No. 20-1014

In the Supreme Court of the United States

Organic Cannabis Foundation, LLC

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Douglas L. Youmans
Counsel of Record
Wagner Kirkman Blaine Klomparens & Youmans LLP
10640 Mather Blvd., Suite 200
Mather, CA 95655
(916) 920-5286
dyoumans@wkblaw.com

Robin L. Klomparens
Wagner Kirkman Blaine Klomparens & Youmans LLP
10640 Mather Blvd., Suite 200
Mather, CA 95655
(916) 920-5286
rklomparens@wkblaw.com

TABLE OF CONTENTS

The 90-day deadline for filing a petition with the Tax Court set forth in Internal Revenue Code § 6213(a) (the "Filing Deadline") is not jurisdictional 1

A. Congress Did Not Make a *Clear Statement* That the Filing Deadline Is Jurisdictional. 2

B. There Is No "Discontinuity". 3

C. If § 6213(A)'s Deadline Is Non-Jurisdictional, Dismissal of an Untimely Petition Would Not Necessarily Have a Preclusive Effect. 3

D. The *Stare Decisis* Exception Does Not Apply to Circuit Court Rulings. 4

E. The Tax Court Has Ruled that Filing Deadlines Can Be Subject to Equitable Tolling. 6

F. *Brockamp* Was a Very Narrow Statute-Specific Holding Which Does Not Generally Preclude Equitable Tolling in Tax Cases. 6

G. Plenary Review is Warranted to Preserve Taxpayer Ability to Contest Proposed Assessments in the Only Pre-Payment Forum Other than Bankruptcy Court—the Tax Court 8

A. The Defect In The Address To Which The Notice Of Deficiency Was Mailed Was Prejudicial And Material. 9

B. Respondent Is Wrong in Claiming Petitioner Was Not Denied Due Process by the Ninth Circuit's *Sua Sponte* Taking Judicial Notice of a Website as Establishing a Fact in Dispute. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Daniels-Hall v. National Education Ass'n, 629 F.3d 992, 998-999 (9th Cir. 2010) .. 12
Fort Bend County v. Davis, 139 S. Ct. 1843, 1849 (2019) 4
Holland v. Florida, 560 U.S. 631, 646 (2010) 7
In Flight Attendants Against UAL Offset v. Commissioner, 165 F.3d 572, 577 (7th Cir. 1999) 6
Kuykendall v. Commissioner, 129 T.C. 77, 81 (2007) 10
LeTulle v. Scofield, 308 U.S. 415, 416 (1940) 12
McPartlin v. Commissioner, 653 F.2d 1185, 1192 (7th Cir. 1981) 10
Merck & Co. v. Reynolds, 559 U.S. 633, 646-648 (2010) 5
Myers v. Comm'r, 928 F.3d 1025, 1036-1037 (D.C. Cir. 2019) 7
Powell v. Commissioner, 958 F.2d 53, 57 (4th Cir. 1992) 10
Teong-Chan Gaw v. Commissioner, 45 F.3d 461 (D.C. Cir. 1995) 10
Tilden v. Commissioner, 846 F.3d 882, 886 (7th Cir. 2017) 2
United States v. Brockamp, 519 U.S. 347, 349-354 (1997) 6
United States v. Kwai Fun Wong, 575 U.S. 402, 410 (2015) 2, 3, 4
Volpicelli v. United States, 777 F.3d 1042, 1046 (9th Cir. 2015) 7
Young v. United States, 535 U.S. 43, 49 (2002) 7

Statutes

28 U.S.C. § 1658(b)(1) 5
Federal Rule of Civil Procedure 6(a) 6
Internal Revenue Code § 6213(a) ..... passim
Internal Revenue Code § 6511 ..... 6, 7, 8
Internal Revenue Code § 6532(c) 7
Internal Revenue Code § 7459(d) 4
Internal Revenue Code § 7476 6
Internal Revenue Code § 7502 ..... 8, 9
Internal Revenue Code § 7508(a) 8
Internal Revenue Code § 7623(b)(4) 7

In the
Supreme Court of the United States

No. 20-1014
Organic Cannabis Foundation, LLC

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

The first question presented is whether the 90-day deadline for filing a petition with the Tax Court set forth in Internal Revenue Code § 6213(a) (the "Filing Deadline") is jurisdictional, a question of national significance concerning the ability of taxpayers to contest proposed, potentially erroneous deficiencies in the Tax Court.

Despite the lack of a *clear statement* that the Filing Deadline is jurisdictional, the Ninth Circuit held that the Filing Deadline is jurisdictional, not subject to equitable tolling. Pet. App. 19-26; Br. in Opp. 14.

A. **Congress Did Not Make a *Clear Statement* That the Filing Deadline Is Jurisdictional**.

Claiming the Ninth Circuit properly applied "traditional tools of statutory construction …[to] plainly show that Congress imbued … [the Filing Deadline] with jurisdictional consequences" as required by *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015), Respondent points to the word "jurisdiction", "…in a provision [§ 6213(a)] that expressly conditions the Tax Court's 'jurisdiction' to grant specified relief… on the filing of 'a timely petition for a redetermination of the deficiency.'" Respondent then asserts, "[i]t would be incongruous for Congress to make the filing of a timely petition a jurisdictional prerequisite to those particular remedies, but not a jurisdictional prerequisite to the proceeding itself." Br. in Opp. 15. Pet. App. 23 (citing *Tilden v. Commissioner*, 846 F.3d 882, 886 (7th Cir. 2017)). However, conditioning the Tax Court's power to enjoin certain actions and order refunds on the "timely" filing of a petition does not logically lead to the conclusion that the Filing Deadline is jurisdictional. There is nothing to indicate that, approximately sixty years after enactment of the first sentence of § 6213(a), authorizing the Tax Court to redetermine deficiencies, Congress intended to restrict that power when it added a totally new provision (in a separate sentence that does not refer to the Filing Deadline) authorizing the Tax Court to enjoin certain actions and order refunds if a "timely petition" was filed.

If Congress had intended to make the filing of a petition by the Filing Deadline a jurisdictional prerequisite to the Tax Court redetermining a deficiency,

it would have done so more clearly than by conditioning the Tax Court's jurisdiction to enjoin collections or order refunds on the timely filing of a petition. Hence, contrary to Respondent's assertion, § 6213(a) does not, "plainly show that Congress imbued … [the Filing Deadline] with jurisdictional consequences" as required by *Kwai Fun Wong*, 575 U.S. at 410.

B. There Is No "Discontinuity".

Respondent argues that, if § 6213(a) is not jurisdictional, the no-collection prohibition provided in the second sentence would lapse, subject to revival if the Tax Court accepts a late-filed petition, a "discontinuity" the Ninth Circuit says the statute does not contemplate. Br. in Opp. 16.

For the reasons set forth in the original petition, Petitioners believe there would be no "discontinuity." Pet. 14.

C. If § 6213(A)'s Deadline Is Non-Jurisdictional, Dismissal of an Untimely Petition Would Not Necessarily Have a Preclusive Effect.

Respondent argues that, if the Filing deadline is non-jurisdictional, a dismissal of a petition for redetermination as untimely would have a preclusive effect which a dismissal "for lack of jurisdiction" would not possess. Br. in Opp. 16. That approach "could potentially have the perverse effect of barring the taxpayer from later challenging the amount in a refund suit… yielding precisely the sort of 'harsh consequences' that [this] Court's recent 'jurisdictional' jurisprudence has sought to avoid." Br. in Opp. 16; Pet. App. 25 (quoting *Kwai Fun Wong*, 575 U.S. at 409) (brackets omitted).

While § 7459(d) provides that, "[i]f a petition for a redetermination of a deficiency has been filed …, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary," it goes on to say, "[a]n order specifying the amount shall be entered in the records of the Tax Court unless the Tax Court cannot determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction." (Emphasis added). As dismissal of a petition as untimely could leave the court in a situation where it could not determine the amount of the deficiency from the record (such that an order specifying the amount could not be entered), the dismissal would not have a preclusive effect, in which case there would be none of the "'harsh consequences' that this Court's recent 'jurisdictional jurisprudence has sought to avoid.'" *Kwai Fun Wong*, 575 U.S. at 409.

D. The *Stare Decisis* Exception Does Not Apply to Circuit Court Rulings.

Respondent's contention that lower court precedent should be considered in this case (Br. in Opp. 19) disregards the distinction between appellate court and Supreme Court precedent clarified in *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849 (2019), where this Court "stated it would treat a requirement as 'jurisdictional' when 'a long line of [Supreme] Court decisions left undisturbed by Congress' attached a jurisdictional label to the prescription." (Brackets and citations omitted, emphasis added).

As this Court has never ruled on the jurisdictional nature of the Filing Deadline, and Respondent cannot point to a single decision from this Court as

support for its assertion that the Filing Deadline is jurisdictional, the *stare decisis* exception does not apply.

Respondent cites *Merck & Co. v. Reynolds*, 559 U.S. 633, 646-648 (2010) to argue that it would be "particularly appropriate" for this Court, in determining whether the Filing Deadline is jurisdictional, to consider uniform lower-court interpretations Congress was aware of when it granted the Tax Court jurisdiction to grant certain relief if a petition has been timely filed. Br. in Opp. 19. However, *Merck* was related to "discovery" under 28 U.S.C. § 1658(b)(1) (involving fraud and securities laws), and the determination of the period for filing an action for securities fraud. The statute at issue in *Merck* repeated "critical language" from an earlier Supreme Court case.

Given the history and precedent surrounding the use of the word 'discovery' in the limitations context generally as well as in this provision in particular, the reasons for making this assumption are particularly strong here. We consequently hold that 'discovery' as used in this statute encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known.

Merck, 559 U.S. at 648). The circumstances here are substantially different—as the "new" sentence added to § 6213(a), authorizing the Tax Court to enjoin certain actions and order refunds if a "timely petition" was filed, was not derived from an earlier Supreme Court case, there is no reason to create an exception to this Court's numerous holdings that *stare decisis* is only applicable to this Court's decisions.

E. The Tax Court Has Ruled that Filing Deadlines Can Be Subject to Equitable Tolling.

Respondent's suggestion that the Tax Court is "interpreting," not equitably tolling, the Filing Deadline when it permits late filings of petitions is a distinction without a difference. Br. in Opp. 20.

As nothing in the Tax Court rules or the Code specifically states the Tax Court can extend filing deadlines, to do so the Tax Court looked to Federal Rule of Civil Procedure 6(a), which is the equivalent of equitable tolling.

F. *Brockamp* Was a Very Narrow Statute-Specific Holding Which Does Not Generally Preclude Equitable Tolling in Tax Cases.

Respondent claims *United States v. Brockamp*, 519 U.S. 347, 349-354 (1997) generally excludes equitable tolling from the Code. Br. in Opp. 22-23. Yet, *Brockamp* was a statute-specific analysis. Quoting *Brockamp*, § 6511 "sets forth its time limitations in unusually emphatic form," using "highly detailed technical" language that "cannot easily be read as containing implicit exceptions" and by "reiterate[ing] its limitations several times in several different ways. . . For these reasons, we conclude that Congress did not intend the 'equitable tolling' doctrine to apply to § 6511's time limitations." *Brockamp*, 519 U.S. at 350-351, 354.

Lower courts have refused to stretch *Brockamp* beyond § 6511. In *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 577 (7th Cir. 1999) (involving the time period to file a § 7476 declaratory judgment petition in the Tax Court), Judge Posner, in dicta, asserted that the government was asking him to broaden the statute-specific conclusion reached by *Brockamp* to exclude all time periods in the Code from equitable tolling. *Flight Attendants Against UAL Offset*,

165 F.3d at 577. His response was that "[t]he argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable estoppel because it is a court of limited jurisdiction is fatuous." *Flight Attendants Against UAL Offset*, 165 F.3d at 577.

In *Volpicelli v. United States*, 777 F.3d 1042, 1046 (9th Cir. 2015) (involving the time period in which to file a wrongful levy action in district court under § 6532(c)), the Ninth Circuit rejected the government's argument that there is no equitable tolling in the Code:

The Court may in time decide that Congress did not intend equitable tolling to be available with respect to any tax-related statute of limitations. But that's not what the Court held in *Brockamp*. It instead engaged in a statute-specific analysis of the factors that indicated Congress did not want equitable tolling to be available under § 6511. The Court later made clear in [*Holland v. Florida*, 560 U.S. 631, 646 (2010)] that the 'underlying subject matter' of § 6511 – tax law – was only one of those factors. [*Holland*, 560 U.S. at 646 (quoting *Brockamp*, 519 U.S. at 352)]…. the other factors on which the Court relied are not a close enough fit with § 6532(c) to render *Brockamp* controlling here."

In *Myers v. Comm'r*, 928 F.3d 1025, 1036-1037 (D.C. Cir. 2019), the D.C. Circuit held that the § 7623(b)(4) whistleblower award filing deadline was nonjurisdictional and subject to equitable tolling. Citing *Young v. United States*, 535 U.S. 43, 49 (2002), the court noted "It is hornbook law that limitations periods are customarily subject to equitable tolling." *Myers v. Comm'r*, 928 F.3d at 1037.

Based on *Brockamp's* observation that § 6511 "set forth several explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling.'" Br. in Opp. 22, Respondent attempts to analogize § 6213(a) to § 6511 by claiming multiple statutory exceptions from the Filing Deadline exist in the form of extensions under § 7502 (mailbox rule), § 7508(a) (filing period suspended for individuals serving in combat zones or hospitalized because of service in combat zones), and § 7508(A) (authorizing Secretary of the Treasury to extend deadlines for taxpayers affected by federally declared disasters, acts of terrorism, or military action). Br. in Opp. 23-24. With the exception of § 7508(A), those statutory exceptions, which apply broadly to many deadlines in the Code, not just to filing deadlines, existed at the time of *Brockamp* and were not mentioned as relevant in that opinion. To argue, as Respondent does, that those extensions are exceptions that must be considered like the exceptions considered in *Brockcamp* would essentially be saying that their existence negates the existence of equitable tolling for any Code filing deadline.

G. Plenary Review is Warranted to Preserve Taxpayer Ability to Contest Proposed Assessments in the Only Pre-Payment Forum Other than Bankruptcy Court—the Tax Court

Tax Court review was put in place so that taxpayers would not have to full pay proposed deficiencies, with penalties and interest, to obtain judicial review. This has practical significance in situations where the amount of the proposed deficiency is hundreds of thousands or millions of dollars. Respondent's assertion that Petitioner can seek relief in a refund suit is contrary to Congressional intent in establishing the Tax Court.

The second question presented is whether the Ninth Circuit denied Petitioner due process under the Fifth Amendment by holding that the notice of deficiency was properly addressed based on a website statement of which it took judicial notice, *sua sponte*, without affording the parties an opportunity for hearing or supplemental briefing.

A. The Defect In The Address To Which The Notice Of Deficiency Was Mailed Was Prejudicial And Material.

Respondent argues that Petitioner has not meaningfully disputed the Tax Court's determination that any defect in the address to which the notice of deficiency was mailed was non-prejudicial and immaterial to the deficiency notice's validity. Respondent totally ignores the following arguments Petitioner presented to the Ninth Circuit:

a. The petition was timely filed under the "mailbox rule" because "FedEx Overnight" was a "designated delivery service" under § 7502 (and IRS Notice 2015-38), and the petition was delivered to FedEx for delivery pursuant to the "Overnight" delivery option which guaranteed the earliest delivery of all FedEx delivery options.

b. Even if the "First Overnight" delivery option Petitioner used was not specifically identified in IRS Notice 2015-38, Petitioner substantially complied with the regulatory requirements of the "mailbox rule" because FedEx essentially used the same equipment and followed the same procedures for all of its "Overnight" deliveries.

Additionally, Petitioner brought to the Ninth Circuit's attention the conflict among the circuit courts pertaining to when the Filing Deadline begins, pointing out that, because Petitioner's petition was delivered to FedEx the day BEFORE expiration of the Filing Deadline, to the extent that delivery was not effectuated BEFORE expiration of the Filing Deadline (for reasons that are not entirely clear because Respondent did not point out that the petition was delivered to the Tax Court the day after expiration of the Filing Deadline until 15 months had passed, long after FedEx purged its records), Petitioner has clearly been prejudiced by the Tax Court's dismissal of the petition as untimely.

Had the Ninth Circuit ruled, like the Tax Court, that the incorrect address on the notice of deficiency did not invalidate it, that would have illuminated the conflict among the circuit courts with respect to when a taxpayer has to file a petition for redetermination when the taxpayer receives an improperly addressed notice of deficiency before the Filing Period has expired. The holding in the majority of circuits that have addressed the issue is that, if an improperly addressed notice of deficiency is received with enough time to file a petition without prejudice, the notice of deficiency is valid and the taxpayer has the "normal" Filing Period to file. See *Kuykendall v. Commissioner*, 129 T.C. 77, 81 (2007). However, the Fourth, Seventh and D.C. Circuits have held the Filing Deadline is tolled until 90 days following receipt of an improperly addressed notice. *Powell v. Commissioner*, 958 F.2d 53, 57 (4th Cir. 1992); *McPartlin v. Commissioner*, 653 F.2d 1185, 1192 (7th Cir. 1981); *Teong-Chan Gaw v. Commissioner*, 45 F.3d 461 (D.C. Cir. 1995).

Review is warranted to resolve the conflict among the circuit courts with respect to when a taxpayer has to file a petition for redetermination when the taxpayer receives an improperly addressed notice of deficiency before the Filing Period has expired. This is a question of national significance which could have precedential value concerning the ability of taxpayers to contest proposed assessments in the Tax Court.

B. Respondent Is Wrong in Claiming Petitioner Was Not Denied Due Process by the Ninth Circuit's *Sua Sponte* Taking Judicial Notice of a Website as Establishing a Fact in Dispute.

Respondent contests whether, by basing its determination that the notice of deficiency was properly addressed on a website of which it took judicial notice, *sua sponte*, without affording Petitioner the opportunity to be heard, the Ninth Circuit denied Petitioner due process, but asserts that Petitioner has not [1] identified any conflicts "…between the Ninth Circuit's approach and any decision of this Court or of another court of appeals….[2] suggest[ed] that a portion of the Postal Service's official website explaining aspects of the postal system that it administers is categorically unsuitable for judicial notice….[or 3] dispute[d] the veracity of the information contained in … the Postal Service's website." Br. in Opp. 27.

However, Respondent (1) fails to identify any case where a court approved the determination of a disputed issue of fact based on taking judicial notice of a website *sua sponte* without allowing the parties an opportunity to be heard; (2) ignores the fact that the website did not definitively state a fact; and (3) ignores the fact that Petitioner could not dispute the veracity of the information because Petitioner was not provided any opportunity to be heard on it. The deprivation of

Petitioner's right to be heard raises important constitutional questions as to Petitioner's due process rights under the Fifth Amendment. This Court has a long history of accepting certiorari on the question of whether an appellate court could decide a case "on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence." *LeTulle v. Scofield*, 308 U.S. 415, 416 (1940). To say that this Court should not accept certiorari in this case, where the Ninth Circuit decided an issue on a point not presented or argued by the parties is inconsistent with this Court's longstanding practice.

Respondent properly cites *Daniels-Hall v. National Education Ass'n*, 629 F.3d 992, 998-999 (9th Cir. 2010), asserting that it is "appropriate to take judicial notice of [certain] information, as it was made publicly available by government entities * * *, and neither party dispute[d] the authenticity of the web sites or the accuracy of the information displayed therein." But Petitioner's argument is that neither party disputed the authenticity of the website or the accuracy of the information displayed therein because neither party was given the opportunity to do so.

CONCLUSION

For the foregoing reasons, the Court should grant Organic Cannabis Foundation, LLC's Petition for Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DOUGLAS L. YOUMANS
Counsel of Record
WAGNER KIRKMAN BLAINE
KLOMPARENS & YOUMANS LLP
10640 Mather Blvd., Suite 200
Mather, CA 95655
(916) 920-5286
dyoumans@wkblaw.com

Counsel for Petitioner,
Organic Cannabis Foundation, LLC