Received
07/15/22 02:29 pm

Filed
07/15/22

Hallmark Research Collective,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

Electronically Filed
Docket No. 21284-21
Document No. 31

Reply to Response to Motion to Vacate or Revise Pursuant to Rule 162

SERVED 07/15/22

UNITED STATES TAX COURT

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

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO VACATE ORDER OF DISMISSAL FOR LACK OF JURISDICTION

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In accordance with this Court's June 2, 2022 Order, petitioner replies to respondent's response to petitioner's motion to vacate or revise the Court's April 1, 2022 Order of Dismissal.

I. Boechler Compels the Conclusion that § 6213(a) is a Nonjurisdictional Statute of Limitations.

The central point of taxpayer's motion to vacate is that Section 6213(a) is a nonjurisdictional timing rule. The main support for this contention is the April 2022 unanimous Supreme Court decision in *Boechler, P.C. v. Commissioner*, 142 S.Ct. 1493 (2022).

Petitioner's memorandum of law in support of its motion to vacate analyzes in detail why *Boechler*'s reasoning in reaching its decision that Section 6330(d)(1) is not jurisdictional applies with equal force to Section 6213(a), and that analysis will not be repeated here.

It is worth quoting the Commissioner's attempt to distinguish *Boechler* in its entirety:

> The Supreme Court did not issue any holding in *Boechler* regarding section 6213(a), nor did it overturn precedent set by appellate courts with respect to the jurisdictional limitations of section 6213. The *Boechler* opinion's holding relates only to filing requirements under section 6330. Although the Court noted in *dicta* that much of the precedent involving the jurisdictional limitations of section 6213 had been decided before the Supreme Court tried to "bring some discipline" to the use of the term "jurisdictional," *Boechler*, 142 S.Ct. at 1500, the Court did not address section 6213(a) further. The Court based its holding on the language of section

> 6330(d)(1), concluding that the phrase "such matter" in that provision "lacks a clear antecedent," and observing that "jurisdiction" is mentioned parenthetically. *Id.* at 1498. That dispositive textual analysis does not apply to section 6213(a).

Respondent's response to motion to vacate at 3-4.

The Commissioner is flatly incorrect. In fact, *Boechler* makes clear that the point of its exegesis of section 6330(d)(1) is to demonstrate that "[w]here multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear." *Boechler* at 1498. The Supreme Court granted certiorari in a tax procedure case (extremely unusual) and then issued a unanimous opinion as part of its larger project "to bring some discipline to use of the jurisdictional label...To that end, we treat a procedural requirement as jurisdictional only if Congress clearly states that it is." *Boechler* at 1497 (citations omitted).

Applying that standard to Section 6330(d)(1), "[t]o satisfy the clear statement rule, the jurisdictional condition must be just that: clear. And as we have already explained, the Commissioner's interpretation is not." *Boechler* at 1499.

The Commissioner's characterization of the central holding of *Boechler* as *dicta* does not bear further comment except to point out that it sets the tone for the rest of the Commissioner's response. For example, petitioner's memorandum of law comprehensively describes how *Organic Cannabis Foundation v. Commissioner*, 962 F.3d 1082 (9th Cir. 2020) is undermined by the requirement

that "the Commissioner's interpretation must be not only better, but also clear." *Boechler* at 1499. Respondent's submission, however, does not apply the clear requirement standard but rather simply reiterates the *Organic Cannabis* opinion's somewhat tortured interpretation of Section 6213(a), reliance on a broader statutory context analysis, and previous decisions interpreting Section 6213(a). Petitioner will not repeat its previous analysis with respect to *Organic Cannabis* other than to note that the Commissioner's submission seems to inhabit a pre-*Boechler* world.

II. The Most Likely Sources of the Tax Court's Deficiency Jurisdiction Are §§ 6214 and 6512(b)(1), Not § 6213(a).

In his response to the motion to vacate, the Commissioner does not address the petitioner's argument, made in its memorandum at p. 8, that the real grant of this Court's deficiency jurisdiction is in § 6214(a), not § 6213(a). Since parties cannot waive jurisdictional objections merely by not making them, it is perhaps wise for the petitioner to expand upon this question so that this disagreement between the parties is not accidentally ignored.

The government responded to the identical argument raised by the taxpayer in *Organic Cannabis*, though the Ninth Circuirt's opinion did not adress this argument. In its answering brief in the Ninth Circuit, the DOJ argued (at pp. 51-55), first, that § 6214(a) is not the jurisdictional grant for a Tax Court deficiency suit, but that the jurisdictional grant was implicit in the original § 274(a) of the

Revenue Act of 1924 and so should be considered residing in the successor to § 274(a), § 6213(a), and, second, that § 6213(a) makes its filing deadline jurisdictional. The DOJ argued that § 6214(a) only gives jurisdiction where the IRS seeks a greater deficiency than is set out in the notice of deficiency and that this grant of jurisdiction is "complementary" to the grant of jurisdiction at § 6213(a).

There are a number of problems with this DOJ argument. But, before responding to it in detail, the petitioner notes that it need not prove that §§ 6214(a) and 6512(b)(1), not § 6213(a), are the only sources of the Tax Court's jurisdiction to redetermine deficiencies set out in the notice of deficiency, merely that the relevant statutes can be read that way (i.e., be read more than one way, creating ambiguity), and so preclude this Court from finding that § 6213(a), first, creates a clear statement that the Tax Court has the power to redetermine deficiencies and, second, creates a clear statement that the filing deadline within § 6213(a) is a jurisdictional limit. As *Boechler* pointed out, "the Commissioner's interpretation must be not only better, but also clear". *Boechler* at 1499.[1]

[1] "[T]he Commissioner repeats his refrain that 'such matter' refers to the entire first clause of the sentence, thereby conditioning the Tax Court's jurisdiction on the deadline. We agree that this is a plausible interpretation of the statute. Some might even think it better than Boechler's. But in this context, better is not enough. To satisfy the clear-statement rule, the jurisdictional condition must be just that: clear. And as we have already explained, the Commissioner's interpretation is not." *Id*. at 1499.

Over the years, this Court has made many, often internally-contradictory, statements as to the source of its deficiency jurisdiction. Though this Court has consistently held that the § 6213(a) filing deadline is jurisdictional, it has usually done so simply because the Court treated any statutory filing deadline as automatically jurisdictional. That is no longer a correct ground where the statute contains no clear statement that Congress intended the filing deadline to be jurisdictional.

And this Court has made statements about whether § 6213(a)'s filing deadline is jurisdictional in many cases where the parties never briefed the issue, and the parties and the Court were apparently unaware of whether the issue had any practical consequences to the parties. The Supreme Court has said not to give precedential effect to such "drive-by jurisdictional rulings":

> JUSTICE STEVENS relies on our treatment of a similar issue as jurisdictional in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). . . . "Jurisdiction," it has been observed, is a word of many, too many, meanings. . . .
>
> It is also the case that the *Gwaltney* opinion does not display the slightest awareness that anything *turned upon* whether the existence of a cause of action for past violations was technically jurisdictional – as indeed nothing of substance did. The District Court had statutory jurisdiction over the suit in any event, since continuing violations were also alleged. It is true, as JUSTICE STEVENS points out, that the issue of Article III standing which is addressed at the end of the opinion should technically have been addressed at the outset if the statutory question was not jurisdictional. But that also did not really matter, since Article III standing was in any event found. The short of the matter is that the jurisdictional character of the elements

> of the cause of action in *Gwaltney* made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by jurisdictional rulings of this sort (if *Gwaltney* can even be called a ruling on the point rather than a dictum) have no precedential effect.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 90-91 (1998) (emphasis in original; cleaned up; some citations omitted).

And as the Supreme Court said in *Kontrick v. Ryan*, 540 U.S. 443 (2004):

> Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court. . . . Classifying time prescriptions, even rigid ones, under the heading "subject matter jurisdiction" can be confounding. Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Id. at 455-456 (cleaned up; citations omitted).

Thus, this Court should not give precedential effect to many comments in its prior cases—some in holdings, some in dicta, and some in drive-by jurisdictional rulings—but should reexamine the statutory provisions and their legislative history in light of the modern, limited view of what the Supreme Court considers "jurisdictional."

Petitioner now turns to the argument that it is §§ 6214 and 6512(b)(1) that together exclusively provide this Court with jurisdiction to redetermine

deficiencies and determine overpayments. The argument begins with the history of the Board of Tax Appeals.

Section 274(a) of the Revenue Act of 1924 did two things: It provided for the respondent to mail notices of deficiency concerning income taxes (what is currently § 6212). And it stated, in its second sentence: "Within sixty days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900." Section 274 sets out what we would today call the deficiency procedures applicable to income taxes. But, nowhere in § 274 can one find the word "jurisdiction." There are similarly-phrased sentences providing 60-day filing deadlines for the Board at Revenue Act of 1924 §§ 279(b) (for notices regarding claims for abatement of income tax jeopardy assessments), 308(a) (for notices of estate tax deficiency), and 312(b) (for notices regarding claims for abatement of estate tax jeopardy assessments). To avoid tedious repetition, in this reply, generally the Board provisions relating to estate taxes and jeopardy assessments of income and estate taxes will not also be quoted, though they contain language in the Revenue Acts of 1924 and 1926 that is parallel to the income tax deficiency provisions that are discussed and quoted in detail in this reply.

Congress did not think that the sentences in §§ 274(a), 279(b), 308(a), and 312(b) were sufficient to give the Board of Tax Appeals the power to hear cases,

so at § 900(e) of the Revenue Act of 1924, Congress wrote: "The Board and its divisions shall hear and determine appeals filed under Section 274, 279, 308, and 312." Thus, Congress implicitly gave the Board the power—i.e., jurisdiction—to decide cases at § 900(e), not at §§ 274(a), 279(b), 308(a), and 312(b). *Estate of Young v. Commissioner*, 81 T.C. 879, 884 (1983) (Dawson, J., writing for the en banc court) ("The origin of this Court lies in the Revenue Act of 1924, which established the Board of Tax Appeals. . . . That act gave the Board jurisdiction to redetermine deficiencies determined by the Commissioner in a statutory notice. Sec. 900(e), Revenue Act of 1924.") (some citations omitted).

As noted in petitioner's prior memorandum, in 1926, Congress decided to make the Board more court-like, including providing for direct appeals to Courts of Appeals. One of the changes in the Revenue Act of 1926 was to explicitly, for the first time, use the word "jurisdiction" with respect to the Board (even though the Board was still an administrative agency, not a court). Section 1001 of the Revenue Act of 1926 amended Title IX of the Revenue Act of 1924 to include, at a new § 904, the following: "The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws." Title II is headed "Income Tax," and the procedures for income tax deficiencies and claims for abatement of jeopardy assessments relating to income taxes are found therein. Title III is headed "Estate Tax," and the procedures

for estate tax deficiencies and claims for abatement of jeopardy assessments relating to estate taxes are found therein.

Thus, unlike § 900(e) of the Revenue Act of 1924, § 904 (as enacted by § 1001) of the Revenue Act of 1926 did not give the Board jurisdiction to redetermine deficiencies, but it also did not pin the Board's jurisdiction to only §§ 274(a) and 308(a) of the Revenue Act of 1926 (the provisions that set out the filing deadlines). Section 904 referred to the entire second and third titles of the Revenue Act of 1926 as the sources of the Board's jurisdiction, which included new provisions under the income and estate taxes that, for the first time, referred to the Board's "jurisdiction."

In Title II of the Revenue Act of 1926, among the income tax deficiency procedures, Congress enacted three new provisions that explicitly use the word "jurisdiction" in connection with the Board, but Congress did not alter to include the word "jurisdiction" the second sentence of § 274(a) of the Revenue Act of 1924 that provides the Board income tax deficiency petition filing deadline. Congress in 1926 also did not alter to include the word "jurisdiction" the filing deadline sentence in § 308(a) of the Revenue Act of 1924 that provides the Board estate tax deficiency petition filing deadline. (The Revenue Act of 1926 eliminated procedures for Board review of notices regarding claims for abatement of jeopardy assessments of income or estate taxes.)

Section 274(e) of the Revenue Act of 1926 provided, for the first time:

> The Board shall have *jurisdiction* to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(Emphasis added). Section 6214(a) is the successor to this provision and a similar new one at Revenue Act of 1926 § 308(e) for deficiencies in estate tax.

Section 274(g) of the Revenue Act of 1926 provided, for the first time:

> The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in doing so shall have no *jurisdiction* to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

(Emphasis added). The first sentence of § 6214(b) is the successor to this provision.

Section 284(e) of the Revenue Act of 1926 provided, for the first time, in part:

> If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have *jurisdiction* to determine the amount of such overpayment, and such amount shall, when the decision of the Board becomes final, be credited or refunded to the taxpayer. . . .

(Emphasis added). The first sentence of § 6512(b)(1) is the successor to this provision and a similar new one at Revenue Act of 1926 § 319(c) for overpayments of estate tax.

The second sentences of §§ 274(a) and 308(a) of the Revenue Act of 1926 differ from the second sentences of §§ 274(a) and 308(a) of the Revenue Act of 1924 in that the 1926 sentences newly exclude Sundays from ending the deficiency petition filing deadline, but Congress did not add the word "jurisdiction" when it revised those sentences. The 1926 provisions also added what are the predecessors of the second and third sentences of § 6213(a). The pertinent language from § 274(a) of the Revenue Act of 1926 is as follows:

> Within 60 days after such notice is mailed (not counting Sunday as the 60th day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. . . . [N]o assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for the collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of Section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Similar changes were made to the estate tax deficiency provisions at Revenue Act of 1926 § 308(a).

Revised Statutes § 3224 was the Anti-Injunction Act (currently at § 7421(a)). Thus, the last sentence in the indented quote did not itself provide any

court with jurisdiction to enjoin, but merely prevented the Anti-Injunction Act from limiting district court injunctive power that was granted to those courts elsewhere. For an argument that the Anti-Injunction Act is not itself jurisdictional under recent Supreme Court precedents, see Patrick J. Smith, "Is the Anti-Injunction Act Jurisdictional?", 133 Tax Notes 1093 (November 28, 2011). It was not until 1988 (over 60 years later)—when the Tax Court was first given injunctive powers in § 6213(a)—that the word "jurisdiction" first appeared in any sentence of § 6213(a) or any of its predecessors. *See* Pub. L. No. 100-647, § 6243(a), 102 Stat. 3342, 3749 (1988).

Enactment of §§ 274(e) and 308(e) of the Revenue Act of 1926 (the predecessors of § 6214(a)) did more than expand the Board's "jurisdiction" to cover increased deficiencies and penalties. New statutory language often serves multiple purposes not all of which are articulated not all of which are articulated in a Committee report, but are nonetheless evident from the literal language. Here, the first 13 words also literally provide the Tax Court jurisdiction to redetermine the deficiency to an amount lower than shown in the notice because claims for that deficiency are, automatically, asserted before the hearing—i.e., they are asserted in the notice and/or the answer.[2] The next phrase in those statutes is "even if the

[2] The Court should not be distracted by the opening phrase of current § 6214(a), which provides: "Except as provided by section 7463 . . . ." That exception is simply to preclude the Tax Court from redetermining amounts in small tax cases

amount so redetermined is greater than the amount of the deficiency." "Even if" is an idiom that confirms the preceding words. The Collins Dictionary states: "You use even if or even though to indicate that a particular fact does not make the rest of your statement untrue: 'Cynthia is not ashamed of what she does, even if she ends up doing something wrong.'"

https://www.collinsdictionary.com/us/dictionary/english/even-if

"Even if" is similar to "whether or not," and, interestingly, at least one Committee report uses the phrase "whether or not" in describing the portion of § 274(e) granting the Board "jurisdiction . . . to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing." The Senate Finance Committee Report states:

> It sometime occurs that after the deficiency letter has been sent out fraud or negligence is for the first time discovered by the commissioner. In order to avoid the necessity of sending out a second notice to the taxpayer in such cases and other similar cases, *it is provided in section 274(e)* that the board shall have jurisdiction upon the appeal from the original deficiency letter to determine whether any penalty, additional amount, or addition to the tax should be assessed *whether or not the commissioner has asserted such claim in the deficiency letter or in his pleadings*.

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that exceed the $50,000 jurisdictional dispute limits for such cases. Section 7463(c) provides: "In any case in which the proceedings are conducted under this section, notwithstanding the provisions of sections 6214(a) and 6512(b), no decision shall be entered redetermining the amount of a deficiency, or determining an overpayment, except with respect to amounts placed in dispute within the limits described in subsection (a) and with respect to amounts conceded by the parties."

S. Rep. 69-52 at 27-28 (emphasis added). Note that there is no statement in this sentence "that it is provided in" § 274(a) (setting out the filing deadline) that the Board has jurisdiction to determine these items set out in the notice of deficiency. The quoted sentence confirms Congress' understanding that § 274(e) is the jurisdictional grant for the Board to determine these items, both those set out in notices of deficiency and in pleadings.

Importantly, at the same time when Congress saw the need to write the word "jurisdiction" into multiple other provisions of the Revenue Act of 1926 in connection with the Board,[3] when redrafting the sentences providing for the Board's deficiency petition filing deadlines, Congress did not insert the word "jurisdiction" or otherwise modify the sentences to speak to the power of the Board. That seems a highly unlikely accident if Congress wanted to clarify the Board's main deficiency jurisdiction. It is often said that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*,

[3] In addition to provisions noted in the text, in multiple subsections of Revenue Act of 1926 § 283 (which addressed taxes under prior acts – i.e., the Revenue Act of 1924 and tax statutes predating 1924), Congress also explicitly referred to the "jurisdiction" of the Board. There are provisions dealing with taxes under prior acts in §§ 280 and 316 of the Revenue Act of 1924, but none contains the word "jurisdiction" or mentions the Board.

464 U.S. 16, 23 (1983) (cleaned up). Indeed, in most recent jurisdictional grants to the Tax Court, such as in §§ 6404(h), 6015(e)(1)(A), 6330(d)(1), and 7623(b)(4), Congress has provided a filing deadline in the same sentence that literally grants the Tax Court "jurisdiction." (And in § 7345(e)(1), Congress even provided a jurisdictional grant without providing for a filing deadline.) Congress knows how to provide jurisdictional grants and appears not to have done so in drafting §§ 274(a) and 308(a) of the Revenue Act of 1926 and their successors.

The Committee Reports accompanying the Revenue Act of 1926 contain no discussions of (1) why the word "jurisdiction" is, for the first time, used in that act in connection with the Board, (2) why §§ 274(a) and 308(a), although amended, were not amended to include the word "jurisdiction," or (3) the modification of § 900(e) of the Revenue Act of 1924 from granting the Board the power to hold hearings to § 904 of the Revenue Act of 1926 (locating the "jurisdiction" of the Board in earlier provisions of the Revenue Act of 1926). H. Rep. 69-1 at 10-11, 17-21; S. Rep. 69-52 at 25-28, 34-38, 1939-1 C.B. (pt. 2) 332; H. Rep. (Conf.) 69-356 at 39-40, 53-55, 1939-1 C.B. (pt. 2) 361.

Moreover, respondent's argument that § 274(a) of the Revenue Act of 1924 provided an implicit grant of jurisdiction to the Tax Court, even if correct for the period from 1924 to 1926, cannot be said to carry over to legislation in 1926 and thereafter. Current § 7442 provides in full: "The Tax Court and its divisions shall

have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926." Pointedly, the Tax Court has no jurisdiction anymore under the Revenue Act of 1924 provisions. The provisions from 1926 on are materially different from those in 1924.

It cannot even be said that, when Congress in 1926 modified Board provisions to make some of them jurisdictional, Congress was aware that courts thought the filing deadlines in §§ 274(a) and 308(a) of the Revenue Act of 1924 were jurisdictional. While it is true that the Board in 1924 had treated the income tax deficiency filing deadline as jurisdictional; *Satovsky v. Commissioner*, 1 B.T.A. 22, 24 (1924); the first court to have done so did it in 1928 in *Lewis-Hall Iron Works v. Blair*, 23 F.2d 972, 974 (D.C. Cir. 1928) (which contained as its sole reasoning on this issue the following *ipse dixit*: "[T]he Board's decision dismissing the petition was correct, for the requirement that such petitions shall be filed within 60 days after the mailing of notice of the deficiency, is statutory and jurisdictional and is not merely procedural. Revenue Act of 1926, § 274(a).").

Finally, at least some members of this Court have concluded that only § 6214(a) authorizes this Court to redetermine the deficiencies set out in the notice of deficiency—i.e., that § 6214(a) is not merely a complementary jurisdictional

grant to § 6213(a) for the Court to redetermine deficiencies in amounts greater than those set out in the notice of deficiency. Below is a non-exhaustive list of opinions where the respondent did not seek additional amounts beyond those set forth in the notice of deficiency, starting with judges currently hearing cases at the Court:

Judge Morrison has written: "This case arises from Abdi's timely petition. We have jurisdiction pursuant to section 6214(a)." *Abidi v. Commissioner*, T.C. Memo. 2015-41 at *2. "We have jurisdiction, pursuant to section 6214, to redetermine the deficiency and the penalty determined in the notice of deficiency. *See* sec. 6214(a)." *Longino v. Commissioner*, T.C. Memo. 2013-80 at *3. "Mr. and Ms. Thoma filed a timely petition for redetermination of the income-tax deficiencies and accuracy-related penalties for both years under section 6213(a). We have jurisdiction under section 6214(a)." *Thoma v. Commissioner*, T.C. Memo. 2020-67 at *4. *See Moyer v. Commissioner*, T.C. Memo. 2016-236 at *2 (same).

Judge Paris has written: "Petitioner received a notice of deficiency and invoked the Court's jurisdiction by filing a petition for redetermination of a deficiency under section 6213(a). Section 6214(a) grants the Court jurisdiction to redetermine the correct amount of a deficiency. . . ." T.C. Memo. 2018-36 at *5.

Judge Ashford has written: "Section 6214(a) establishes our deficiency jurisdiction". *Dees v. Commissioner*, 148 T.C. 1, 13 (2017) (Ashford, J., concurring in the result only).

Senior Judge Halpern has written: "Section 6214(a) establishes our jurisdiction to redetermine (i.e., determine de novo) deficiencies determined by the Secretary." *Moya v. Commissioner*, 152 T.C. 182, 198 (2019). He also wrote, "We thus conclude that the notices of deficiency respondent issued to petitioners for their 2007 taxable years were valid, so that petitioners' filing of a petition in response to those notices gave us jurisdiction under section 6214(a) to redetermine the deficiencies reflected in the notices." *Stevens v. Commissioner*, T.C. Memo. 2020-118 at *47.

Senior Judge Holmes has written: "Our Court has for decades had the power, when we have jurisdiction over a particular taxpayer for a particular tax year, to determine or redetermine the correct amount of his deficiency—including any penalties. *See* sec. 6214(a)." *Graev v. Commissioner*, 149 T.C. 485, 502 (2017) (Holmes, J., concurring in the result).

Former Judge Simpson has written:

> Section 6214(a) was initially enacted as part of the Revenue Act of 1926. *In addition to authorizing the Court to redetermine a deficiency*, the statute provided that the Court had the authority to "determine whether any penalty, additional amount or addition to the tax should be assessed". Sec. 274(e), Revenue Act of 1926, ch. 27, 44 Stat. 56.

Bregin v. Commissioner, 74 T.C. 1097, 1103 (1980) (emphasis added).

In sum, § 6214(a) in part provides the sole jurisdiction for this Court to redetermine deficiencies set out in notices of deficiency, and § 6213(a) provides no grant of jurisdiction to this Court. Petitioner has the better of this argument. Even if petitioner did not have the better of this argument, the acceptance of this argument by some Tax Court judges indicates that the petitioner's interpretation of the statutes is a reasonable one—which is enough to avoid a holding that § 6213(a) provides a clear statement that the filing deadline therein is jurisdictional.

III. Even if § 6213(a) Provides the Only Grant of Jurisdiction to This Court to Redetermine Deficiencies Set Out in Notices of Deficiency, Nothing in the Section Provides A Clear Statement That the Filing Deadline Therein Is Jurisdictional.

Let's, for a hypothetical, take the respondent's position and assume that the language in §§ 274(a) and 308(a) of the Revenue Act of 1924, provided implicit grants to the Board of jurisdiction to redetermine the deficiencies set out in notices of deficiency—i.e., ignoring § 900(e) of the Revenue Act of 1924 and all language additions to other related statutes since 1926. And let's assume that § 6213(a) also implicitly provides the sole jurisdictional grant to the Tax Court to redetermine the deficiencies set out in notices of deficiency. That still does not mean that the government's interpretation of the filing deadline in § 6213(a) as jurisdictional would meet the clear statement rule used in *Boechler*.

To repeat, the second sentence of Revenue Act of 1924 § 274 (a) provided: "Within sixty days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900." Section 308(a) of the Revenue Act of 1924 was the same, except that Congress substituted "executor" for "taxpayer." If that language provided implicit grants of jurisdiction to the Board to redetermine deficiencies, one must also ask, per *Boechler*, whether the introductory phrases "[w]ithin sixty days after such notice is mailed to the taxpayer" are tied to the implicit grants of jurisdiction with a clear statement that the filing deadlines are also jurisdictional. *Sebelius v. Auburn Regional Med. Cntr.*, 568 U.S. 145 (2013), would seem to be directly on point and to reject the jurisdictional nature of a filing deadline contained within a sentence providing only an implicit jurisdictional grant.

In *Auburn*, the issue was the interpretation of a statute providing for an administrative hearing concerning Medicare provider reimbursement disputes. There was no provision pointed out to the Supreme Court as literally giving the boards any "jurisdiction." The provision at issue arguably implicitly gave the boards jurisdiction and also explicitly provided for the meeting of a particular filing deadline as a condition of the hearing. The question was whether the filing deadline was a jurisdictional condition of the boards' abilities to hear the matters.

The statute, 42 U.S.C. § 1395*oo*(a), provided:

§ 1395*oo*. Provider Reimbursement Review Board

Establishment. Any provider of services which has filed a required cost report within the time specified in regulations may obtain a hearing with respect to such cost report by a Provider Reimbursement Review Board (hereinafter referred to as the "Board") which shall be established by the Secretary in accordance with subsection (h) and (except as provided in subsection (g)(2)) any hospital which receives payments in amounts computed under subsection (b) or (d) of section 1886 and which has submitted such reports within such time as the Secretary may require in order to make payment under such section may obtain a hearing with respect to such payment by the Board, if—

(1) such provider—

(A)

(i) is dissatisfied with a final determination of the organization serving as its fiscal intermediary pursuant to section 1816 as to the amount of total program reimbursement due the provider for the items and services furnished to individuals for which payment may be made under this title for the period covered by such report, or

(ii) is dissatisfied with a final determination of the Secretary as to the amount of the payment under subsection (b) or (d) of section 1886,

(B) has not received such final determination from such intermediary on a timely basis after filing such report, where such report complied with the rules and regulations of the Secretary relating to such report, or

(C) has not received such final determination on a timely basis after filing a supplementary cost report, where such cost report did not so comply and such supplementary cost report did so comply,

(2) the amount in controversy is $10,000 or more, and

> (3) such provider files a request for a hearing within 180 days after notice of the intermediary's final determination under paragraph (1)(A)(i), or, with respect to appeals under paragraph (1)(A)(ii), 180 days after notice of the Secretary's final determination, or with respect to appeals pursuant to paragraph (1)(B) or (C), within 180 days after notice of such determination would have been received if such determination had been made on a timely basis.

Note that the above, like the second sentences of §§ 274(a) and 308(a) of the Revenue Act of 1924 and the first sentence of § 6213(a), is directed only at what the provider "may" do—i.e., the provider "may obtain a hearing with respect to such payments by the Board if" three conditions are met, the third of which is compliance with a 180-day filing deadline. The Supreme Court assigned an amicus in the case to argue that the filing deadline is jurisdictional, since neither party wanted to make that argument. Here's from the opinion:

> *Amicus* urges that the three requirements in § 1395*oo*(a) are specifications that together define the limits of the PRRB's jurisdiction. Subsection (a)(1) specifies the claims providers may bring to the Board, and subsection (a)(2) sets forth an amount-in-controversy requirement. These are jurisdictional requirements, *amicus* asserts, so we should read the third specification, subsection (a)(3)'s 180-day limitation, as also setting a jurisdictional requirement.
>
> Last Term, we rejected a similar proximity-based argument. A requirement we would otherwise classify as nonjurisdictional, we held, does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions. *Gonzalez*, 565 U.S., at 146-147; *see Weinberger v. Salfi,* 422 U.S. 749, 763-764 (1975) (statutory provision at issue contained three requirements for judicial review, only one of which was jurisdictional)....[W]e are persuaded that the time limitation in

> § 1395*oo*(a) is most sensibly characterized as a nonjurisdictional prescription.

568 U.S. at 155-156.

At worst, there is a reasonable dispute as to whether the language of § 6213(a) can be said to provide a jurisdictional filing deadline. Under *Boechler*, that is not good enough for a clear statement, even if, as between the two interpretations of the filing deadline, the government's argument may be said to be the better one (a fact that the petitioner does not concede).

IV. Section 6213(c) Does Not Support a Conclusion that Section 6213(a) is Jurisdictional

Section 6213(c) provides:

> 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.

According to the Commissioner, the two uses of "shall" proves that § 6213(a) is jurisdictional because otherwise there would be the "incongruous" result that the Tax Court could take no action to enjoin the assessment and collection of the deficiency as required by § 6213(c) when "it also would be required to take action under § 6213(a) to determine whether the amount of that assessment and collection is correct based on the merits of the case." Respondent's response at 7-8.

To begin with, it should be kept in mind that the Commissioner's argument, even if valid in some sense, is extremely far removed from the *Boechler* requirement of a clear statement of intention that § 6213(a) is jurisdictional—it's just another variation of an argument that statutory context can somehow provide proof of clear Congressional intent regarding the jurisdictional nature of § 6213(a). *Boechler* rejected statutory context arguments, and they are just as unpersuasive here.

However, the Commissioner's assertion fails even on its own terms. The IRS is free to assess a deficiency after 90 days has passed, but there are numerous circumstances in which the 90 days is extended. For example, under § 7502 (timely mailing), § 7508 (extensions for soldiers in combat zones or contingency operations), § 7508A (extensions for federally declared disasters, significant fires, and terroristic or military actions), and § 7451(b) (inaccessibility of the office of the clerk of the Tax Court). Under any of these circumstances, the Commissioner will be required to abate an assessment under § 6213(c) if the Tax Court later determines that it received a timely petition after the 90 days has passed and after the Commissioner has assessed. It is worth noting that the *Boechler* opinion also points out that many of these same exceptions (which also apply to the § 6330(d)(1) deadline) function like equitable tolling. *Boechler* at 1501.

Further, Treas. Reg. § 1.301.6213-1(c) provides:

> If no petition is filed with the Tax Court within the period prescribed in section 6213(a), the district director or the director of the regional service center shall assess the amount determined as the deficiency and of which the taxpayer was notified by registered or certified mail and the taxpayer shall pay the same upon notice and demand therefor. In such case the district director will not be precluded from determining a further deficiency and notifying the taxpayer thereof by registered or certified mail. If a petition is filed with the Tax Court the taxpayer should notify the district director who issued the notice of deficiency that the petition has been filed in order to prevent an assessment of the amount determined to be the deficiency.

As the last sentence indicates, there will be circumstances under which the Commissioner is unaware of a timely-filed petition.

A third example of premature assessments that were subsequently abated comes from the recent pandemic. The Tax Court ended up months behind on processing petitions that were timely filed. As noted in an official Tax Court Press Release of August 16, 2021, the Court "has also begun notifying the IRS of those petitions the Court has received prior to service in order to limit the potential for premature assessment and enforcement action against petitioners." The IRS even "created a dedicated email address in October 2020 for petitioners to reach out with concerns about premature assessments or enforcement action..." *Id.*

Another source of uncertainty with respect to deadlines is found in the provision of § 6213(a) extending the 90-day deadline to "150 days if the

notice is addressed to a person outside the United States...” The Tax Court has long held that the taxpayer has 150 days if the taxpayer happened to be outside the United States on the date the notice was mailed even if the taxpayer’s last known address was in the United States.

The Tax Court summarized its body of caselaw on the issue in *Looper v. Commissioner*, 73 T.C. 690, 693-694 (1980):

> The 150-day rule finds its origins in the Revenue Act of 1942, ch. 619, 56 Stat. 798. Prior to the 1942 Act, the time for filing the petition was the same regardless of the residential status of the petitioner. The 1942 Act added to section 272(a)(1), I.R.C. 1939, the following language: “If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.” (56 Stat. 876.)
>
> In *Hamilton v. Commissioner*, 13 T.C. 747 (1949), we were first called upon to interpret this section. The liabilities of two separate individuals were involved. One had been a resident of England and France for a period extending 3 years before the notice of deficiency was mailed. The notice was mailed to a New York address which was that taxpayer’s “last known address” and she filed her petition within the 150-day period but outside the 90-day period. We read section 272(a)(1) to provide the 150-day period for persons who were physically outside the United States at the time the statutory notice was mailed and we held that her petition was timely. That the notice of deficiency bore a New York address rather than a foreign address was not relevant to our analysis, since no claim was made by petitioner in *Hamilton* that the New York address was not the last known address.
>
> The *Hamilton* rule has been followed in *Krueger v. Commissioner*, 33 T.C. 667 (1960), to permit an individual on a world cruise at the time the notice was mailed to take advantage of the 150-day period; in *Degill Corp. v. Commissioner*, 62 T.C. 292 (1974), to a

> Pennsylvania corporation all of whose activities took place abroad; in *Camous v. United States*, 67 T.C. 721 (1977), to both a husband and wife when only one of them was abroad; and in *Estate of Lombard v. Commissioner,* 66 T.C. 1 (1976) to the estate of a decedent, domiciled outside the United States at the time of her death, with an executor in a foreign country and an administrator in this country.
>
> While these decisions were sometimes justified on the technical ground that the word "outside," in the section 6213(a) clause "if the notice of deficiency is addressed to a person outside the United States," modifies "person" rather than "addressed," the Court has rejected a "mechanical approach in favor of an interpretation more consonant with the desires of its framers." *Lewy v. Commissioner*, 68 T.C. 779, 782 (1977). Thus, in *Cowan v. Commissioner*, 54 T.C. 647 (1970), where the taxpayer had been visiting Mexico from 9 a.m. until 7:30 p.m. on the day the notice of deficiency was mailed at 3 p.m., we rejected the taxpayer's argument that his ephemeral presence abroad at the time the notice was mailed entitled him to 150 days to file. Similarly, in *Lewy v. Commissioner, supra*, the taxpayer was a resident of France who happened to be in the United States on the day the notice was mailed but left for France the following day and was gone for almost 3 months. We held that he was entitled to the 150-day period.

Clearly, in a case where the IRS sends a notice of deficiency to a taxpayer's last known address in the United States, it has no idea that the taxpayer might be residing or temporarily outside the United States and thus be entitled to 150 days.

A final example of a statutory extension that can lead to the reversal of a premature statutory assessment is found in § 6213(f), which tolls the statute of limitations under § 6213(a) while a bankruptcy automatic stay is in effect plus sixty days after. While the IRS tries to keep up with bankruptcy

filings, it often doesn't know at the end of ninety days that there is a bankruptcy stay in effect, so a statutory assessment may need to be reversed.

In short, § 6213(c) is not the sharp-edged jurisdictional sword that the Commissioner claims, but rather is subject to numerous exceptions and operates in many circumstances in ways that closely resemble equitable tolling.

As a result, the equitable tolling available under the correct non-jurisdictional reading of § 6213(a) is quite similar to the uncertainties requiring abatements of assessments under § 6213(c) under any of the above circumstances.

V. Section 6215 Does Not Support a Conclusion that Section 6213(a) is Jurisdictional.

Section 6215(a) provides:

> If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary. No part of the amount determined as a deficiency by the Secretary but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment.

The Commissioner advances yet another statutory context argument, this time based on § 6215. Respondent's reasoning (after quoting the above provision), in its entirety, is:

> Yet, section 6213(c) would have required the assessment and collection of the full amount of the deficiency upon the lapse of the

> period for filing a petition with the Court. These provisions read together establish that Congress intended that only a timely filed petition would be the subject of the Court's decision so that the prohibition against assessment and collection of disallowed amounts in section 6215 does not conflict with the requirement to assess and collect amounts determined in defaulted notices under section 6213(c).

Respondent's response at 9-10.

Section 6215 does not, in fact, join in mystic harmony with § 6213(c) to provide clear evidence of the jurisdictional nature of § 6213(a)—rather, it's a prosaic administrative rule concerning decisions of the Tax Court that have become final. If there's a final decision that the taxpayer owes money, the IRS can collect it; if there's a final decision that the taxpayer doesn't owe money, the IRS can't collect anything. That's all that § 6215 does.

VI. The Number of Tax Court Petitions That Would Be Affected by a Non-jurisdictional Interpretation of Section 6213(a) is Limited.

Petitioner's memorandum of law in support of the motion to vacate provides a lengthy empirical analysis of the universe of cases that might be affected under § 7459(d) if § 6213(a) is held to be non-jurisdictional, concluding that perhaps 148 taxpayers might be affected. Memorandum at 23-37.

That same memorandum also points out, again after a lengthy examination of the relevant universe of cases, that equitable tolling would likely be asserted in perhaps 30 deficiency cases each year. Memorandum at 43-49.

In sharp contrast, the Commissioner does not present in rebuttal any substantive analysis of the administrative issues involved other than to point out that more than 28,000 petitions were filed with the Tax Court in fiscal year 2021, a statistic that is utterly irrelevant. Respondent's response to motion to vacate at 16.

VII. The Standard for Reviewing a Motion to Vacate Under Rule 162 May Include an Error of Law.

Under § 7453, this Court may prescribe its own rules of practice and procedure.

However, it may be helpful to point out a recent Supreme Court decision with respect to Federal Rule of Civil Procedure 60(b)(1), a rule that bears on some of the same matters as Rule 162, namely the grounds for relief from a decision.

In *Kemp v. United States*, 142 S.Ct. 1856 (2022), the Supreme Court held (in an 8-1 decision):

> Federal Rule of Civil Procedure 60(b)(1) allows a party to seek relief from a final judgment based on, among other things, a "mistake." The question presented is whether the term "mistake" includes a judge's error of law. We conclude, based on the text, structure, and history of Rule 60(b), that a judge's errors of law are indeed "mistake[s]" under Rule 60(b)(1).

Petitioner merely seeks to draw this Court's attention to this decision, and points out that it is also arguing that the decision to dismiss taxpayer's petition for lack of jurisdiction is also mistaken as a matter of law.

CONCLUSION

In *Boechler*, a unanimous Supreme Court announced, in deliberately sweeping terms applicable to all federal statutes, that "a procedural requirement is jurisdictional only if Congress clearly states that it is" and that, in the case of IRS deadlines, "the Commissioner's interpretation must not only be better, but also clear." *Boechler* at 1497, 1499. Petitioner has demonstrated that the Commissioner's interpretation of § 6213(a) is neither.

Respectfully submitted,

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Dated: July 15, 2022