.

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, and which they subsequently proved to the Taxpayer Advocate Service and IRS that they did not owe. This scenario should be one for equitable tolling, as the Culps in good faith sought the services of the IRS and TAS and the U.S. Tax Court to correct the wrongs inflicted on them and return the money they were owed for the IRS seizing their property without notice and without any basis in fact, as the Culps received no "self-employment income" for 2015, as proven at IRS's directive by university Attorney Sean Corgan and his letter to the IRS noting that the payments in question to the Culps were not for "self-employment income" but were for emotional distress damages in settlement of a law suit with the university. (A-P3-P15, para's 19-24, and P106-P107)

**2. If the IRS Did Mail a Notice of Deficiency on February 5, 2018, as they alleged, the Tax Court Had Jurisdiction Under § 6512(b) to Find that There is No Deficiency, But There Is an Overpayment in the Taxable Year 2015.**

The Tax Court implicitly assumed, correctly, that if the Culps had filed a timely Tax Court deficiency petition, the Tax Court might have had overpayment jurisdiction in this case. The Tax Court did not consider whether equitable tolling could be used to make the deficiency petition seeking an overpayment determination timely, since the Tax Court likely assumed that equitable tolling could not apply to the filing deadline in § 6213(a) that it thought is jurisdictional.

The failure to consider this issue is a legal issue, reviewable do novo. *Anderson v. Commissioner*, 698 F.3d 160, 164 (3d Cir. 2012) ("We review the Tax Court's legal conclusions de novo and its factual findings for clear error.").

In the instant case, there is no dispute that the amounts that the Culps seek to be refunded were all collected by the IRS during 2019 (A-P12, para. 14; A-P18, para. 32, and A-P20, para. 37) after any issuance of a purported February 5, 2018 notice of deficiency.

Section 6214(a) provides part of the Tax Court's deficiency jurisdiction. It states, in relevant part, that "the Tax Court shall have jurisdiction to re-determine the correct amount of the deficiency". Section 6213(a) provides a 90-day period for filing a deficiency petition. Section 6512(b)(2), quoted above, grafts on to the Tax Court's jurisdiction to re-determine deficiencies jurisdiction to determine overpayments. Section 6512(b)(3) limits the amount of overpayment that can be determined to several items, one of which is amounts paid after the notice of deficiency was issued. There is nothing in the language of § 6512(b) that would preclude the Tax Court from determining an overpayment if a deficiency petition is considered timely as a result of equitable tolling, and this Court should so hold.

**3. The 90-day Deadline in § 6213(a) in Which to File a Tax Court Deficiency Petition Is Not Jurisdictional under Recent Supreme Court Precedent.**

Whether the deadline to file a Tax Court petition is jurisdictional is a question this Court reviews de novo. *Rubel v. Commissioner*, 856 F.3d 301, 304 n. 3 (3d Cir. 2017). This Court, the Tax Court, and other Circuit courts – but not the Supreme Court – have long considered the deadline in § 6213(a) to file a Tax Court deficiency petition to be jurisdictional. For an example of this Court's precedent, *see, e.g., Sunoco Inc. v. Commissioner*, 663 F.3d 181, 187 (3d Cir. 2010). Simply put, that is no longer a valid legal position after the Supreme Court's recent ruling in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (April 21, 2022). Based on *Boechler*, this Court must overrule its prior precedent and hold that the deficiency filing deadline is not jurisdictional. The Culps endorse everything said about *Boechler* in the amicus brief of The Center for Taxpayer Rights, so will not needlessly repeat the argument made therein.

In *Boechler*, the Supreme Court held the deadline in § 6330(d)(1) to file a Tax Court "Collection Due Process" petition to be subject to equitable tolling. The logic of *Boechler* applies equally to require this Court to hold that the deficiency petition filing deadline is subject to equitable tolling. Again, to avoid needless repetition, the Culps merely state that they agree with everything set out in the

amicus brief of The Center for Taxpayer Rights explaining why the deficiency petition filing deadline is subject to equitable tolling.

**4. Based on the facts in this case, the Culps Are Entitled to Sufficient Equitable Tolling to Make Their Deficiency Petition Timely.**

The Tax Court did not rule on whether, if equitable tolling could apply in this case, the Culps had shown facts that would justify equitable tolling. However, the facts here are eminently clear, including the fact that the Culps did not owe any money to the IRS, and the IRS took/stole money from them, without proper notices, as required by Congressional statutes. In addition, the Culps used due diligence in attempting to resolve these issues with the IRS, from letters and unanswered calls to the Ogden IRS office, to seeking representation from TAS, to filing with the U.S. Tax Court and the Third Circuit Court of Appeals.

The Culps respectfully ask that this Court determine as a matter of law that the facts shown herein justify equitable tolling. In this regard, the actions and inactions of TAS, and the malfeasance of TAS in failing in its responsibilities under Congressional mandates to process the Culps' defense to the IRS assault on their 2015 1040 return, including levies without notice, are indefensible and in bad faith and justify the equitable tolling of time frames for filing suit in the U.S. Tax Court. The Culps acted with due diligence in processing their case through TAS before bringing their case to the U.S. Tax Court. TAS, however, did not operate with due diligence or in good faith. 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. (A-P13-P19, at para's 19-36)

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." (A-P150, and Petition, A-P18, para. 33)

The Taxpayers' Bill of Rights, IRC Section 7803(a)(3), sets forth 10 fundamental rights that taxpayers have and that cannot be violated by the IRS or the IRS Taxpayer Advocate Service. Among those rights is 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. *See* Petition, at para's 40, 41, 41a, 41b, 41c, 41d, and 42, P-21-P22, setting forth these statutory standards TAS is required to live by. In addition, Internal Revenue Manual Section 13.1.16.12 provides 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 they have spent hundreds of dollars to try to find someone to listen and correct the record and return the money stolen from them by levy returned to their Social Security accounts.

Notably, when the Supreme Court ruled in *Boechler* that the Collection Due Process filing deadline is not jurisdictional and is subject to equitable tolling, Boechler had not yet articulated any particular ground for equitable tolling. The Supreme Court decided the legal issues, then remanded, writing: "None of this is to say that Boechler is entitled to equitable tolling on the facts of this case. That should be determined on remand. We simply hold that Sec. 6330(d)(1)'s filing deadline, like most others, can be equitably tolled in appropriate cases." 142 S. Ct. at 1501. The present case filed by the Culps is an "appropriate case."

There are multiple reasons why equitable tolling of the statutes is appropriate in the Culps' case, including the fact that the Culps have diligently and repeatedly sought to work with TAS and the IRS to remedy the wrongs the IRS inflicted on them, including levies on their Social Security and other tax year rebates applied to their 2015 1040 return, without basis in fact.

This included providing TAS with a letter from LaSalle University attorney Sean Corgan, who at TAS's request, wrote a letter to confirm that the monies received by the Culps in 2015 from the university were "emotional distress"

damage payments in settlement of a law suit and were not "self-employment income." Thus, the IRS had, without basis, taxed the Culps for receiving money for self-employment income, and TAS confirmed with the Culps that the IRS had made a mistake and the error would be rectified, and that the Culps would receive a refund for money unlawfully levied on by the IRS. And that they should be patient, that it may take a couple of months before the refund is issued. *See* A-P7-P20, Petition, at para's 5-14, 19-24, 27-29, 31-33, 37, 40, 41a-d, 42-45, which discusses the "actions and malfeasance of the IRS" and the 'independent' IRS Taxpayer Advocates Office." (A-P8, para. 5)

Instead, TAS slip-slided away into the night never to be heard from again, and the levies on the Culps property started up again, again, without notice. *(See* A-P7-P20, Petition, at para's 5-14, 19-24, 27-29, 31-33, 37, 40, 41a-d, 42-45, which discusses the "actions and malfeasance of the IRS" and the 'independent' IRS Taxpayer Advocates Office." A-P8, para. 5) 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* case.

The initial reason why equitable tolling should have begun in the present case is that the taxpayers did not actually see any notice of deficiency until, after filing their petition in the Tax Court, they saw a purported copy attached to the IRS

motion to dismiss their case. TAS did not furnish the Culps with a copy of such a notice during the time they sought assistance from TAS.

This Court has written:

> There may be equitable tolling (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

*Mannella v. Commissioner*, 631 F.3d 115, 125 (3d Cir. 2011).

In *Mannella*, a wife was seeking relief from joint and several tax liability under § 6015(f) on account of joint return tax deficiencies relating to her husband. The IRS had issued a regulation stating that, in order to be timely, a taxpayer had to file with the IRS a request for § 6015(f) relief within two years of the commencement of collection activities by the IRS. Under the regulation, the IRS' issuance of a notice of intention to levy could commence the 2-year period, and the IRS noted that the taxpayer's request for relief was filed beyond two years after that notice was issued. In response, the taxpayer argued that circumstances beyond her control had prevented her from timely filing with the IRS – i.e., her husband admitted that he alone received the IRS notice, but hid it from the taxpayer so that she did not receive it during the 2-year period.

In *Mannella*, after this Court upheld the validity of the regulation, it noted the equitable tolling argument and remanded the case to the Tax Court for it to determine whether the regulation's filing deadline is subject to equitable tolling and whether the taxpayer's alleged non-receipt of the notice during the 2-year period was a sufficient ground for equitable tolling of that period. 631 F.3d at 125-126. Shortly after *Mannella* was issued, the IRS abandoned the regulatory limit on filing, and the taxpayer received relief without the Tax Court's ever having to decide the issues remanded. However, the *Mannella* opinion suggests that non-receipt of an IRS notice during a period when a contest of the notice is running may be a ground for the equitable tolling of that period.

When the Board of Veterans Appeals ("BVA") issues a ruling, under 38 U.S.C. § 7266(a), the veteran has 120 days to file an appeal with the Court of Appeals for Veterans Claims ("Veterans Court"), which is an Article I court, like the Tax Court. In *Henderson v. Shinseki*, 562 U.S. 428 (2011), the Supreme Court held that the 120-day deadline is not jurisdictional, and the Federal Circuit, which hears appeals from the Veterans Court, treats the filing deadline as subject to equitable tolling. In *Checo v. Shinseki*, 748 F.3d 1373 (Fed. Cir. 2014) (en banc), although the BVA promptly mailed its decision to the veteran, she was homeless at the time, and so she did not receive the notice until the 91st day of the 120-day

period. She filed her appeal with the Veterans Court 33 days after the end of the 120-day filing period. The Veterans Court held that she was not entitled to equitable tolling on the grounds of extraordinary circumstances and dismissed her appeal. The Federal Circuit reversed and remanded the case. The court wrote:

> During oral argument at the Veterans Court, the Secretary acknowledged that it has conceded that Ms. Checo's homelessness qualifies as an extraordinary circumstance in this case. *See* J.A. 75. The Veterans Court accepted this concession, and we agree. We therefore conclude that Ms. Checo has satisfied the extraordinary circumstance element.

*Id.* at 1378-1379 (footnote omitted). Thus, non-receipt or vary late receipt of the BVA ruling can be a ground for equitable tolling.

This case suggests that non-receipt of the final decision during the 60-day period could qualify for equitable tolling under the exceptional circumstance ground in an appropriate case where the claimant was otherwise diligent. And in the present case, the Culps have been diligent from the beginning to today to work with the IRS and TAS to remedy the issues that are at the center now, in front of the Third Circuit.

The Culps recognize that a notice of deficiency that is not received in the 90-day period is "valid" for purposes of allowing the IRS to initially assess the deficiency on day 91 if the taxpayer does not file a Tax Court petition in that period. § 6213(c) ("If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has

been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.") However, it should not be held valid to cut off a taxpayer's right to file a petition beyond the 90 days, if the taxpayer, as here, has good grounds for equitable tolling. Like statutory extensions of the 90-day deadline at §§ 7502 (for timely mailing), 7508 (for service in a combat zone), or 7508A in the case of Presidentially-declared disasters – many of which are not known to apply before the IRS assesses the deficiency under § 6213(c), thinking that no extensions apply – when a notice of deficiency's filing period is extended by judicial equitable tolling, any such assessment should be abated during the Tax Court proceeding if the Tax Court subsequently finds that the petition was timely filed, although after the end of the 90-day period. That is common Tax Court procedure in the case of statutory filing extensions subsequently found to apply. *See, e.g., Fleming v Commissioner*, T.C. Memo. 2017-120 at *2-*3.

## CONCLUSION

For the reasons set forth above, David Culp and Isobel Berry Culp respectfully request that judgment be entered for them in the amount of $3,367 (as a refund for levies on their Social Security payments and other levies taken to pay any other amounts allegedly owed on their 2015 1040 taxes), plus costs and any other

monetary damages authorized by statute and assessed against the IRS by this Court.

Respectfully submitted,

Isobel Berry Culp
*Appellant*
*Pro Se*

David Culp
*Appellant*
*Pro Se*

July 29, 2022

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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David Culp
*Appellant*

Dated: July 29, 2022

## CERTIFICATE OF SERVICE

This is to certify that a copy of this brief was served on counsel for the appellee, Joan I. Oppenheimer and Isaac B. Rosenberg, Esqs., by mailing the same on July 29, 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 a copy of this brief was served on counsel for the amicus Center for Taxpayer Rights, Keith Fogg, Audrey Patten, and Carlton M. Smith, Esqs. by mailing the same on July 29 2022 in a postage-paid wrapper addressed to Ms. Patten at Tax Clinic of the Legal Services Center of Harvard Law School, 122 Boylston Street, Jamaica Plain, MA 02130.

David Culp
*Appellant*

Dated: July 29, 2022