Received
12/08/22 06:20 pm

Filed
12/08/22

Paul Andrew Frutiger,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

Electronically Filed
Docket No. 31153-21
Document No. 31

Response to Order that jurisdiction is retained by Judge Buch Case is stricken from the trial session. Respondent by October 21, 2022 file a response to this Order. Petitioner shall file a response to this Order by November 18, 2022. Any motion for leave to file an amicus brief in support of either party must be filed by November 18, 2022. The proposed amicus brief must be lodged at the time the motion is filed. Respondent may file a further response to this Order by December 9, 2022. All papers filed in response to this Order shall be filed only in Docket No. 31153-21.

SERVED 12/08/22

UNITED STATES TAX COURT

PAUL ANDREW FRUTIGER, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	))))))))))	Docket No. 31153-21 Filed Electronically

RESPONDENT'S RESPONSE TO PETITIONER'S RESPONSE AND THE AMICUS BRIEF OF THE CENTER FOR TAXPAYER RIGHTS

PURSUANT to the Court's order dated September 7, 2022, respondent responds to petitioner's response and the Amicus Brief of the Center for Taxpayer Rights as follows:

1. In an Order dated September 7, 2022, the Court *sua sponte* raised the issue of the untimely filing of the petition in this case and ordered the parties to address whether the Tax Court lacks jurisdiction over an untimely petition under section 6015(e)(1)(A), following the Supreme Court's decision in *Boechler v. Commissioner*, 142 S. Ct. 1493 (2022).

2. On October 4, 2022, respondent filed a response to the Court's Order.

3. On October 21, 2022, respondent filed a motion for leave to supplement his response and lodged a supplement to his response, which the Court granted and filed on October 28, 2022.

4. On November 16, 2022, petitioner Paul Andrew Frutiger filed his response to the Court's Order.

5. On November 18, 2022, the Center for Taxpayer Rights ("Amicus"), filed a motion for leave to file an amicus brief. The motion was granted, and Amicus's brief was filed by the Court.

6. This response to the Amicus brief complies with the Court's order to respond by December 9, 2022.

A. Petitioner's Assertion that *Boechler* Controls Lacks Merit

7. In his response, petitioner argues that it would be inequitable for him to be responsible for the outstanding taxes and asserts that *Boechler* controls because "[t]he language used by Congress in the innocent spouse law is about as identical as in the collection due process law." (Pet'r's Resp. at 1-2). Petitioner's argument ignores the difference in language between sections 6015(e)(1)(A) and 6330(d)(1), including that (1) the ambiguous "such matter" language in section 6330(d)(1) at issue in *Boechler* is not present in section 6015(e)(1)(A); (2) unlike section 6330(d)(1), section 6015(e)(1)(A) uses the word "if" to expressly condition the Court's jurisdiction to timely petitions; and (3) the Supreme Court has recognized the differences between sections 6015 and 6330 regarding whether the petition filing deadline is jurisdictional. As this Court explained in its recent decision holding that its deficiency jurisdiction under section 6213 is limited to

timely filed petitions, "*Boechler* emphatically teaches that these are different sections. Each must be analyzed in light of its own text, context, and history." *Hallmark Research Collective v. Commissioner*, 159 T.C. No. 6, slip op. at 41 (Nov. 29, 2022) (unanimously reaffirming that the deadline for filing a petition in a deficiency proceeding is jurisdictional).

8. Notably, petitioner did not suggest in his response that any circumstances existed that might have equitably tolled the statute of limitations (*i.e.* why he was prevented from filing a timely petition). Nor has he made any such argument in any of his other filings. Thus, it appears that the only question for the Court in this case will be whether to dismiss his petition for lack of jurisdiction or merely as untimely.

B. Contrary to Amicus's Arguments, the Statute Clearly and Unambiguously Shows that the 90-day Deadline is Jurisdictional

9. As set forth in respondent's supplement filed on October 28, 2022, Congress has made a clear, unambiguous statement that the 90-day filing deadline of section 6015(e)(1)(A) is a jurisdictional deadline. As a result, petitioner's failure to timely petition prevents this Court from acquiring jurisdiction to consider the request for relief under section 6015.

10. In pertinent part, section 6015(e)(1)(A) provides that an individual seeking relief "may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under

this section *if* such petition is filed . . . not later than the close of the 90th day after the date [the IRS issues its final notice of determination, or six months after the date the request was made]." (emphasis added)

11. In the statute, Congress explicitly uses the word "jurisdiction" (reflecting its intent to invoke jurisdiction) and uses "if" to condition that jurisdiction upon a timely petition being filed. This Court has held the jurisdictional reading of this provision is not a "close case." *Pollock v. Commissioner*, 132 T.C. 21, 32 (2009). The three courts of appeals having considered the issue have all held—while applying the "clear statement" rule adopted since *Kontrick v. Ryan*, 540 U.S. 443 (2004), and applied by the Supreme Court in *Boechler*—that the statute is clear. *See Nauflett v. Commissioner*, 892 F.3d 649 (4th Cir. 2018); *Rubel v. Commissioner*, 856 F.3d 301 (3rd Cir. 2017); *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017) (*per curiam*). And in *Boechler,* the Supreme Court itself highlighted the 90-day deadline section 6015(e)(1)(A) as an example of a clear statement of jurisdictional intent. *See* 142 S. Ct. at 1498-99.

12. Amicus's arguments to the contrary are unpersuasive. Amicus begins its argument by citing a line of Supreme Court cases holding that certain statutory time frames are non-jurisdictional. (Amicus Br. at 6-8). But rather than holding that all statutory time frames are non-jurisdictional, these cases establish the

framework for determining whether a deadline is clearly jurisdictional. *See, e.g.*, *United States v. Kwai Fun Wong*, 575 U.S. 402, 409-410 (2015); *Sebelius v. Auburn Reg'l Med. Ctr*, 568 U.S. 145, 153 (2013); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006); *see also Hallmark*, 159 T.C. No. 6, at 7-9 (laying out the framework established by these cases).

13. As respondent pointed out in his supplement to his initial response, the three courts of appeals affirmatively addressing section 6015(e)(1)(A) already applied the "clear statement" framework when rendering their decisions, so the cases cited by Amicus do not offer anything that was not already considered. *See Nauflett*, 892 F.3d 649; *Rubel*, 856 F.3d 301; *Matuszak*, 862 F.3d 192.

14. Amicus then cites *Boechler* as holding that where "there [are] multiple plausible interpretations of the statute (some of which would make the filing deadline not jurisdictional), . . . there [is] no clear statement of a jurisdictional deadline." (Amicus Br. at 11). Amicus offers three alternative readings of section 6015 that it suggests are "plausible" readings of the jurisdictional portion of the statute in an attempt to generate ambiguity. (*Id.* at 10-13).

15. In its first proposed reading, Amicus isolates the jurisdictional clause because it is in a parenthetical and "[u]nder the last[-]clear[-]antecedent rule employed in *Boechler*, the parenthetical grant of jurisdiction could apply only to

the immediately preceding phrase . . . ." (*Id.* at 12). That argument misunderstands the last-clear-antecedent canon, which is used to interpret a pronoun or demonstrative adjective. A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* at 144-46 (2012). While that canon was important to interpret the pronoun phrase "such matter" in *Boechler,* the jurisdictional clause here has no pronoun phrase for which there would be an antecedent. Additionally, this reading suggests that parentheses grammatically shield their contents from being modified by anything else in the sentence, which is not correct. *See* Anne Stilman, *Grammatically Correct* 155 (2010) (noting that a parenthesized clause "may fit in grammatically" with the rest of the sentence).

16. Amicus's second and third alternative readings essentially rewrite the statute. The second reading posits that the jurisdictional reference only applies to the phrase immediately following it (*i.e.*, "(and the Tax Court shall have jurisdiction) to determine the appropriate relief available under this section"). (Amicus Br. at 13). The third alternative suggests that the jurisdictional language only refers to the phrases immediately preceding and following the parenthetical with the remainder of the sentence as "simply tacking on." (*Id.*).

17. Both of these readings ignore the "if" and the conditions placed on Tax Court jurisdiction that follow. However, the statute makes clear that those subsequent conditions following "if" are jurisdictional. Indeed, Amicus itself

acknowledges that section 6015(e)(1)(A) has a jurisdictional prerequisite that appears after the "if": the IRS's determination of relief or failure to make a determination within a period of time. (Amicus Br. at 18). However, it fails to explain why that section modifies the jurisdictional clause while the time-period to file the petition does not.

18. Moreover, Amicus overstates the holding of *Boechler*. *Boechler* did not alter the "clear statement" standard to require the parties or this Court to hunt for a plausible interpretation that speaks in non-jurisdictional terms. Rather *Boechler* holds, consistent with the Supreme Court's disciplined approach set for in earlier decisions, that there must be a "clear statement" of jurisdictional intent.

19. *Boechler* required the Supreme Court to discern the meaning of the pronoun phrase "such matter" as used in section 6330(d)(1) to define the boundary of the Tax Court's CDP jurisdiction. The Court held that the text did not "clearly mandate a jurisdictional reading" because the phrase lacked an obvious antecedent. The parties' competing interpretations of the phrase, both of which the Court found plausible using the tools of statutory interpretation, demonstrated the lack of clarity. In highlighting the lack of an obvious antecedent to the pronoun phrase, the Court went on to note additional interpretations and explained that the existence of competing plausible interpretations made it difficult to conclude that a jurisdictional reading was clear.

20. But *Boechler* does not suggest that the parties (or the Court) must hunt for alternative readings of an otherwise clear statute in the hopes that one might stick. Doing so would have the parties (and the Court) rewrite a statute that is clear—like Amicus does by ignoring the conditional "if" following the explicit jurisdictional language.

21. The plain text of section 6015 makes clear that the 90-day time limit is jurisdictional. First, Congress explicitly uses the word "jurisdiction"—showing its intent to address the authority of the Tax Court—followed by two qualifications: first limiting the scope of the jurisdiction (to determine the appropriate relief), and second requiring a timely petition to invoke that jurisdiction ("if" such petition is filed within the 90-day period).

22. Amicus argues that *Boechler* (as well as *Auburn*; *Weinberger v. Salafi*, 422 U.S. 749 (1975); and *Magnum v. Action Collection Servs., Inc.*, 575 F.3d 935 (9th Cir. 2009)) show that merely including "jurisdiction" in the statute is insufficient. (*See* Amicus Br. at 14-22). However, those cases dealt with statutes where the time bar was merely in the same statute as the jurisdictional grant rather than a situation, like this one, where the jurisdictional grant is directly, grammatically modified by the time bar. *See Hallmark*, 159 T.C. No. 6, slip op. at 16 (noting that the deadline in that case was not just in a section of the statute but "in the same *sentence* as, and . . . embedded in, the jurisdictional grant") (emphasis

in original). Moreover, Congress's deliberate inclusion of that word is not irrelevant, and the Court should construe the statute so as to give it effect. *See* Scalia & Garner, *Reading Law* at 174 ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored.") (footnote omitted); (*see also* Amicus Br. at 32) ("Amicus concedes that a statute with [the] word 'jurisdiction' in it may look more like a statute whose internal time limit may be jurisdictional . . . .").

23. The syntax of the statute with an "if" clause indicates that the sentence is conditional, and an English conditional sentence needs both a dependent (or conditional) clause (the "if" clause) and a main (or result) clause (which is conditioned by the dependent clause). Conditionals – Grammar, Cambridge Dictionary, https://dictionary.cambridge.org/grammar/british-grammar/conditionals; *see also* Stillman, *Grammatically Correct* at 258. A main clause is one that can form a sentence on its own and does not depend on other clauses to form a complete thought. Stillman, *Grammatically Correct* at 74.

24. None of Amicus's proposed interpretations addresses what the main or result clause of section 6015(e)(1)(A) would be. However, there are only two main clauses in this statute: "the taxpayer may file a petition" and "the Tax Court shall have jurisdiction." Respondent submits the clear reading is to apply the "if" clause to both clauses because it is a postpositive modifier following a series

(albeit of two items) in parallel construction. Scalia & Garner, *Reading Law* at 147 ("Series-Qualifier Canon"). But even if the "if" clause only modified one main clause, the nearest-reasonable-referent canon indicates that it would modify the jurisdictional clause, as that is closer in the statute. *Id.* at 152.

25. Amicus further attempts to diminish the Supreme Court's express statement in *Boechler* that section 6015(e)(1)(A) "more clearly links[s] [its] jurisdictional grant[] to a filing deadline" by labelling it a "toss-off comment." (Amicus Br. at 22-23). Rather than presuming that the Supreme Court makes these sorts of "toss-off comment[s]" carelessly, a better understanding is that the Court intentionally included this language as a guide for Congress to write jurisdictional filing deadlines consistent with the "clear statement" framework and to confirm that it does not require Congress to "incant magic words" to convey a clear jurisdictional intent. *See Auburn*, 568 U.S. at 153.

26. Amicus also suggests that the statute could be rewritten to be even clearer than it already is. (Amicus Br. at 13-14). However, the statute does not have to be as clear as possible—it merely needs to be clear using the traditional tools of statutory construction. *Wong*, 575 U.S. at 409-10. The clarity of the statute (when correctly applying the rules of English grammar and statutory construction) is enough for this Court to continue following the decade of precedent holding that the deadline is jurisdictional.

C. Amicus's Reliance on *Auburn* is Misplaced

27. Amicus attempts to discount this clear statement by citing to the Supreme Court's decision in *Auburn*, in which the Court held the time limit in 42 U.S.C. § 1395oo(a)(3) is not jurisdictional. That statute provides that a Medicare provider "may obtain a hearing" before a board created by the statute if the provider (among other requirements), "files a request for a hearing within 180 days." Amicus argues that this statute is like section 6015(e)(1)(A) because it uses the word "may" before the word "if" appears and that the Supreme Court broke the sentence into two pieces to hold the time limit was not jurisdictional. (Amicus Br. at 8, 18)

28. Amicus fails to note that the Supreme Court primarily cited the fact that the statute in *Auburn* did "not speak in jurisdictional terms" and lacked "words with jurisdictional import." 568 U.S. at 154; (*contra* Amicus Br. at 16) (arguing that *Auburn* shows that the "presence or absence of the word 'jurisdiction' can be irrelevant to the Court's jurisdictional analysis"). Additionally, the Court did not cite the use of the word "may" as a reason for holding that the statute was non-jurisdictional. *See* 568 U.S. at 154-55.

29. Amicus's arguments were appropriately rejected by the courts of appeals. Specifically, the courts in *Rubel* and *Nauflett* both expressly rejected these arguments. *Rubel*, 856 F.3d at 305 n.7; *Nauflett*, 892 F.3d at 654 (noting the

rejection in *Rubel*). Amicus tries to quibble with *Rubel*, noting that section 6015(e)(1)(A) contains "shall" and "jurisdiction" by arguing that they are in a parenthetical that "plausibly does not apply to the filing deadline." (Amicus Br. at 39-40). As previously discussed, however, the only plausible reading is that the filing deadline does modify the jurisdictional clause.

30. The court in *Matuszak* apparently did not deem this argument worthy of discussion beyond a parenthetical quoting *Auburn*. 862 F.3d at 196 ("the time period to appeal to a review board under 42 U.S.C. § 1395oo(a)(3) contains no 'words with jurisdictional import'") (quoting 568 U.S. at 154); *see also* Br. for Appellant at 23-27, *Matuszak*, 2016 WL 6350508 (arguing that section 1395oo(a) is similar and that *Auburn* dictates the result). Amicus tries to diminish *Matuszak* by arguing with the quoted statement. (Amicus Br. at 38) ("But the complete sentence of 42 U.S.C. § 1395oo(a) does contain words with automatic jurisdictional import."). To the extent that Amicus suggests that the Supreme Court was wrong, that would be an error in the reasoning of *Auburn*, not *Matuszak*. Moreover, the Second Circuit quoted two other cases for the same proposition, and Amicus challenges neither of those. *See Matuszak*, 862 F.3d at 196 (also quoting *Musacchio v. United States*, 136 S. Ct. 709 (2016); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011)).

D. The Statutory Context Does Not Defeat Congress's Clear Statement

31. Amicus next argues that the context of section 6015 aids its interpretations, citing the equitable nature of section 6015 and the fact the Tax Court is an Article I court. Amicus is correct that courts have looked to the context of the statute to determine whether a deadline is jurisdictional. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) (courts examine the "text, context, and relevant historical treatment"); *see also Hallmark*, 159 T.C. No. 6, slip op. at 19-28 (discussing how section 6213 fit into the statutory scheme). But Amicus is misguided in its search for supportive context.

32. In aid of its equity argument, Amicus attempts to compare the statutory context of section 6015(e)(1)(A) and the jurisdictional deadline to file a notice of appeal with the Veterans Court under the provisions of Veterans' Judicial Review Act (the "VRJA") that was considered in *Henderson*. (Amicus Br. at 27-29)

33. In *Henderson*, the Supreme Court considered whether a 120-day deadline for veterans to appeal the denial of veteran benefits to the Veterans Court was jurisdictional. 562 U.S. at 434. In describing Congress's intent with respect to the VRJA, the Court noted the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims" that included the long standing "solicitude of Congress for veterans." *Id.* at 440.

34. Amicus attempts to draw similarities between section 6015 and the VRJA based on what it suggests are the "unusually protective" nature of the two statutes. (Amicus Br. at 28). Amicus first points to the fact that the person seeking relief initiates the process and may do so "at virtually any time", though it does not explain how this is "protective." (*Id.* at 28-29). Second, Amicus argues that the various procedures initiated by the IRS are "solicitous and unusually protective," despite the fact that none of the cited processes are required by section 6015. (*Id.* at 30). Section 6015 sharply contrasts with the context of Amicus's proffered comparator because the VA has a *statutory* duty to assist veterans in developing evidence to substantiate their claims. *Henderson*, 562 U.S. at 431-32 (citing 28 U.S.C. §§ 5103(a), 5103A).

35. Further, while section 6015 permits equitable relief, it is not itself a purely equitable statute. Rather, section 6015 has complex procedural requirements. For example, rather than having a single "equitable" provision for relief, there are three avenues to relief, each with their own requirements that taxpayers have to meet. Of these, subsection (b) only invokes equity as one of several requirements for relief, while subsection (c) does not invoke equity, at all. And the true equitable-relief provision (subsection (f)) is only available after the determination that relief is not available under either subsections (b) or (c).

36. Additionally, the statute also contains procedural protections for the non-requesting spouse, *see, e.g.*, I.R.C. § 6015(e)(4) (requiring notice to the non-requesting spouse and an opportunity to be a party to a Tax Court proceeding), and even the IRS, *see, e.g.*, I.R.C. § 6015(e)(2) (suspending the running of the statute of limitations on collection).

37. More importantly though, even if we were to assume that the equitable aspects of section 6015 were akin to the VRJA, *Henderson* does not support Amicus's position. Unlike section 6015(e)(1)(A), the Supreme Court held the text of the provision at issue "[did] not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences." *Id*. at 438 (noting that the provision did not "speak in jurisdictional terms or refer in any way to the jurisdiction" of the Veterans Court). In contrast, and as discussed above, section 6015(e)(1)(A) expressly speaks in jurisdictional terms.

38. Amicus also points to the Tax Court's invocation of traditional rules of equity in *Hall v. Commissioner*, 135 T.C. 374 (2010), as a reason to invalidate the then-regulatory limitations period for claims under subsection (f). (Amicus Br. at 25). However, *Hall* made no suggestion that traditional equitable considerations can overcome clear statutory text. Moreover, Amicus ignores that every court of appeals that addressed that issue reversed the Tax Court. *See, e.g.*, *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010), *reversing* 132 T.C. 131

(2009); *Manella v. Commissioner*, 631 F.3d 115 (3d Cir. 2011), *reversing* 132 T.C. 196 (2009); *Jones v. Commissioner*, 642 F.3d 459 (4th Cir. 2011). In fact, the regulatory limitations period was not invalidated until it was *legislatively* overruled in 2019. Taxpayer First Act of 2019, Pub. L. No. 116-25, § 1203(a)(2), 133 Stat. 981, 988.

39. Amicus's suggestion that the analysis of section 6015(e)(1)(A) is different because it provides for review of an administrative decision by an Article I court also falls flat. (Amicus Br. at 28). The Supreme Court has previously held that certain deadlines for seeking jurisdictional review of administrative decisions are jurisdictional. *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995) (deadline to appeal the Board of Immigration Appeals's final order of removal); *see also Henderson*, 562 U.S. at 437-38 ("Instead of applying a categorical rule regarding review of administrative decisions, we attempt to ascertain Congress's intent regarding the particular type of review at issue in this case."). Indeed, litigants commonly come across statutes limiting the time to seek review that have jurisdictional consequences. *See, e.g.*, *Bowles v. Russell*, 551 U.S. 205 (2007) (deadline to appeal from a district court civil judgment); *see also In re Caterbone*, 640 F.3d 108 (3d Cir. 2011) (deadline to appeal a bankruptcy court decision).

E. Amicus's Attempts to Discredit Prior Precedent Including the Three Circuit Courts Holding Section 6015(e)(1)(A) Jurisdictional are Unpersuasive

40. Amicus attempts to discredit the prior precedent holding that section 6015(e)(1)(A) is a clear jurisdictional provision. As an initial matter, none of its arguments are availing: the clarity of the statutory text (as discussed, *supra*) on its own means that the courts' bottom-line holdings were correct.

41. Amicus argues that *Boechler* fundamentally changed the way courts must approach the inquiry whether Congress has made a clear statement and that this Court's opinion in *Pollock* (as well as the three circuit courts having considered the issue) are no longer correct in the light that change. Respondent submits that, rather than announcing a "fundamentally" new rule, *Boechler* is more accurately read as merely applying the preexisting clear-statement test to a provision of the Code granting jurisdiction to the Tax Court. *See* 142 S. Ct. at 1497.

42. Each of the three circuit court opinions postdate the Supreme Court's efforts to bring discipline to the use of the term jurisdiction, and each correctly applied the same bright-line "clear statement" rule applied in *Boechler*. *Nauflett*, 892 F.3d at 652 (citing *Auburn* and *Wong* to conclude the plain text of 6015(e)(1)(A) is jurisdictional); *Matuszak*, 862 F.3d at 196 (citing *Auburn*, *Wong*, and *Arbaugh* in concluding that the 90-day deadline of 6015(e)(1)(A) was one of

the "rare" statutory periods that speaks in clear jurisdictional terms); *Rubel*, 856 F.3d at 304 (citing *Wong* and *Arbaugh* and concluding Congress was "explicit" that section 6015(e)(1)(A) was a jurisdictional time limit).

43. Nothing in the Court's analysis of section 6330(d)(1) undermines the conclusions reached in any of *Nauflett*, *Matuszak*, or *Rubel* with respect to the clarity of the jurisdictional deadline in section 6015. *Boechler* does not require the court to search for alternative readings where the statute is otherwise clear. Each of the courts of appeals did not merely conclude that the jurisdictional reading was a preferred or better reading of the statute; they said that the statute is clear. *Nauflett*, 892 F.3d at 652 (concluding Congress had "uttered 'magic words,' expressly conditioning the Tax Court's power on the timely filing of a petition."); *Rubel*, 856 F.3d at 305 ("Congress's explicit statement that § 6015(e)(1)(A)'s time limit is jurisdictional means that it is and that the Tax Court lacks authority to consider untimely petitions."); *Matuszak*, 862 F.3d at 196 ("Not only did Congress place the grant of jurisdiction and the time limitation in the same sentence and subsection, it expressly conditioned the Tax Court's jurisdiction on the timely filing of a petition: 'the Tax Court shall have jurisdiction . . . if [the] petition is filed' within the specified period.").

44. Amicus argues that the opinions in *Nauflett*, *Rubel* and *Matuszak* all rely on the broader statutory context by which section 6015(e)(1)(B) limits

collection on the liability by the IRS and provides the Tax Court with injunctive authority for timely filed petitions, and it points out that *Boechler* rejected a similar argument with respect to section 6330(e)(1). The Court in *Boechler* explained that this contextual argument may have strengthened the government's argument that 6330(d)(1) was jurisdictional, but the test was whether the statute was clear not whether the government's interpretation was better. In short, while *Boechler* shows that the "superior" reading of a statute is not sufficient to overcome ambiguous text, it is nevertheless another clue showing Congress's intent for the time bar to be jurisdictional. *Hallmark*, 159 T.C. No. 6, slip op. at 17 ("[W]e posit simply that [the analogous sentence in section 6213(a)] 'strengthen[s]' (but does not clinch) the argument that the 90-day deadline . . . is jurisdictional.").

45. But, in any event, this factor was not decisive or necessary to the courts' decisions, as each concluded that the statutory text itself was clear.

46. Amicus further argues that the courts quoted section 6015(e)(1)(A) by using ellipses to omit the "to" clause immediately following the parenthetical and, in *Nauflett*, using brackets to omit a parenthesis. (Amicus Br. at 36-38).[1] However, Amicus fails to say how these omissions are material to interpreting the

[1] Contrary to Amicus's claim, *Rubel* did not use ellipses. (*Compare* Amicus Br. at 37 ("In *each* quoted passage, the courts used numerous ellipses . . .") (emphasis added) *with id.* at 36 (quoting *Rubel* without a single ellipsis)).

text. Rather (as discussed *supra*), basic rules of grammar and statutory construction mean that the "if" clause modifies the jurisdictional clause, and that result does not depend on omitting the intervening language or parenthesis. Moreover, despite its argument to the contrary, *Boechler* did not prohibit omitting irrelevant language. *Compare* (Amicus Br. at 37-38) *with Boechler*, 142 S. Ct. 1493. In fact, courts do omit irrelevant language when discussing statutory texts that they are interpreting. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 987 (2005) (omitting the end of the statute being interpreted).

47. Regarding this Court's decision in *Pollock*, Amicus quibbles with the citation to *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), and the fact that this Court cited it for the proposition that a statute looks more jurisdictional if it grants jurisdiction. (Amicus Br. at 32). However, Amicus admits that the proposition itself is correct, and its complaint is merely that *Zipes* should not have been cited for that proposition. (*Id.*). In *Zipes*, the Supreme Court cited the absence of jurisdictional terms as a reason against holding that a statute of limitations was jurisdictional. 455 U.S. at 394. While it is more correct to say that the Supreme Court indicated that a statute that does not include jurisdictional terms does not look jurisdictional, it is clear enough that this Court was applying the logical inverse.

48. Second, Amicus asserts that this Court "relied on" the similarity between section 6015(e)(1)(A) and section 6330(d)(1). (Amicus Br. at 33). However, the Court was merely analogizing between the statutes because it considered them "similar question[s.]" 132 T.C. at 31. Hardly "rel[ying] on" that analogy, the Court discussed both the analytical framework for determining whether a deadline is jurisdictional and the text of the statute. *Id.* at 31-32.

49. Lastly, Amicus argues that this Court was wrong to consider the complexity of the statute in determining whether the deadline was jurisdictional. (Amicus Br. at 35). It asserts that "if that were the test, *Boechler* would have held the § 6330(d)(1) filing deadline jurisdictional in *Boechler* [sic] because § 6330(d)(1) is part of a very similar system of detailed CDP rules . . . ." (*Id.*). That argument misunderstands that the Court was citing statutory complexity as merely one factor pointing toward jurisdictionality rather than the test, itself. 132 T.C. at 31. The fact that the complexity of section 6330(d)(1) did not overcome the ambiguity in *Boechler* does not mean that it is irrelevant in all cases.

50. Respondent notes that, in discussing the existing precedent addressing section 6015(e)(1)(A), Amicus argues that *stare decisis* has no application here. As Amicus explains, in two cases the Supreme Court has held that a deadline to be jurisdictional invoking *stare decisis* because the Court has held the deadline as jurisdictional for more than 100 years. (*See* Amicus Br. at 8) (citing *John R. Sand*

& Gravel Co. v. United States, 552 U.S. 130 (2008), and *Bowles v. Russell*, 551 U.S. 205 (2007)).

51. Contrary to Amicus's suggestion, respondent does not argue that *stare decisis* dictates the result here. The jurisdictional intent is clear from the plain language of section 6015, and this Court need not rely on *stare decisis* to reaffirm the conclusion reached in *Pollock* that it is not a "close case."

52. The Supreme Court has said that the reason that *stare decisis* has special force in statutory interpretation is because Congress is presumed to read case law and consider it when legislating. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007).

53. While Amicus argues that Congress should only be presumed to pay attention to Supreme Court decisions, (Amicus Br. at 10), this Court has viewed uniform treatment of a statutory deadline as jurisdictional by lower courts (and even the IRS) as "significant enough" to apply the prior-construction canon. *Hallmark*, 159 T.C. No. 6, slip op. at 28-29 & n.26; *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (citing an "unwavering line of administrative and judicial interpretation"—that included no Supreme Court opinions—and holding that Congress's reenactment of a statute is presumed to intend to incorporate these interpretations).

54. Moreover, Congress has *actually* amended section 6015(e) multiple times in response to circuit court decisions. In 2006, the statute was amended to provide review of claims under subsection (f) after two courts of appeals said that no judicial review was available. Tax Relief and Health Care Act of 2006 § 408, 120 Stat. 2922; 131 Cong. Rec. 8700 (daily ed. Dec. 5, 2006) (statement of Rep. Tauscher) (noting that decisions by the Eighth and Ninth Circuit Courts of Appeals denied the Tax Court jurisdiction over subsection (f) claims). In 2019, the statute was again amended, this time clarifying the standard and the scope of Tax Court review after the courts of appeals issued conflicting opinions. Taxpayer First Act of 2019 § 1203(a)(1).; H. Comm. on Ways and Means, 116th Cong., Rep. of the Comm. On Ways and Means House of Reps. on H.R. 1957 at 39-40 (Comm. Print 2019) (citing the conflicting decisions as the reason for the change).[2] And notably, *Pollock* and the three appellate court cases were all decided before the 2019 act.

F. Amicus's Remaining Arguments are Irrelevant

55. Amicus complains about respondent not answering questions that the Court did not ask. In particular, Amicus discusses at length petitioner's ability to sue for refund seeking innocent-spouse relief in the district court or the court of

[2] This was also the act that legislatively overruled the regulatory limitations period for subsection (f) claims. The legislative history does not cite the conflicting decisions between the Tax Court and courts of appeals as a reason for changing the statute. However, it is not a far leap to infer that they played a role in making that change.

federal claims. (Amicus Br. at 55-64). That issue is irrelevant. Whether this Court dismisses a petition for lack of jurisdiction or merely as untimely has no effect on whether another court will have subject matter jurisdiction over an issue in a later suit (though, a dismissal that is not for lack of jurisdiction could be a decision on the merits for *res judicata* purposes). Conversely, whether another court has jurisdiction to consider a separate action does not affect whether Congress has clearly limited this Court's jurisdiction by statute. Thus, respondent's purported failure to address an irrelevant (and unrequested) topic hardly "speaks to [any] internal, and seemingly unresolved, concerns about the issue." (*Id.* at 64).

G. Should the Court Hold that the Deadline is Non-jurisdictional, Respondent Should be Allowed to Amend His Answer

56. Lastly, Amicus argues that, if the Court does break with over a decade of precedent and significantly depart from "traditional Tax Court practice" by holding that section 6015(e)(1)(A) is subject to equitable tolling, respondent should not be permitted to amend his answer. (Amicus Br. at 64-66). As an initial matter, Amicus does not identify any procedural authority allowing it to request a preemptive bar on amending a pleading. Even if *petitioner* could make such a request, Amicus should not be permitted to do so on his behalf as it is not his counsel of record and has demonstrated its unfamiliarity with any prejudice that he might claim. (*See, e.g.*, *id.* at 65) (asserting that "prejudice precludes this Court

from granting any respondent motion for leave to file out of time an amendment to answer" (a) without saying what that prejudice is and (b) while acknowledging that petitioner could file a reply).

57. Regardless, Rule 41(a) allows the Court to grant leave to amend a pleading and provides that "leave shall be given freely when justice so requires." As the Court recognized in granting leave to amend answers after *Boechler*, justice requires allowing amendment where there are sudden, radical changes to long-standing precedent. And petitioner would not be prejudiced because (a) no trial date is set and (b) he would have sufficient time to prepare a reply. *Ax v. Commissioner*, 146 T.C. 153, 169 (2016) (holding that, where the nonmoving party is given adequate time to respond to the new amended pleading there is no unfair surprise or prejudice). Accordingly, if the Court holds that the time bar is not jurisdictional, it should allow respondent to amend his answer and assert the statute of limitations as a defense.

[This page is intentionally left blank.]

Conclusion

It follows that the Court should hold that section 6015(e)(1)(A) is a jurisdictional provision not subject to equitable tolling and dismiss this case for lack of jurisdiction on the ground that the petition herein was not timely filed.

DRITA TONUZI
Deputy Chief Counsel (Operations)
Internal Revenue Service

Julia Kapchinskiy

Date: 12/8/2022 By: _____

JULIA KAPCHINSKIY
General Attorney (Tax)
(Small Business/Self Employed)
Tax Court Bar No. KJ21186
701 B Street
Merrill Lynch Building Suite 901
San Diego, CA 92101
Telephone: 619-744-7126
julia.kapchinskiy@irscounsel.treas.gov

OF COUNSEL:
JOSEPH W. SPIRES
Division Counsel
(Small Business/Self Employed)
SHERRI S. WILDER
Area Counsel
(Small Business/Self Employed)
JEFFREY L. HEINKEL
Associate Area Counsel
(Small Business/Self Employed)