No. 22-1789

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ISOBEL BERRY CULP;
DAVID R. CULP,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE ORDER OF
THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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GLOSSARY

A.__	Appendix filed by the appellants (ECF No. 24)
Amicus Br.	Brief amicus curiae of the Center for Taxpayer Rights in support of the appellants (ECF No. 14)
Br.	Appellants' opening brief (ECF No. 25)
Commissioner	Appellee Commissioner of Internal Revenue
I.R.C.	Internal Revenue Code of 1986 (26 U.S.C.)
I.R.M.	Internal Revenue Manual
IRS	Internal Revenue Service
TAS	Taxpayer Advocate Service

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Internal Revenue Service mailed a statutory notice of deficiency to the last known address of appellants Isobel Berry Culp and David R. Culp, on February 5, 2018. (A.131-A.141.)[1] The United

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[1] The appendix filed by the Culps (ECF No. 24) includes materials almost identical to the documents filed in the Tax Court, but it does not include the materials from the Tax Court record itself (ECF No. 7). For instance, the Culps' appendix appears to contain file and service copies

(continued…)

States Tax Court has jurisdiction to redetermine the deficiencies in such statutory notices if the taxpayer files a petition with the court "[w]ithin 90 days . . . after the notice . . . is mailed" to the taxpayer. Section 6213(a) of the Internal Revenue Code of 1986 (26 U.S.C.) (I.R.C.). The Culps, however, filed their petition on April 22, 2021 (A.158, A.164), beyond the 90-day statutory deadline, which expired on May 7, 2018. The Tax Court, therefore, lacked jurisdiction over this case, as it correctly held. *See* discussion *supra*, pp. 20-26.

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of documents, which are not stamped received by the Tax Court and which bear different signatures and handwritten dates. (*Compare* A.3-A.4, A.24, A.144, A.152-A.153, *with* ECF No. 7-2 at 2-3, 21, 51, 59-60.) The Culps' appendix also includes their exhibits as if they had been filed with their petition (*see* A.26-A.118), even though the exhibits were lodged instead with the Culps' response to the Commissioner's motion to dismiss. (*See* ECF No. 7-1 at 2 ("Attachment(s)"); ECF No. 7-2 at 52 (conceding that "[t]he exhibits to the PETITION . . . were not attached to the 18-page PETITION filed with the court but are attached and incorporated herein to this Response"); *id.* at 61-138 (exhibits).) And the Culps' appendix includes extra-record (but irrelevant) materials, such as a cover letter that apparently accompanied their petition (A.2) and a notice of receipt from the Tax Court (A.5.)

But to avoid confusion and duplication—and because the materials in the Culps' appendix do not meaningfully differ from the documents in the Tax Court record (which this Court can access)—the Commissioner is not seeking leave to file a supplemental appendix.

The Tax Court dismissed the Culps' petition for lack of subject matter jurisdiction on February 5, 2021. (A.155-A.159.) The Culps timely filed their notice of appeal on April 25, 2022, within 90 days of the Tax Court's dismissal order. (A.161.) *See* I.R.C. § 7483; Fed. R. App. P. 13(a)(1). This Court has appellate jurisdiction to review the Tax Court's order. *See* I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUES

1. Whether the Culps met their burden below to establish the Tax Court's jurisdiction.

2. Whether the 90-day period of I.R.C. § 6213(a) to file a petition for redetermination of a deficiency is jurisdictional.

3. If this 90-day period is not jurisdictional, whether it can be equitably tolled.

4. Whether the Culps waived any claims to equitable tolling.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Undersigned counsel respectfully state that this case has not previously been before this Court, and they are unaware "of any other case or proceeding that is in any way related" to this case. 3d Cir. R. 28.1(a)(2), 28.2.

STATEMENT OF THE CASE

A. Factual background

1. The Culps' 2015 joint income tax return and the February 2018 notice of deficiency

The Culps are husband and wife. (A.7.) In 2015, they each received an $8,826.30 payment from La Salle University "as compensation for 'emotional distress, pain and suffering and related damages' pertaining to an employment-related lawsuit" that they had brought against the school.[2] (A.102.)

When the Culps filed a joint income tax return for the 2015 tax year, they reported $106,686 of taxable income and $3,232 of income taxes owed. (A.53.) Their return apparently reported the two payments from La Salle as $17,652 of "Other income," which the Culps described as "PRIZES, AWARDS." (A.52 (line 21); *see also* A.39.)

Based on a Form 1099-MISC sent to the IRS by La Salle, the IRS determined that the Culps had failed to report the $8,826.30 paid to

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[2] The Culps had accused La Salle of age discrimination, breach of contract, and other misconduct connected to their employment at the school. *See generally* Am. Compl., *Culp v. La Salle Univ.*, No. 2:08-cv-1500 (E.D. Pa. June 4, 2008), ECF No. 9; Fed. R. Evid. 201(b) (authorizing courts to take judicial notice of facts "not subject to reasonable dispute").

David by the school in 2015, which the IRS considered "[n]onemployee compensation." (A.34, A.136.) On February 5, 2018, the IRS mailed a statutory notice of deficiency to the Culps showing a $3,363 underpayment of taxes for 2015, plus a $1,324 penalty under I.R.C. § 6651(a). (A.130, A.131.) The underpayment comprised $2,116 of additional income taxes and $1,247 of unpaid self-employment tax. (A.135.) The IRS mailed the notice of deficiency by certified mail to the Culps' last known address—a post office box in Montrose, Pennsylvania, the same address the couple had used on their 2015 return. (*See* A.158; *compare* A.130-A.131 *and* A.141 *with* A.52.)

2. Pre-collection correspondence between the Culps and the IRS

Before mailing the Culps the notice of deficiency, the IRS had mailed them a CP2000 notice proposing to increase their taxes owed for 2015.[3] (A.32-A.36.) The IRS sends such notices whenever a taxpayer's reported income does not match the information on file with the IRS. *See* Internal Revenue Manual (I.R.M.) § 21.3.1.6.52 (Oct. 1, 2011); *see also id.* § 21.3.1.3 (Oct. 1, 2019). A CP2000 explains the information

[3] The record does not include a complete copy of this notice; it only contains the excerpts attached by the Culps to their filings below.

used by the IRS to determine the proposed changes to the taxpayer's return and invites the taxpayer to explain whether and why he disagrees with the proposed changes. *See id.* § 21.3.1.6.52.

The CP2000 mailed to the Culps directed them to send their response "by December 13, 2017" and warned that, if they failed to do so, the IRS would "send [them] a Statutory Notice of Deficiency[.]" (A.32.) The Culps did not respond to the CP2000 until January 2018. (A.38-A.39.)

In their untimely letter to the IRS, the Culps claimed that La Salle had provided only Isobel with a Form 1099 for the settlement payment to her and no such form for the payment made to David. (A.39.) They agreed that the settlement payments were "non-employee compensation," but they claimed to have reported both payments from the school as "other income" on line 21 of their 2015 return and paid income taxes on that income accordingly. (A.39.) The Culps thus disputed owing any more taxes on the settlement payments. (A.39.)

The IRS responded to the Culps' letter in another CP2000, dated May 7, 2018.[4] (A.55-A.57.) The IRS accepted that the Culps had reported the payment to David as taxable income and thus proposed to reverse the increase in income taxes owed on that payment. (*See* A.57; *see also* A.56.) But the IRS stood by its proposal to assess $1,247 in self-employment tax arising from the nonemployee compensation paid by La Salle. (A.57.) The CP2000 explained that self-employment tax is generally owed on nonemployee compensation and "consists of Social Security Tax of 12.4% and Medicare Tax of 2.9%," plus "an additional Medicare Tax of 0.9%" on "[self-employment] income in excess of certain thresholds based on . . . filing status." (A.57.)

Like the first CP2000 mailed to the Culps, the second CP2000 invited them to submit any disagreements to the IRS in writing within 30 days. (A.55.) The Culps apparently did not send another response to the IRS. (*See* A.11-A.12, A.146-A.147.)

[4] The record does not include a complete copy of this notice either, because the Culps did not provide one below.

3. The IRS collects the Culps' overdue 2015 taxes through levies

Nearly a year after the Culps' 90-day deadline under I.R.C. § 6213(a) had expired, Isobel was notified that $148.95 of her April 2019 Social Security payment had been levied upon and applied to a delinquent tax debt owed to the IRS. (A.59.) A week later, David received a similar notice that $326.10 of his monthly Social Security payment had been levied upon. (A.60.) In May 2019, Isobel was notified of another $148.95 Social Security levy. (A.61.) And a week later, David received notice of another $326.10 levy. (A.62.)

The Culps then enlisted the help of the IRS's Taxpayer Advocate Service (TAS) in June 2019. (*See* A.13.) TAS is "an independent organization within the IRS" that "helps taxpayers resolve problems with the IRS and recommends changes to prevent future problems." I.R.M. § 13.1.7.3(1) (Sept. 21, 2021). Eventually, at TAS's urging, the Culps obtained a letter from La Salle's in-house counsel describing the nature of the 2015 settlement payments. (A.15, A.102.) But TAS allegedly stopped communicating with the Culps after that, without having resolved their disputes with the IRS. (*See* A.17-A.18, A.103-A.104.)

In November 2019, David was notified that $851.57 of his 2018 income tax refund had been withheld and applied by the IRS toward the Culps' outstanding taxes for 2015. (*See* A.18, A.109.) Thus, the IRS's collection actions recovered a little over $1,800 of the amounts owed by the Culps for 2015.[5] (A.20.)

B. Proceedings in the Tax Court

1. The Culps' petition seeking a "refund" and challenging the IRS's collection actions

On April 22, 2021, the Culps filed a Tax Court petition, in which they asserted "a right to a refund of all payments made under protest, or levied on, or executed on by the IRS as to the[ir] . . . 2015 tax return." (A.20.) They claimed that they had fully paid the amounts charged against them for 2015 "through unlawful and inappropriate levies." (A.20.) They also alleged that the IRS and TAS had acted negligently, recklessly, and in bad faith (A.21-A.22) and sought damages for wrongful collection under I.R.C. § 7433(a) and for failure to release a lien under I.R.C. § 7432. (A.22.)

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[5] The Culps had also made a voluntary $202 payment to the IRS in May 2017. (*See* A.10, A.30, A.38.)

The petition did not mention, let alone dispute, the February 2018 notice of deficiency. Instead, the petition purported to challenge a "Notice of Determination Concerning Collection Action" (A.3), which the Culps failed to include with their petition.

In the petition, the Culps argued that the Tax Court could consider their refund claims under I.R.C. § 6512(b) and that those claims were timely because the couple sought to recover taxes paid within the preceding two years. (A.23; *see also* A.4.) The Culps also contended that "the actions of TAS in hiding information from the[m] and undermining their claims against the IRS" justified "expand[ing] the time frames for filing an action." (A.23.) The petition did not specify which part or parts of the Culps' "action" should be accepted out of time because of TAS's alleged misconduct, nor did the petition mention and address the 90-day deadline for deficiency actions imposed by I.R.C. § 6213(a).[6]

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[6] The petition also discussed a separate and unrelated dispute involving the Culps' law firm, Berry and Culp, P.C. (*See* A.12-A.13, A.15-A.17, A.23.) When they filed this suit, the Culps simultaneously filed a second Tax Court case for their firm, using an apparently identical petition. (*See* A.125-A.126; *see generally Berry & Culp PC v. Commissioner*, No. 14058-21 (Tax Ct.).) That second case remains pending in the Tax Court.

2. The Commissioner's motion to dismiss the petition for lack of subject matter jurisdiction

The Commissioner moved to dismiss the petition for lack of jurisdiction on September 1, 2021. (A.122-A.129, A.155.) He argued that the petition was untimely to the extent the Culps sought a redetermination of their 2015 taxes (A.124-A.125) and unripe to the extent they purported to challenge a notice of determination concerning collection action (A.123-A.124).

The Commissioner provided proof that the IRS had mailed the notice of deficiency to the Culps' last known address in February 2018, almost three years before they sued. He attached to his motion a copy of the notice of deficiency and of Postal Service Form 3877, which showed that, on February 5, 2018, the Commissioner mailed the notice of deficiency by certified mail to the Culps' mailing address in Montrose, Pennsylvania. (A.125, A.130-A.141.) And the Commissioner confirmed that the IRS had no record of mailing the Culps any notice of determination concerning collection action for 2015. (A.124.)

The Culps opposed the motion on several contradictory grounds. First, they claimed that they had "never received" the notice of deficiency. (A.145.) Second, they disputed that the IRS had "ever sent"

the notice. (A.145.) Third, they suggested that if the IRS had mailed the notice of deficiency, it later "scuttled" the notice after receiving the Culps' January 2018 letter. (A.146.) To prove this alleged rescission, the Culps pointed to the CP2000 mailed in May 2018, which reduced the total amount that they owed, but which still proposed to assess self-employment tax for 2015. (*See* A.146, A.55-A.57.)

The Culps' response, like the petition, neither mentioned nor relied on I.R.C. § 6213(a) to establish the Tax Court's jurisdiction. (*See generally* A.144-A.153.) And they conceded that the IRS never mailed them a notice of determination concerning collection action for 2015. (*See* A.148.) Instead, the Culps re-invoked the court's authority under I.R.C. § 6512(b) to determine overpayments and to order refunds in limited instances. (A.149-A.150.) The Culps then argued anew that their suit was timely because they had filed their petition within "a two-year Lookback Rule for refund litigation filed in the U.S. Tax Court." (A.150.) The Culps also repeated their theory that "the [allegedly] bad faith actions of TAS in secreting information from [them] and undermining their claims against the IRS . . . expand[ed] the time frames for filing an action." (A.150.) Finally, the Culps challenged the

Commissioner's motion as untimely (by five days) and urged the court to deny the motion on that basis. (A.151 (citing Tax Ct. R. 36).)

3. The Tax Court's dismissal

The Tax Court agreed with the Commissioner that it lacked jurisdiction over the Culps' petition and granted the motion to dismiss. (A.156-A.159.) The court explained that its jurisdiction was limited by statute, emphasized that it was the Culps' burden to establish jurisdiction, and held that the couple had not met their burden. (A.156.)

First, the court noted that its collection-due-process jurisdiction under I.R.C. § 6330(d) "depends upon the issuance of a valid notice of determination and the timely filing of a petition." (A.156.) The court found that the Culps had "failed to demonstrate that [the Commissioner] ha[d] issued a notice of determination concerning collection activity for [2015]," *e.g.*, by rebutting the Commissioner's no-records statement with a copy of a notice. (A.157.) Because there was no determination for the court to review, there was no basis for jurisdiction under I.R.C. § 6330(d). (A.157.)

Second, the court noted that its deficiency jurisdiction under I.R.C. § 6213(a) "depends upon the issuance of a valid notice of deficiency and the timely filing of a petition." (A.157.) The court found that the Commissioner had mailed the notice of deficiency to the Culps' "last known address" on February 5, 2018, and that the couple had filed their petition long after their 90-day period to do so had expired, in May 2018. (A.158.) Because the notice was "valid, even if . . . not received by the taxpayer" (A.158), and because the Tax Court lacked "authority to extend th[e] 90-day period" under I.R.C. § 6213(a) (A.157), the court held that it "lack[ed] jurisdiction over any challenge to the Notice of Deficiency." (A.158.)

Finally, the court rejected the Culps' argument about the timeliness of the Commissioner's motion, because "[i]t is well settled that . . . either party, or the Court sua sponte, may raise jurisdiction at any time." (A.155-A.156 (citing cases).)[7]

[7] The court also held that it lacked jurisdiction over the Culps' unrelated claims involving Berry & Culp, P.C. (A.159.)

SUMMARY OF ARGUMENT

The Tax Court correctly held that it lacked deficiency jurisdiction under I.R.C. § 6213(a). The statute imposes a 90-day deadline to seek a redetermination in the Tax Court. This deadline runs from the date a notice of deficiency is mailed, which occurred in this case on February 5, 2018. The Culps did not file their petition until three years later.

The Tax Court also correctly held that it lacked "refund" jurisdiction under I.R.C. § 6512(b). The Tax Court has no freestanding authority to consider refund claims. Its authority depends on its underlying deficiency jurisdiction, a point the Culps now concede. Since the Tax Court lacked deficiency jurisdiction here, it lacked refund jurisdiction as well. In addition, the Tax Court correctly held that it lacked collections-related jurisdiction under I.R.C. §§ 6320(c) and 6330(d) because the Culps did not receive a notice of determination concerning collection action from the IRS Independent Office of Appeals, which notice is a predicate for such jurisdiction.

There is no merit to the arguments that I.R.C. § 6213(a) is nonjurisdictional and is subject to equitable tolling. This Court's precedents treat section 6213(a)'s deadline as jurisdictional, and neither

the Culps nor their amicus have shown that *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022), has eroded these precedents. *Boechler* involved another statute, I.R.C. § 6330(d)(1). That statute differs substantially from section 6213(a) in its text, context, and history, all of which support the widespread and longstanding view that section 6213(a)'s 90-day deadline is jurisdictional and thus not subject to equitable tolling. But even if section 6213(a) is a nonjurisdictional claims processing rule, the statute's text and context reflect Congress's intent to preclude courts from tolling the deadline for equitable reasons.

Furthermore, this Court should not entertain the Culps' arguments about equitable tolling of section 6213(a)'s 90-day deadline. The Culps waived any equitable tolling argument by failing to raise it below. Moreover, there is no basis for tolling here. The Tax Court's findings and the record belie the critical allegation behind the Culps' tolling claim: that they never received the notice of deficiency.

The Court should also reject the Culps' other appellate arguments. The Tax Court did not abuse its discretion by accepting the Commissioner's motion 50 days after service of the petition. Nor did it abuse its discretion by discussing only some of the Culps' arguments in

the dismissal order. And the Tax Court properly limited its decision to the jurisdictional issues, which must always be resolved before reaching the merits of a federal case.

ARGUMENT

The Tax Court correctly dismissed the Culps' petition for lack of jurisdiction because they did not establish any statutory basis for the court's review

Statement of the standard or scope of review

When reviewing an order dismissing a claim for lack of subject matter jurisdiction, this Court exercises plenary review over legal conclusions and reviews findings of fact for clear error. *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 193 (3d Cir. 2018). This Court reviews a lower court's discretionary rulings for abuse of discretion. *See generally Greate Bay Hotel & Casino v. Tose*, 34 F.3d 1227, 1235 (3d Cir. 1994).

A. Introduction

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

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

"The Tax Court's principal basis for jurisdiction is I.R.C. § 6213(a)," which "gives the Tax Court jurisdiction to redetermine a 'deficiency' in income . . . taxes as to which [i] the IRS has issued a notice of deficiency . . . and [ii] the taxpayer has filed a timely petition for redetermination." *Sunoco*, 663 F.3d at 187. This Court recently reexamined section 6213(a) and concluded that it "unequivocal[ly]" and "unambiguous[ly]" speaks in "jurisdictional" terms. *Garrett v. Commissioner*, 798 F. App'x 731, 733 (3d Cir. 2019); *see also* pp. 33-34, *infra* (citing similar holdings in other circuits).

The Tax Court also has jurisdiction to review certain collections-related determinations made by the IRS Independent Office of Appeals. But several events must occur before that jurisdiction arises: (i) the IRS must issue a notice to the taxpayer of its intent to begin a collection action and of the taxpayer's right to a collection-due-process hearing before the Office of Appeals, *see* I.R.C. § 6330(a); (ii) the taxpayer must request and receive a hearing, *id.* § 6330(b)-(c); (iii) the Office of Appeals must decide the disputed issues, *id.* § 6330(c)(3); (iv) the Office of

Appeals must notify the taxpayer of its final determination, *see id.* § 6330(d)(1); and (v) the taxpayer must file a petition with the Tax Court within 30 days of the determination. *See id.*; *accord* I.R.C. § 6320(c) (adopting a similar framework for liens). While this 30-day deadline to seek Tax Court review is not jurisdictional, *see Boechler*, 142 S. Ct. at 1501, the Tax Court's jurisdiction still hinges on the issuance of a notice of determination concerning collection action by the Office of Appeals. *See generally* 14 *Mertens Law of Fed. Tax'n* § 50:22 (Sept. 2022 update).

Finally, the Tax Court has very "limited" authority over refunds. *Sunoco*, 663 F.3d at 188 (quoting *Est. of Baumgardner v. Commissioner*, 85 T.C. 445, 452 (1985)). Under I.R.C. § 6512(b), the court has "jurisdiction to determine the amount of [an] overpayment" once it "finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year." I.R.C. § 6512(b)(1). "[W]hen the decision of the Tax Court has become final," the overpayment must then "be credited or refunded to the taxpayer." *Id.* If the Commissioner does not timely refund an overpayment, the Tax Court then obtains jurisdiction "upon motion by the taxpayer . . . to

order the refund of such overpayment." *Id.* § 6512(b)(2). Otherwise, refund jurisdiction "generally lies with the federal district courts and the Court of Federal Claims." *Sunoco*, 663 F.3d at 188.

B. The Tax Court lacked jurisdiction to review the notice of deficiency under I.R.C. § 6213(a) because the Culps' petition was untimely

The Tax Court recognized that the Culps' petition did not challenge a notice of deficiency. (*See* A.156.) Yet the court still considered whether it could exercise its deficiency jurisdiction under I.R.C. § 6213(a). (*See* A.157-A.158.) Given the record below, the Tax Court did not clearly err in finding that the IRS had properly mailed the Culps a notice of deficiency for 2015 and that the Culps had filed their petition more than 90 days later. The court thus correctly held that it lacked deficiency jurisdiction under section 6213(a).

1. A properly mailed notice of deficiency starts section 6213(a)'s 90-day clock

By statute, a notice of deficiency must be mailed "to the taxpayer" at his "last known address." I.R.C. § 6212(a)-(b)(1). The Tax Court's deficiency jurisdiction thus depends on when the notice of deficiency "is mailed" to the taxpayer. I.R.C. § 6213(a); *see Delman v. Commissioner*, 384 F.2d 929, 934 (3d Cir. 1967). This Court and others have uniformly

held that actual "*receipt* of the notice by the taxpayers is not required in order that the statutory filing period commence." *Clarkson v. Commissioner*, 664 F. App'x 265, 267-68 (3d Cir. 2016) (emphasis added) (quoting *Boccuto v. Commissioner*, 277 F.2d 549, 552 (3d Cir. 1960)); *accord United States v. Goldston*, 324 F. App'x 835, 837 (11th Cir. 2009) (per curiam) (citing cases); *see generally* 14 *Mertens Law of Fed. Tax'n* § 50:52 (Sept. 2022 update).

The Commissioner has the burden of proving, by competent evidence, the issuance of a deficiency notice and the act and date of its mailing. *See Hoyle v. Commissioner*, 136 T.C. 463, 468 (2011); *accord Clarkson*, 664 F. App'x at 267-68 & n.9. "The Tax Court has held . . . that 'exact compliance with Postal Service Form 3877 mailing procedures raises a presumption of official regularity in favor of the Commissioner and is sufficient, absent evidence to the contrary, to establish that a notice of deficiency was properly mailed.' " *Clarkson*, 664 F. App'x at 267-68 (emphasis omitted) (quoting *Hoyle*, 136 T.C. at 468).

2. The IRS properly mailed the notice of deficiency on February 5, 2018

The Tax Court correctly rejected the Culps' allegation that the IRS had never issued a notice of deficiency and correctly found that it had properly mailed the notice of deficiency to their last known address on February 5, 2018. (A.158.) The Commissioner provided copies of the notices mailed to David and Isobel, each dated February 5, 2018, and each bearing its own tracking number. (A.130-A.131; *accord* A.158.) The Commissioner also supplied "a properly completed" Postal Service Form 3877, postmarked February 5, 2018, and signed by the receiving post office employee. (A.141; *accord* A.158.) This form showed the use of "Certified" mail and bore the same two tracking numbers found atop the notices of deficiency.[8] (*Compare* A.141 *with* A.130-A.131; *accord* A.158.) And the Culps "ha[d] not disputed" that the P.O. Box in Montrose, Pennsylvania was their last known address. (A.158.)

Given its finding of proper mailing, the Tax Court correctly rebuffed the Culps' claim that they had "never received the Notice of

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[8] The form also showed the number of mail pieces received by the post office. *See Clarkson*, 664 F. App'x at 268 n.10 (discussing *O'Rourke v. United States*, 587 F.3d 537, 541 (2d Cir. 2009)).

Deficiency" (A.158), since actual receipt is irrelevant under section 6213(a). *See Clarkson*, 664 F. App'x at 267-68. "The taxpayer's failure to receive a notice properly mailed to [his] last known address does not extend or toll the ninety days" to file a petition under section 6213(a). *Freck v. I.R.S.*, 37 F.3d 986, 993 n.13 (3d Cir. 1994) (citing *Tadros v. Commissioner*, 763 F.2d 89, 91-92 (2d Cir. 1985)).

The Culps speculated that the IRS would not have mailed the May 2018 CP2000 if the IRS had mailed them a notice of deficiency months earlier. (A.148.) But the Culps ignored that the first CP2000 they received warned that the IRS would issue a notice of deficiency if they did not respond by December 17, 2017, and they missed that deadline by at least several weeks. *See* p. 6, *supra*.[9]

Finally, the Tax Court correctly rebuffed the Culps' alternative theory that the May 2018 CP2000 must have rescinded the earlier

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[9] The Culps' response to the first CP2000 was nominally dated January 5, 2018, but the record does not show when they mailed their letter or when the IRS received it. If the IRS receives a taxpayer's response to a CP2000 after the 30-day response deadline, and close in time to the "Notice [of Deficiency] Mailout Date," the IRS must issue the notice of deficiency *before* it processes the taxpayer's untimely response to the CP2000. I.R.M. § 4.19.2.4.6.6.3(2) (Sept. 1, 2015); *accord* I.R.M. § 4.19.2.6.28(3).

notice of deficiency. The IRS cannot rescind a notice of deficiency without the taxpayer's consent, and that consent must be evidenced by a signed writing that specifically identifies the notice of deficiency and its issue date, among other things. *See* Rev. Proc. 98-54 §§ 5.03, 5.04, 5.06(2), 1998-2 C.B. 531. The Culps never claimed to have sent such a document to the IRS.

3. By filing suit in April 2021, the Culps missed their 90-day deadline under I.R.C. § 6213(a) by almost three years

Having found that the IRS properly mailed the notice of deficiency on February 5, 2018, the Tax Court correctly determined that the Culps had until May 7, 2018, to file their petition under section 6213(a). But the Culps did not mail their petition to the Tax Court until April 19, 2021, and their petition was not filed with the court until April 22, 2021, which is nearly three years too late. (A.158 (citing I.R.C. § 7502).) The Tax Court thus correctly found that the petition was untimely and therefore beyond the court's deficiency jurisdiction.

4. The Culps fail to show that the Tax Court erred as to the timeliness of their petition

On appeal, the Culps repeat the same unavailing arguments they made below. They claim that the IRS "never sent" the notice of

deficiency or, instead, that they "never received" the notice and that the IRS later "retracted" it. (Br. 16; *see also id.* at 17-19.) For the reasons above, the Culps have failed to show any error, let alone clear error, in the Tax Court's contrary factual findings.

At any rate, if the Tax Court had erred in crediting the Commissioner's proof of mailing over the Culps' contrary, "no-notice" allegation, that error was harmless. "The notice of deficiency . . . is the taxpayers' ticket to the Tax Court to litigate the merits of the deficiency determination, and is a jurisdictional prerequisite to a suit in that forum." *Robinson v. United States*, 920 F.2d 1157, 1158 (3d Cir. 1990) (internal quotation marks and citation omitted); *see also Laing v. United States*, 423 U.S. 161, 165 n.4 (1976). So if the IRS had not issued a notice of deficiency, the Tax Court still could not have exercised jurisdiction.

Finally, crediting the Culps "rescission" theory does not help them establish deficiency jurisdiction under section 6213(a). "If a notice of deficiency is rescinded, the taxpayer has no right to file a petition with the Court based on such a notice." *Nichols v. Commissioner*, 84 T.C.M. (CCH) 483, 2002 WL 31415492, at *3 (Oct. 24, 2002) (citing cases). Nor

can the Culps rely on the CP2000 mailed in May 2018 to satisfy the statute's notice-of-deficiency requirement. A CP2000 is not a notice of deficiency, *see Milligan v. Commissioner*, 108 T.C.M. (CCH) 662, 2014 WL 7398662, at *2 (Dec. 30, 2014), and, in any event, the Culps filed their petition more than 90 days after the last CP2000 was mailed to them (in May 2018).

C. The Tax Court lacked "refund" jurisdiction under I.R.C. § 6512(b) because it had no underlying jurisdiction to consider the Culps' 2015 deficiencies

In the Tax Court, the Culps chiefly relied on I.R.C. § 6512(b) and invoked the court's "refund jurisdiction." (*See, e.g.*, A.4, A.20, A.23, A.149-A.150.) They argued that the Tax Court can "adjudicate[ ]" refund claims without a notice of deficiency and that such claims are timely if filed with the Tax Court within two years of a disputed payment. (A.150; *see also* A.4, A.23.) The Culps were wrong as a matter of law, and the Tax Court did not err in dismissing their petition.

Far from granting the Tax Court unbounded power over any two-year-old tax payments, section 6512(b) provides only "limited" authority as to refunds. *Sunoco*, 663 F.3d at 188 (quoting *Est. of Baumgardner*,

85 T.C. at 452). The statute ties the Tax Court's "refund" jurisdiction to the court's extant authority to "determine" an underlying deficiency. *See Winn-Dixie Stores, Inc. v. Commissioner*, 110 T.C. 291, 295 (1998) (citing *Barton v. Commissioner*, 97 T.C. 548, 552 (1991)); *see, e.g.*, *Pope v. Commissioner*, 119 T.C.M. (CCH) 1415, 2020 WL 2520638, at *4 (May 18, 2020).

As this Court has explained, "[A] Tax Court determination of overpayment is a prerequisite to any award of the amount of such overpayment where a notice of deficiency has been issued and a redetermination sought in the Tax Court." *Bachner v. Commissioner*, 81 F.3d 1274, 1278 (3d Cir. 1996). Section 6512(b) thus merely "expand[s]" upon the Tax Court's underlying deficiency jurisdiction. *Ax v. Commissioner*, 146 T.C. 153, 160 (2016); *see also* 14 *Mertens Law of Fed. Tax'n* § 50:20 (Sept. 2022 update) ("[T]he Tax Court's overpayment jurisdiction arises out of a tax deficiency action.").

In this case, there was no underlying jurisdiction for the Tax Court to expand. The Culps' untimely petition deprived the court of any authority to redetermine their 2015 deficiencies. Thus, the Tax Court

could not exercise its expanded "refund jurisdiction" under section 6512(b).

Section 6512(b)(3) does not, as the Culps argued below, prescribe a separate deadline for seeking refunds in Tax Court. (*See, e.g.*, A.23, A.150.) That subsection simply forbids the allowance and payment of refunds until the Tax Court finds that an overpayment was made either "after the mailing of the notice of deficiency," I.R.C. § 6512(b)(3)(A), or within the limitation periods governing refund claims submitted to the IRS. *See id.* § 6512(b)(3)(B)-(C) (cross-referencing I.R.C. § 6511(b)(2), (c) & (d)). Taxpayers have two years from the time a tax was paid, or three years from the time the relevant tax return was filed (whichever is later) to file a refund claim with the IRS. *See id.* § 6511(a).

For at least two reasons, the Culps mistakenly relied on section 6512(b)(3). First, the statute makes a refund contingent on a Tax Court "determin[ation]" of overpayment and thus presumes that the court has exercised its underlying deficiency jurisdiction. Second, the Culps have not alleged (and the record does not show) that they ever filed a refund claim with the IRS. Simply put, section 6512(b)(3)

does not displace a taxpayer's 90-day deadline to invoke the Tax Court's deficiency jurisdiction under section 6213(a).[10]

The Culps make new arguments on appeal. They contend that the Tax Court can exercise "overpayment jurisdiction" if a "deficiency petition is considered timely as a result of equitable tolling" of section 6213(a)'s 90-day deadline. (Br. 21, 22.) They also fault the Tax Court for "assum[ing] that equitable tolling could not apply to the filing deadline in § 6213(a)." (Br. 21.)

The Court should reject these new arguments because the Culps never made them below, and they have proffered no "exceptional circumstances" to justify appellate review of their novel theories. *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 416 (3d Cir. 2011) (internal quotation marks omitted). Nor did The Tax Court commit "plain error" by overlooking these unstated theories *sua sponte*. *Forrest v. Parry*, 930 F.3d 93, 113 (3d Cir. 2019). As discussed below, appellate courts

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[10] On appeal, the Culps appear to abandon their argument that section 6512(b) grants standalone Tax Court jurisdiction over refunds. They now concede that the statute "assumes a predicate timely filed deficiency suit." (Br. 3; *see also id.* at 22 ("grants on to".) They also apparently ditch their "two-year Lookback Rule" theory, emphasizing instead that the levies here occurred after the notice of deficiency was issued. (Br. 22.)

had long treated section 6213(a) as jurisdictional. *See* pp. 32-34, 38, *infra*. For that reason, the 90-day deadline of section 6213(a) cannot be equitably tolled. *See Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340, 345 (3d Cir. 2000) ("[A] jurisdictional bar . . . cannot be tolled, regardless of the equities[.]"). And finally, even if the Tax Court had erred, that error did not affect the Culps' "substantial rights." *Forrest*, 930 F.3d at 113. The Culps could have filed a refund suit in either a district court or the Court of Federal Claims. *See* 28 U.S.C. § 1346(a)(1), I.R.C. § 7422(a). For some reason, the Culps have not apparently pursued that separate relief.

D. The Tax Court lacked collections-related jurisdiction under I.R.C. §§ 6320(c) and 6330(d) because there has been no notice of determination concerning collection action for 2015

The Tax Court held that it lacked jurisdiction under I.R.C. § 6320(c) and I.R.C. § 6330(d) because the Office of Appeals had not "issued a notice of determination concerning collection activity for [2015]." (A.157.) The record supports that conclusion. Beyond checking a box on their form petition, the Culps did not allege, let alone prove, that the IRS had mailed them any notice of determination that could support the Tax Court's collections-related jurisdiction. Indeed,

the Culps did not simply fail to show that the IRS had issued a notice of determination; they argued affirmatively that the IRS had not done so. In their response to the motion to dismiss, they accused the Commissioner of "ma[king] it impossible to file a claim with the Tax Court" under sections 6320(c) or 6330(d) (A.148), because the IRS, "without notice," had "levied on [their] assets." (A.147.) The Culps still concede that the Office of Appeals issued no notice of determination concerning the collection of their 2015 taxes. (*See, e.g.*, Br. 19-20, 24.) There is thus no basis for the Tax Court's collections-related jurisdiction under sections 6320(c) and 6330(d).[11]

[11] The Culps also sought damages under I.R.C. §§ 7432 and 7433 for the IRS's and TAS's alleged misconduct. (A.22-A.23.) Although the Tax Court did not discuss their damages claims, it plainly lacked jurisdiction over them because such damages actions must be brought in a district court. *See* I.R.C. § 7432(a) ("taxpayer may bring a civil action . . . against the United States in a district court of the United States"); *id.* § 7433(a) (same). Both statutes also require administrative exhaustion of remedies within the IRS. *See* I.R.C. §§ 7432(d)(1), 7433(d)(1). The Culps did not allege that they exhausted those remedies.

E. Despite *Boechler v. Commissioner*, I.R.C. § 6213(a) is still jurisdictional

1. This Court's published precedents treat the deadline as a jurisdictional requirement

Since the 1950s, this Court has construed section 6213(a)'s 90-day deadline as a jurisdictional requirement. In *Dudley v. Commissioner*, 258 F.2d 182, 183 (3d Cir. 1958), the Court explained that "the Tax Court acquires jurisdiction to redetermine [a] deficiency only after a notice of deficiency . . . is mailed to a taxpayer who thereafter files a petition for redetermination within the appropriate time." *See also Geftman v. Commissioner*, 154 F.3d 61, 63 (3d Cir. 1998) ("The Tax Court had jurisdiction . . . based on [the taxpayer's] timely filing of a petition[.]"). Scarcely a decade ago, this Court reaffirmed that section 6213(a) is jurisdictional because the statute empowers "the Tax Court to redetermine a 'deficiency' in income." *Sunoco*, 663 F.3d at 187.

And just a few years ago, this Court reexamined the question whether Section 6213(a) is jurisdictional in light of recent Supreme Court decisions distinguishing between claims processing rules and jurisdictional statutes. *See Garrett*, 798 F. App'x at 732 & n.4. This Court held that "Section 6213(a) is jurisdictional." *Id.* at 733. Its

analysis began and ended with the statute's plain language. "Congress spoke in unequivocal terms, stating that the Tax Court 'shall have no jurisdiction' unless a petition . . . is timely filed." *Id.* (quoting I.R.C. § 6213(a)). The statute's "unambiguous language combined with th[e] tight linkage between the court's authority and a statutory deadline leads inevitably—without resorting to further analysis—to the conclusion that Congress limited the court's authority to review only . . . petitions that are timely filed." *Id.* (footnote omitted); *accord Asad v. Commissioner*, 751 F. App'x 339, 340 (3d Cir. 2018) (per curiam); *Clarkson*, 664 F. App'x at 266 & n.3.

The Court is not alone in this view. "In cases too numerous to mention, dating back to 1924, [the Tax Court] ha[s] held that the statutorily-prescribed filing period in deficiency cases is jurisdictional." *Guralnik v. Commissioner*, 146 T.C. 230, 238 (2016). So has nearly every circuit. *See, e.g.*, *Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1092 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2596 (2021); *Tilden v. Commissioner*, 846 F.3d 882, 886-87 (7th Cir. 2017); *Edwards v. Commissioner*, 791 F.3d 1, 5-6 (D.C. Cir. 2015); *Briley v. Commissioner*, 622 F. App'x 305, 306 (4th Cir. 2015)

(per curiam); *Mabbett v. Commissioner*, 610 F. App'x 760, 765 & n.7 (10th Cir. 2015); *Terrell v. Commissioner*, 625 F.3d 254, 259 (5th Cir. 2010); *Sicari v. Commissioner*, 136 F.3d 925, 928 (2d Cir. 1998); *Patmon & Young Prof'l Corp. v. Commissioner*, 55 F.3d 216, 217 (6th Cir. 1995); *Pugsley v. Commissioner*, 749 F.2d 691, 692 (11th Cir. 1985) (per curiam) (citing *Rich v. Commissioner*, 250 F.2d 170, 175 (5th Cir. 1957)); *Andrews v. Commissioner*, 563 F.2d 365, 366 (8th Cir. 1977) (per curiam) (citing cases); *see also Athens Pizza of Jaffrey, Inc. v. Commissioner*, 134 F.3d 361, 1998 WL 42182, at *1 (1st Cir. Feb. 3, 1998) (per curiam) (unpublished table decision). Neither the Culps nor their amicus cite any contrary decisions.

2. *Boechler* does not erode or contradict this Court's prior decisions about I.R.C. § 6213(a)

The Court is "bound by [its] precedential opinions . . . unless they have been reversed by an en banc proceeding or have been adversely affected by an opinion of the Supreme Court." *Garcia v. Att'y Gen. of U.S.*, 553 F.3d 724, 727 (3d Cir. 2009) (citing *In re Continental Airlines*, 134 F.3d 536, 542 (3d Cir. 1998)); *see also* 3d Cir. I.O.P. 9.1. The en banc Court has never addressed the jurisdictional character of

section 6213(a), so the panel should follow *Dudley* and its progeny unless a Supreme Court decision has eroded the holdings in those cases.

Boechler, however, does not fit the bill because it does not "conflict" with this Court's prior decisions. *Mennen Co. v. Atl. Mut. Ins. Co.*, 147 F.3d 287, 294 n.9 (3d Cir. 1998). Indeed, in the term just before *Boechler*, the Supreme Court denied certiorari in *Organic Cannabis*, which presented the same jurisdictional question the Culps and their amicus raise here. *See* Pet. for Writ of Cert., *Organic Cannabis Found., LLC v. Commissioner*, No. 20-1014, 2021 WL 307473, at *ii (S. Ct. Jan. 22, 2021).[12]

Boechler did not examine section 6213(a), and it mentioned the statute only once. *See* 142 S. Ct. at 1500. The case concerned the 30-day deadline under I.R.C. § 6330(d)(1) to petition the Tax Court for review of a final collection-due-process determination. That statute allows petitioners to seek Tax Court review "within 30 days of a

[12] Amicus contends that the D.C. Circuit's decision in *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019), also warrants revisiting this Court's section 6213(a) decisions. (Amicus Br. 19, 21, 26.) But *Myers* is neither an en banc decision of this Court nor conflicting Supreme Court precedent, and the case involved a different statute (I.R.C. § 7623(b)(4)).

determination" by the IRS's Independent Office of Appeals and parenthetically adds that "the Tax Court shall have jurisdiction with respect to such matter." I.R.C. § 6330(d)(1) (parentheses omitted).

The *Boechler* Court agreed that the text and structure of section 6330(d)(1) could be read to make its deadline jurisdictional, but the Court did not adopt that construction because "the text does not *clearly* mandate the jurisdictional reading." 142 S. Ct. at 1498 (emphasis added); *see also id.* at 1499. The Court emphasized that "[t]he deadline . . . explains what the taxpayer may do," while the "parenthetical at the end of the sentence[ ] speaks to what the Tax Court shall do." *Id.* at 1498. The Court distinguished this language from other Tax Code provisions that "more clearly link their jurisdictional grants to a filing deadline." *Id.* at 1498-99 (discussing I.R.C. §§ 6404(g)(1), 6015(e)(1)(A)).

Section 6213(a) differs from section 6330(d)(1) in several, jurisdictionally significant ways. Textually speaking, section 6213(a) more clearly evinces Congress's intent to "imbue[ ]" the statute's "procedural bar with jurisdictional consequences." *Boechler*, 142 S. Ct. at 1497 (quoting *United States v. Kwai Fun Wong*, 575 U.S. 402, 410

(2015)). The second sentence of section 6213(a) provides that "no assessment . . . in respect of any tax . . . and no levy or proceeding in court for its collection shall be made . . . until the expiration of such 90-day or 150-day period, as the case may be . . . ." This sentence is a strong indication that the time limit is jurisdictional. As noted by this Court in a similar context—*i.e.*, the 90-day period under I.R.C. § 6015(e) to seek innocent spouse relief—a statutory prohibition against collection during the relevant filing window "reflects that the ninety-day period is meant to allocate when different components of the tax system have the authority to act and further supports the view that [the provision] is jurisdictional." *Rubel v. Commissioner*, 856 F.3d 301, 305 (3d Cir. 2017); *accord Matuszak v. Commissioner*, 862 F.3d 192, 197 (2d Cir. 2017). Such a structure "reflects Congress's intent to set the boundaries on the Tax Court's authority." *Rubel*, 856 F.3d at 305.

Section 6213(a)'s context also more clearly supports its jurisdictional nature than does the context of section 6330. The statute not only sets the last day on which a taxpayer may petition the Tax Court, but it also sets the first date on which the IRS may undertake assessment and collection activities. *See* I.R.C. § 6213(c).

Section 6213(a)'s context also supports a jurisdictional construction when it comes to overpayments. If late petitions could be dismissed on untimeliness grounds, rather than jurisdictional grounds, taxpayers would lose their right to contest the amount of a deficiency in a separate refund suit because section 7459(d) makes nonjurisdictional dismissals res judicata as to "the amount determined by the Secretary." I.R.C. § 7459(d); *see Organic Cannabis*, 962 F.3d at 1095.

Finally, if the statute's text and context leave any doubt, section 6213(a)'s "relevant historical treatment" tips the scales in favor of its longstanding jurisdictional treatment. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010); *Organic Cannabis*, 962 F.3d at 1095. As discussed above, "the circuits have uniformly adopted a jurisdictional reading of § 6213(a) or its predecessor since at least 1928." *Organic Cannabis*, 962 F.3d at 1095. Indeed, several circuits, including this Court in *Garrett*, have revisited the question since the Supreme Court started " 'bring[ing] some discipline' to the use of th[e] term [jurisdictional].' " *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). All have reached the same conclusion. *See Garrett*, 798 F. App'x at 732 & n.4; *accord Organic Cannabis*, 962 F.3d at 1093;

Tilden, 846 F.3d at 886; *Mabbett*, 610 F. App'x at 765 n.7. And Congress, for its part, has repeatedly embraced, rather than bucked, the longstanding and unanimous authority construing section 6213(a)'s deadline as a jurisdictional requirement. *See, e.g.*, *Organic Cannabis*, 962 F.3d at 1095 (discussing Pub. L. No. 100-647, § 6243(a), 102 Stat. 3342, 3749 (1988)).[13]

Boechler did not, as the amicus argues, "completely undermine[ ]" the jurisdictional reasoning of this Court and other circuits. (Amicus Br. 4.) Each of the amicus's arguments on this score is meritless.

First, the amicus contends that the *Boechler* Court "disparaged [the] opinions from lower courts holding the § 6213(a) filing deadline

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[13] In 1998, for instance, Congress endorsed the view that the 90-day deadline is jurisdictional. The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. 105-206, 112 Stat. 685, 767 (1998), made two changes related to the statute's deadline. First, it directed the Commissioner to include in notices of deficiency the specific date he determined to be the last day on which the taxpayer may file a petition in the Tax Court under section 6213(a). Second, the RRA amended section 6213(a) to require that a petition filed in the Tax Court by the date identified by the Commissioner be treated as timely filed. *See* RRA § 3463(a), 112 Stat. at 767. Both the Senate Report and House Report on these changes expressly confirm that if a "petition is not filed within [the] time period" in section 6213(a), "the Tax Court does not have jurisdiction to consider the petition." S. Rep. No. 105-174, at 90 (1998), *reprinted in* 1998-3 C.B. 537, 626; *accord* H.R. Rep. No. 105-364, pt. 1, at 71 (1997), *reprinted in* 1998-3 C.B. 373, 443.

jurisdictional." (Amicus Br. 4.) On the contrary, the Court simply reaffirmed its preference for its own "long line of . . . decisions" and found that "no such 'long line' of authority exists" with respect to section 6330(d)(1). 142 S. Ct. at 1500. That is beside the point here. The Commissioner does not rely on the longstanding, unanimous circuit precedent about section 6213(a) as "analogous" support for construing another statute, *id.*, but as direct support for construing section 6213(a). *Boechler* says nothing about the meaning of section 6213(a).

Second, the amicus argues that section 6213(a) is even less clearly jurisdictional than section 6330(d)(1) because "the jurisdictional grant for deficiency suits is in [I.R.C.] § 6214(a)." (Amicus Br. 7.) That is wrong too; it ignores this Court's statement in *Sunoco* that "[t]he Tax Court's principal basis for jurisdiction is I.R.C. § 6213(a)," which "gives the Tax Court jurisdiction to redetermine a 'deficiency' in income, estate, gift, and certain excise taxes as to which the IRS has issued a notice of deficiency." 663 F.3d at 187. The Court added that section 6214(a) operates only to "extend[ ]" the Tax Court's deficiency jurisdiction under section 6213(a) to " 'any additional amount, or any addition to the tax,' " beyond the amounts in the notice of deficiency,

which the IRS might "assert[ ] . . . at or before trial." 663 F.3d at 188 (quoting I.R.C. § 6214(a)). That understanding is consistent with the Tax Court's view that its jurisdiction under section 6214(a) is "merely complementary to the jurisdiction conferred by section 6213." *Est. of Young v. Commissioner*, 81 T.C. 879, 885 (1983), *implied overruling on other grounds recognized by Brown v. Commissioner*, 115 T.C.M. (CCH) 1512, 2018 WL 3090292, at *5 (June 21, 2018).

Third, the amicus emphasizes that "Section 6213(a)'s first sentence does not even contain the word 'jurisdiction.' " (Amicus Br. 7.) That, however, is irrelevant since "Congress, of course, need not use magic words in order to speak clearly on this point." *Henderson*, 562 U.S. at 436. And the Supreme Court has already held that the first sentence of section 6213(a) addresses the Tax Court's jurisdiction. *See Laing*, 423 U.S. at 165 n.4. ("A deficiency notice is of import primarily because it is a jurisdictional prerequisite to a taxpayer's suit in the Tax Court for redetermination of his tax liability.")

Finally, the amicus argues that section 6213(a) is not jurisdictional because the statute could have been clearer (*see* Amicus Br. 6, 8), even contending that "implicit grant words are not enough to

provide a clear statement" about jurisdiction. (Amicus Br. 8.) But neither *Boechler* nor any other case supports that view, which would effectively adopt the "magic words" requirement that the Supreme Court has repeatedly rejected while discarding the Court's routine consideration of "context" to determine "whether Congress intended a particular provision to rank as jurisdictional." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

F. Section 6213(a)'s filing deadline cannot be equitably tolled even if it is not jurisdictional

1. Equitable tolling is not permissible because it is inconsistent with the text of I.R.C. § 6213(a)

"The mere fact that a time limit lacks jurisdictional force . . . does not render it malleable in every respect." *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019). Some time bars, "[t]hough subject to waiver and forfeiture, . . . are 'mandatory'—that is, they are 'unalterable' if properly raised by an opposing party." *Id.* (citation omitted).

Under section 6213, a timely petition is at least mandatory, if not 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 . . . shall be paid upon notice and demand from the Secretary." Thus, the statute mandates assessment and payment of the deficiency if the taxpayer fails to file a timely petition. That the assessment and payment of the deficiency become mandatory in the absence of a timely petition is a very strong indication that Congress intended a timely petition to be at least a mandatory, if not jurisdictional, requirement. Because assessment and payment are mandatory under the statute if the taxpayer does not file a timely petition, there can be no tolling; the statutory language leaves no room for it.

Furthermore, equitable tolling is incompatible with a statute when it "would throw a cloud of uncertainty over . . . rights" that ordinarily demand certainty. *United States v. Beggerly*, 524 U.S. 38, 49 (1998); *see, e.g.*, *Auburn Reg'l Med. Ctr.*, 568 U.S. at 157-58. Certainty is a major concern when it comes to tax collection, because "[t]ax law . . . is not normally characterized by case-specific exceptions reflecting individualized equities." *United States v. Brockamp*, 519 U.S. 347, 352 (1997). "The nature and potential magnitude of the administrative problem" that equitable tolling might cause "suggest[s] that Congress

decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system." *Id.* at 352-53. Moreover, "taxes are the lifeblood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935). This factor also counsels against tolling here.

In *Brockamp*, the Supreme Court rejected equitable tolling because the statute "set[ ] forth its time limitations in unusually emphatic form," "reiterate[d] its limitations several times in different ways," and "set[ ] forth explicit exceptions to its basic time limits." 519 U.S. at 350-52. And in *Beggerly*, the Supreme Court rejected equitable tolling where the statute "already effectively allowed for equitable tolling," by expressly abating the limitations period "until the plaintiff knew of should have known" that he could file suit. 524 U.S. at 48 (quoting 28 U.S.C. § 2409a(g)). Although the *Boechler* Court held that neither section 6330(d)(1)'s text nor its context overcame the presumption in favor of equitable tolling, *see* 142 S. Ct. at 1500-01, section 6213(a) differs significantly from section 6330(d)(1) on both

counts and is more like the non-tollable statutory deadlines in *Brockamp* and *Beggerly*.

First, section 6213(a) repeats the petition deadline multiple times and emphatically so. The statute's first sentence announces the 90-day deadline. The second sentence forbids the IRS from taking certain actions before the 90-day deadline expires. And the fourth sentence strips the Tax Court of jurisdiction "to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed . . . ."

The 90-day deadline also features prominently in two other parts of the statute. Subsection (c) commands the Commissioner to assess and demand payment of any deficient taxes "[i]f the taxpayer does not file a petition with the tax Court within the time prescribed in subsection (a)." I.R.C. § 6213(c). And subsection (d) gives taxpayers the right "to waive the restrictions" on collection action during the petition period prescribed "in subsection (a)." *Id.* § 6213(d).

Second, section 6213 provides several express exceptions to the 90-day petition deadline. Like section 6330(d), section 6213 suspends (and then extends) the petition deadline in certain bankruptcy cases.

Compare I.R.C. § 6213(f)(1), *with id.* § 6330(d)(2). Section 6213 also suspends the petition deadline "for any period during which the Secretary has extended the time allowed for making correction [of certain excise taxes]." *Id.* § 6213(e).

In addition, section 6213(a) requires the Tax Court to "treat[ ] as timely" any petitions that are "filed . . . on or before the last date specified for such filing by the Secretary in the notice of deficiency." While the 90-day petition deadline runs from mailing, the IRS is separately required to "include on each notice of deficiency . . . the date determined by [the IRS] as the last day on which the taxpayer may file a petition with the Tax Court." I.R.C. § 6212 note (Pub. L. 105-206, tit. III, § 3463(a)). So if the notice includes the wrong petition deadline, *e.g.*, one more than 90 days from mailing, this exception gives the taxpayer the benefit of the IRS's error.

This is quintessential "equitable tolling." The exception protects taxpayers who would otherwise be "induced or tricked" by the IRS "into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990). Section 6330(d) contains no such exception. Congress has thus said precisely "where and when[ ] to expand the

statute's limitations periods," thereby denying "the courts a generalized power to do so wherever a court concludes that equity so requires." *Brockamp*, 519 U.S. 347, 352-53.

Third, section 6213(a)'s deadline embodies "the IRS's need for 'finality and certainty' " when it comes to tax administration. *Rubel*, 856 F.3d at 306 (quoting *Becton Dickinson*, 215 F.3d at 351); *see also Garrett*, 798 F. App'x at 732 n.11. If the statute's 90-day deadline were flexible, the United States would never have certainty about the amount of taxes it will collect for a given tax year. This need for certainty makes the deadline "a central provision of tax law" and thus unlike the "far more limited and ancillary" deadline in section 6330(d)(1). *Boechler*, 142 S. Ct. at 1501.

In Fiscal Year 2021, the IRS issued more than 2 million notices of deficiency implicating over $10 billion in tax revenue. *See* Table 22, Information Reporting Program, Fiscal Year 2021, *Internal Revenue Service Data Book, 2021*, *available at* [https://perma.cc/YB5F-UHZ8]. Over 34,000 deficiency petitions were then filed in the Tax Court. *See* United States Tax Court, *Congressional Budget Justification, Fiscal Year 2023* at 19 (Feb. 28, 2022), *available at* [https://perma.cc/WWD3-

RUYR]. That number would skyrocket if taxpayers could derail the assessment of taxes simply by claiming, months or years later, that they never received a properly mailed notice of deficiency.

"[A]llowing case-specific exceptions and individualized equities" for potentially millions of taxpayers "could lead to unending claims and challenges" that tie up billions of dollars each tax year. *Rubel*, 856 F.3d at 306. Such widespread administrative havoc would prove orders of magnitude worse than the hassles flowing from "the relatively small number of petitions" that are now subject to equitable tolling under section 6330(d)(1). *Boechler*, 142 S. Ct. at 1501.[14]

2. The Culps' and the amicus's arguments lack merit

The Culps and their amicus rely excessively on *Boechler* and ignore the many textual and contextual differences distinguishing

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[14] For comparison, the IRS Office of Appeals handled roughly 27,000 collection-due-process cases in FY2021. *See* Table 27, Appeals Workload, by Type of Case, Fiscal Year 2021, *Internal Revenue Service Data Book, 2021*, *available at* [https://perma.cc/YB5F-UHZ8]. That same year, about 1,200 collections-related petitions were filed in the Tax Court. *See* United States Tax Court, *Congressional Budget Justification, Fiscal Year 2023* at 19.

section 6213(a) from section 6330(d)(1). The Court should reject all their arguments.

First, the amicus contends that "*Boechler*'s conclusion . . . applies with equal force to § 6213(a)" because it is "similar to § 6330(d)(1)." (Amicus Br. 19, 20.) But the amicus does not say how the statutes are similar, let alone meaningfully so, and the amicus never grapples with section 6213(a)'s many distinguishing features. The Culps, in turn, cite a Federal Circuit case about a veterans statute (38 U.S.C. § 7266) that no one disputed allowed equitable tolling. (Br. 29-30 (discussing *Checo v. Shinseki*, 748 F.3d 1373, 1378-79 (Fed. Cir. 2014).) That case is inapposite.

Second, the amicus argues that section 6213(a)'s deadline can be tolled because "deficiency procedures are, like [collection-due-process] procedures, unusually protective of taxpayers." (Amicus Br. 21; *see also id.* at 20-22.) But that overstates a point that *Boechler* made about section 6330 as a whole, *see* 142 S. Ct. at 1500, the sole purpose of which is to protect taxpayers before their property is levied. *See Goza v. Commissioner*, 114 T.C. 176, 179-80 (2000). Taxpayers cannot challenge a wrongful levy after the fact. *See* I.R.C. § 7426(a). Yet they

can still sue for a refund if they miss the 90-day deadline to seek a redetermination in Tax Court. *See id.* § 7422. Section 6213 thus strikes a balance between a taxpayer's interest in a pre-payment forum and the government's interest in the prompt and final assessment of overdue taxes.

Finally, the amicus contends that section 6213(a)'s deadline is "comparatively ancillary" to tax administration, and thus worthy of tolling, because it does not affect hundreds of millions of taxpayers each year like the deadline at issue in *Brockamp*. (Amicus Br. 24.) But the amicus concedes that no case, not even *Boechler*, says what distinguishes "central" deadlines from "ancillary" ones. (*Id.*) The amicus just seizes on *Boechler*'s observation that tolling the section 6330(d)(1) deadline would affect "a relatively small number of petitions." 142 S. Ct. at 1501. As discussed above, that would not be true if section 6213(a)'s deadline could be equitably tolled.

G. The Culps waived reliance on equitable tolling which, in any event, is unavailable on the facts of this case

The Culps purport to make "the doctrine of equitable tolling" and the Supreme Court's decision in *Boechler* "[t]he centerpiece" of this appeal. (Br. 14.) They argue that they should have been allowed to file

their petition almost three years late because of the circumstances in this case. (Br. 26-30.) The Culps did not make the tolling arguments below, and, in any event, tolling is unavailable on the facts of this case.

1. The Culps have waived equitable tolling

The Culps' waived any arguments about section 6213(a) and equitable tolling by failing to raise them below. *See Tri-M Grp.*, 638 F.3d at 416; *see, e.g.*, *Schottanes v. Borough of N. Haledon*, 343 F. App'x 771, 774 (3d Cir. 2009) (rejecting an equitable tolling argument first raised on appeal); *Marcum v. Harris*, 328 F. App'x 792, 796 (3d Cir. 2009) (same).

The Culps' petition did not dispute that section 6213(a) is jurisdictional. In fact, their pleading did not mention the statute or any notice of deficiency, let alone assert that the statute's 90-day deadline could and should be tolled here. Instead, the Culps nominally invoked the Tax Court's collections-related jurisdiction under I.R.C. §§ 6320(c) and 6330(d) and then insisted the court could exercise untethered "refund jurisdiction" under I.R.C. § 6512(b).

When confronted with the Commissioner's section 6213(a) arguments, the Culps again did not dispute that the statute is

jurisdictional or ask the Tax Court to toll the 90-day deadline. Rather, the Culps disputed the very *existence* of the notice of deficiency and accused the IRS of "ma[king] it impossible to file a claim" under section 6213(a). (A.148.) And while they made passing references to "expand[ing] the time frames for filing an action" (A.23, A.150), they never said which timeframes, and they focused exclusively on alleged misconduct by TAS in 2019—misconduct that is irrelevant to section 6213(a) because it allegedly occurred long after the Culps' 90-day deadline had expired.

Thus, despite the opportunities and burden to do so, the Culps gave the Tax Court no reason to question section 6213(a)'s jurisdictional character or to consider equitable tolling of the 90-day deadline. If anything, the Culps argued that section 6213(a) did not apply to their case. "When a litigant takes an unequivocal position [below], he cannot on appeal assume a contrary position simply because the decision in retrospect was a tactical mistake." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 116 (3d Cir. 1992).

2. The Culps have shown no basis for equitable tolling

This Court "may affirm on any basis supported by the record, even if it departs from the [lower court's] rationale." *Host Int'l, Inc. v. MarketPlace, PHL, LLC*, 32 F.4th 242, 247 n.3 (3d Cir. 2022) (internal quotation marks omitted). This Court also routinely declines to remand cases when doing so would be futile. *See, e.g.*, *Geness v. Cox*, 902 F.3d 344, 355 n.7 (3d Cir. 2018); *United States v. Thomas*, 713 F.3d 165, 175 (3d Cir. 2013); *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 219 n.15 (3d Cir. 2009). Both principles apply here because the Culps' new tolling theory faces an insurmountable factual hurdle: the Culps offered no credible evidence to show that they did not receive the notice of deficiency, which argument is the crux of their novel tolling argument.

As discussed above, actual receipt of a notice of deficiency is irrelevant under section 6213(a). *See* pp. 20-21, *supra*. Yet even when taxpayers properly dispute receipt in the Tax Court, the Commissioner may rely on the notice's "delivery to the USPS to establish that [the taxpayer] actually received, or refused receipt of, the notice . . . unless [the taxpayer] offers credible rebutting evidence." *Rivas v.*

Commissioner, 113 T.C.M. (CCH) 1268, 2017 WL 1224708, at *7 (Apr. 3, 2017) (citing cases); *see also Chinweze v. Commissioner*, 123 T.C.M. (CCH) 1304, 2022 WL 2047593, at *5 (June 7, 2022) (citing cases); *see, e.g.*, *Freeland v. Commissioner*, 345 F. App'x 829, 831 (3d Cir. 2009) (per curiam).[15]

"[A] taxpayer's self-serving testimony that he did not receive the notice of deficiency, standing alone, is generally insufficient to rebut the presumption" of physical receipt. *Chinweze*, 2022 WL 2047593, at *5 (internal quotation marks omitted). Moreover, that a taxpayer "ha[s] received every other item that the IRS has mailed to the same address in th[e] matter" undercuts a sworn claim of non-receipt. *Freeland*, 345 F. App'x at 831 n.2. Unsworn disclaimers never suffice. *See, e.g.*, *Rivas*, 2017 WL 1224708, at *7 (rejecting an unsworn "claim" of non-receipt); *cf. Lupyan*, 761 F.3d at 322 (holding that, under the common-

[15] This presumption parallels the common-law mailbox rule. *See, e.g.*, *Guerra v. Consol. Rail Corp.*, 936 F.3d 124, 136 (3d Cir. 2019) (citing *Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314, 319 (3d Cir. 2014)). Under that rule, "[a] strong presumption of receipt applies" when, as here, a disputed "notice is sent by certified mail." *Lupyan*, 761 F.3d at 319.

law mailbox rule, "a sworn statement to dispute receipt" may rebut the presumption of receipt).

The Tax Court here found that the IRS had properly mailed the notice of deficiency to the Culps' last known address. That finding is not clearly erroneous, and it supports the presumption that the Culps also physically received the notice of deficiency. They never rebutted that presumption. They offered no sworn statements about the notice of deficiency, just the unverified claims sprinkled throughout their response to the Commissioner's motion. They did not bolster their unsworn statements with corroborative evidence, *e.g.*, a documented lack of access to their P.O. box around February 2018, or other, contemporaneously recorded instances of postal problems around that time. To the contrary, as the Tax Court observed, the Culps' submitted "various and sundry" documents showing that they had received correspondence from the IRS, at the same address, both shortly before and shortly after February 2018. (A.158; *see, e.g.*, A.32 (Nov. 13, 2017); A.55 (May 7, 2018).)

Moreover, none of the Culps' other allegations of misconduct bear on their failure to file their petition in May 2018. They did not engage

TAS until more than a year after their 90-day deadline had expired. And they have never explained why they waited almost two years after the levies began, and 18 months after TAS "went silent" (A.21), to file this petition. So even if tolling were theoretically possible here, a "fail[ure] to exercise due diligence in preserving [one's] legal rights" cannot justify tolling "the time limits imposed by Congress in a suit against the Government[.]" *Irwin*, 498 U.S. at 96.

H. The Culps' remaining appellate arguments lack merit

The Culps complain that the Tax Court accepted the Commissioner's motion to dismiss out of time, and they seek reversal on that basis. (*See* Br. 5-6, 10, 15.) They fail to show an abuse of discretion. As the Tax Court correctly explained, jurisdictional defects can be raised "at any time." (A.156.) *Accord Galluzzo v. Commissioner*, 564 F. App'x 656, 660 (3d Cir. 2014) (quoting *Shelton v. Commissioner*, 63 T.C. 193, 198 (1974)); *Brown v. Commissioner*, 78 T.C. 215, 218 (1982). Moreover, "[u]nless precluded by statute, the [Tax] Court in its discretion may make longer . . . any period provided by [its] Rules." Tax Ct. R. 25(c). Rule, not statute, prescribes the deadline to respond to a petition. *See* Tax Ct. R. 36(a).

The Culps also fault the Tax Court for not "mention[ing] . . . the[ir] arguments" or "the statutory authority or cases they cite[d] for jurisdiction." (Br. 13.) Again, the Culps fail to show an abuse of discretion. The Tax Court expressly discussed and rejected several of the Culps' arguments against dismissal: that the Culps never received the notice of deficiency, that the IRS never issued the notice, and that the Commissioner's motion was untimely. (A.155-A.156, A.158.) Moreover, "[t]he author of an opinion has broad discretion to determine what the opinion should contain and in what detail." *Lowder v. Dep't of Homeland Sec.*, 504 F.3d 1378, 1383 (Fed. Cir. 2007). And "[t]he failure to discuss particular contentions in a case . . . does not mean that the tribunal did not consider them in reaching its decision." *Id.*; *accord Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944).

Finally, the Culps repeatedly argue the merits of their 2015 deficiencies and claim that the IRS has not defended its determination. (*See, e.g.*, Br. 6, 11-12, 14-15, 21, 25-27.) But the Commissioner has not conceded the merits of this case by raising jurisdictional concerns first. And "[w]hen subject matter jurisdiction is at issue, a federal court is generally required to reach the jurisdictional question before turning to

the merits." *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 249 (3d Cir. 2003). The Tax Court did just that here.

* * *

At bottom, the Culps want an income tax refund, and there is a clear mechanism for seeking one: filing an administrative claim for refund with the IRS and then suing in a district court or the Court of Federal Claims. I.R.C. §§ 6511, 7422. This Court should reject the Culps' attempt to bring a refund suit in the Tax Court in the guise of a three-year old deficiency case.

CONCLUSION

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

Respectfully submitted,

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OCTOBER 12, 2022

CERTIFICATE OF BAR MEMBERSHIP

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

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Attorney for Appellee

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