

No. 20-1031

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In The  
**Supreme Court of the United States**

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NORTHERN CALIFORNIA  
SMALL BUSINESS ASSISTANTS, INC.,

*Petitioner;*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**BRIEF OF THE CENTER FOR  
TAXPAYER RIGHTS AS *AMICUS CURIAE*  
IN SUPPORT OF THE PETITIONER**

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## **INTEREST OF THE AMICUS<sup>1</sup>**

The Center for Taxpayer Rights (“the Center”) was established in 2019 as a § 501(c)(3)<sup>2</sup> non-profit corporation dedicated to furthering taxpayers’ awareness of and access to taxpayer rights. The Center accomplishes its mission, in part, by educating the public and government officials about the role taxpayer rights plays in promoting compliance and trust in systems of taxation. The Executive Director of the Center is Nina E. Olson, who, from 2001 through 2019, served as the Internal Revenue Service (“IRS”) National Taxpayer Advocate, appointed under § 7803(c)(1)(B). In that role, Ms. Olson submitted reports to Congress twice a year urging administrative and legislative improvements to taxpayer rights.

Counsel for the Center is the Tax Clinic of the Legal Services Center of Harvard Law School (“the Clinic”). The Clinic was formed in 2015 to represent low-income taxpayers before the IRS and in tax matters before the

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<sup>1</sup> The parties were timely notified and have consented to the filing of this brief. The petitioner provided written consent on January 23, 2021. The Solicitor General, on behalf of respondent, provided written consent on February 4, 2021. Pursuant to Supreme Court Rule 37.6, this is to affirm that no party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. Aside from the *amicus*, the only person contributing to the preparation or submission of this brief was Harvard University, of which the Tax Clinic at the Legal Services Center of Harvard Law School is a component part. Harvard University contributed the costs of printing.

<sup>2</sup> Unless otherwise indicated, all section references are to the Internal Revenue Code, Title 26.

courts. The Clinic regularly represents taxpayers in deficiency, “Collection Due Process” (“CDP”), and “innocent spouse” cases in the Tax Court and in the courts of appeal and has also filed many *amicus* briefs on its own. Professor T. Keith Fogg is the Director of the Clinic. Carlton M. Smith (counsel of record for the Center in this Court), in his retirement from general practice, volunteers his services to the Clinic and was, from 2003 to 2013, the director of a similar student tax clinic at the Benjamin N. Cardozo School of Law.

The Center’s purpose in filing this brief is to request that this Court grant the petition for certiorari and hold that the deadline in § 6213(a) in which to file a Tax Court deficiency suit is not jurisdictional and is subject to equitable tolling. Such a nonjurisdictional ruling may be of aid to low-income taxpayers because, in that event, any noncompliance with the filing deadline would become an affirmative defense that the IRS could waive or would forfeit (if the IRS did not raise the argument early enough in the litigation). Other such taxpayers who, for equitable reasons, missed the filing deadline might also benefit.

The Center is only filing an *amicus* brief in this, and not the companion, case, *Organic Cannabis Foundation, LLC v. Commissioner of Internal Revenue*, Docket No. 20-1014, because the companion case presents an additional alternative jurisdictional issue that could dispose of that companion case on grounds other than those discussed in this brief.

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## SUMMARY OF ARGUMENT

The Tax Court has held that nearly all of its petition filing deadlines are jurisdictional and so not subject to equitable tolling. This Court should grant the writ of *certiorari* in this case and hold that the Tax Court's view is incorrect – at least as to deficiency suits in the Tax Court. The Tax Court has misunderstood this Court's recent direction not to treat filing deadlines as jurisdictional, unless either Congress has made a clear statement to that effect in the statute (which it has not in the case of deficiency suits) or a *stare decisis* exception to the current rules applies (and none does here). The unfortunate consequence of the Tax Court's position, and that of the Ninth Circuit and several other Circuits, is that for nearly every petition filed in the Tax Court, Tax Court judges have to police the issue of whether a petition was timely filed as a jurisdictional issue. Considerable judicial resources are invested in this policing, without any indication that Congress has ever desired this outcome.

Section 7459(d), as currently drafted, may suggest that the dismissal of a Tax Court petition for late filing, if late filing is not considered a jurisdictional issue, effects a decision on the merits precluding by *res judicata* the taxpayer from subsequently paying the deficiency and suing for a refund in district court or the Court of Federal Claims. However, no court has so held yet, and the Ninth Circuit's view that this would be the case, even if true, would not affect any significant number of taxpayers, since, as a practical matter, taxpayers dismissed from the Tax Court for late filing, even today,

almost never (perhaps never) pay the deficiency and sue for a refund. This § 7459(d) concern is more a theoretical than real concern. Far more taxpayers would benefit by a holding that the Tax Court's deficiency suit filing deadline is not jurisdictional and is subject to equitable tolling than would be harmed by this § 7459(d) concern. Congress is the more appropriate forum for raising any potential § 7459(d) concern.

In addition to cases such as the instant one (which presents a rare fact pattern), it should be anticipated that a ruling that equitable tolling of the deficiency filing deadline would help taxpayers in more typical, recurring cases, such as cases where taxpayers timely file their Tax Court petition mistakenly with the IRS office that issued the notice of deficiency or where medical issues (such as COVID-19) prevented timely filing in the Tax Court.

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## **ARGUMENT**

This brief will not repeat the argument made by the petitioner for why the Tax Court deficiency suit filing deadline is not jurisdictional and is subject to equitable tolling. For further arguments in support of petitioner's position that the deficiency suit filing deadline is not jurisdictional and is subject to equitable tolling, *see* Bryan Camp, "New Thinking About Jurisdictional Time Periods in the Tax Code," 77 *Tax Lawyer* 1 (2019). Instead, this brief will primarily attempt to inform this Court of the practical

consequences of rulings on the jurisdictional and equitable tolling issues.

### **I. The Tax Court Needlessly Expends Considerable Judicial Resources Each Month Incorrectly Policing the Filing Deadline as a Jurisdictional Issue.**

Many taxpayers might be affected by a ruling that the Tax Court's deficiency jurisdiction filing deadline is not jurisdictional (whether or not the filing deadline is also subject to equitable tolling). In the fiscal year ended September 30, 2018, taxpayers filed 24,463 Tax Court petitions. IRS Data Book, 2018 at 62 (Table 27), available at [www.irs.gov](http://www.irs.gov). These petitions were under about 20 different jurisdictions of the Tax Court. The Tax Court's position is that the filing deadline of any petition in the Tax Court, under any of its jurisdictions, is a jurisdictional issue for the court. Tax Court Rule 13(c) ("In all cases, the jurisdiction of the Court also depends on the timely filing of a petition."). (Parenthetically, the D.C. Circuit, which hears all appeals of Tax Court whistleblower actions under § 7623(b)(4), has overruled the Tax Court and held that the filing deadline for such an action is not jurisdictional and is subject to equitable tolling under current Supreme Court authority. *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019).)

Three jurisdictions of the Tax Court comprise the vast bulk of its petitions (deficiency, CDP, and innocent spouse), but it has long been the case that deficiency

petitions make up the overwhelming majority of all petitions filed. Harold Dubroff & Brant Hellwig, “The United States Tax Court: An Historical Analysis” (2d Ed. 2014) at 909 (Appendix B). The Dubroff & Hellwig book is the semi-official history of the Tax Court, available at a link on the “History” page of the court’s website. “Over 75 percent of the petitioners who file with the Court are self-represented (pro se).” U.S. Tax Court Congressional Budget Justification Fiscal Year 2021 (Feb. 10, 2020) at 22, also available at a link on that “History” page.

Because the Tax Court does not publish statistics breaking down filings under each of its jurisdictions, and because that court also does not separately identify in statistics cases dismissed for lack of jurisdiction, in order to get a sense of how many cases in the court each year might be affected by a ruling on whether the deficiency petition filing deadline is jurisdictional, the Center reviewed, using the Tax Court’s DAWSON online system (available on the Tax Court’s website), 1% of a randomly-chosen sample of dockets filed during the fiscal year ended September 30, 2018. The year ended September 30, 2018 was chosen simply to allow likely enough time for jurisdictional issues to be raised and disposed of in all cases. The 245 dockets reviewed were numbers 10001-18 through 10245-18 (as to which petitions were filed between May 21 and 24, 2018, inclusive). Of those 245 dockets, 24 were not deficiency cases.<sup>3</sup> Of the remaining 221 dockets that comprised

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<sup>3</sup> Sixteen dockets were CDP cases under § 6330(d)(1). Three dockets were so-called TEFRA partnership cases under § 6226

deficiency cases, 38 (17% – i.e., 38/221) were dismissed for lack of jurisdiction. However, there were multiple grounds for the 38 dismissals for lack of jurisdiction:

<u>Number of Cases</u>	<u>Dismissal Reason</u>
25	failure to pay filing fee
10	late filing
1	failure to file proper amended petition
1	no original signature on petition
1	tax paid before notice of deficiency issued

In only one of the 10 dockets where the case was dismissed for late filing was there any suggestion of facts which might give rise to equitable tolling. In *Lavery v. Commissioner*, Docket No. 10026-18 (order dated Jul. 18, 2018), it appears that there may have been a timely filing in the wrong forum (i.e., a timely mailing to the IRS, instead of the Tax Court).

This review shows that floodgates would not open if equitable tolling were allowed to excuse the late filing of a modest number of deficiency petitions each year.

The greater practical effect of a ruling that the Tax Court's deficiency suit filing deadline is not

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applicable to pre-2018 taxable years. Five dockets did not fall under any Tax Court jurisdiction because the IRS had not issued any of the so-called “tickets” to the Tax Court in those cases (and the cases were dismissed by the court for lack of jurisdiction).

jurisdictional would be to benefit taxpayers where the IRS attorneys in the case either had omitted to notice the possible late filing of a petition or had deliberately decided not to argue that a petition was late and so forfeited or sought to waive the late filing argument. As this Court has noted, “[t]he expiration of a ‘jurisdictional’ deadline prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons.” *Dolan v. United States*, 560 U.S. 605, 610 (2010) (citation omitted). In contrast, if a filing deadline is not jurisdictional, it is subject to forfeiture and waiver (whether or not it is subject to equitable tolling or estoppel).

Every month, the Tax Court dismisses multiple deficiency cases only because the filing deadline is currently treated as jurisdictional and so the Tax Court judges, *sua sponte*, police late filing. The court’s position that the filing deadline is jurisdictional necessitates that judges examine the files in every case for late filing – the judges not being able merely to rely on the IRS to raise all late filing issues. When a judge suspects that a petition in a particular case was filed late, but the IRS attorneys have made no argument to that effect, the judge issues an order to show cause why the case should not be dismissed for lack of jurisdiction. In November and December 2019 (typical recent pre-COVID-19 months), the Tax Court issued orders to show cause to dismiss deficiency petitions for untimely

filings four and eight times, respectively.<sup>4</sup> All 12 such taxpayers lost their chance to have their deficiencies litigated in the Tax Court only because the judges treated the filing deadline as jurisdictional. If, as the Center believes, the filing deadline is not jurisdictional, judges have been investing considerable resources over the years engaging in needless policing.

Judges do not merely police jurisdiction in the middle of a case, but also when a case settles. About once a month, some taxpayer and the IRS settle a case on the merits and submit to the Tax Court a proposed stipulated decision setting forth the amount of the deficiency, but the Tax Court judge refuses to sign the decision until the parties show cause why the case should not instead be dismissed for lack of jurisdiction on account of a late filing of the petition that the IRS had not noticed. (The decision in the Tax Court is analogous to the judgment in a district court case.) An example of a show cause order issued in this situation is that in

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<sup>4</sup> See orders in *Beaupre v. Commissioner*, Docket No. 23536-18S (dated Nov. 8, 2019); *Croker v. Commissioner*, Docket No. 9070-18S (dated Nov. 15, 2019); *Gonzalez v. Commissioner*, Docket No. 2256-19S (dated Nov. 15, 2019); *Chappell v. Commissioner*, Docket No. 20711-19 (dated Nov. 27, 2019); *Harris v. Commissioner*, Docket No. 15979-19S (dated Dec. 17, 2019); *Castaldo v. Commissioner*, Docket No. 19264-19 (dated Dec. 19, 2019); *Treas v. Commissioner*, Docket No. 12225-19S (dated Dec. 19, 2019); *Davila-Cabrera v. Commissioner*, Docket No. 19192-19 (dated Dec. 20, 2019); *Mansfield v. Commissioner*, Docket No. 19342-19S (dated Dec. 23, 2019); *Rosenthal v. Commissioner*, Docket No. 18392-19S (dated Dec. 26, 2019); *Stephens v. Commissioner*, Docket No. 20418-19 (dated Dec. 30, 2019); and *Slavo v. Commissioner*, Docket No. 19732-19 (dated Dec. 31, 2019).

*Williams v. Commissioner*, Docket No. 24954-17 (dated Jan. 26, 2018).

A further example of overuse of judicial resources is where the IRS agrees with the taxpayer that a petition was timely filed, but the Tax Court takes the time to conclude that the petition was not timely filed. For example, in *Tilden v. Commissioner*, 846 F.3d 882 (7th Cir. 2017), rev'g T.C. Memo. 2015-188, the parties were initially in disagreement over whether a deficiency petition had been timely filed under the rules of § 7502. Section 7502 provides a timely-mailing-is-timely-filing rule applicable to Tax Court petitions. The initial dispute was about which provision of regulations under the Code section applied to the case. By the time the Tax Court wrote its opinion, however, the parties agreed that the petition was timely filed. However, the Tax Court disagreed and dismissed the petition for lack of jurisdiction as untimely. The Tax Court could not merely accept the IRS' concession that the filing was timely because of the Tax Court's position that the deficiency suit filing deadline is a jurisdictional issue. In the Seventh Circuit, both parties again argued that the filing was timely. This led the judges at oral argument, *sua sponte*, to wonder whether they had to decide the § 7502 issue, since, if the filing deadline at § 6213(a) was not jurisdictional, the government was waiving any untimeliness argument, which was the government's prerogative. The judges asked the attorneys for each side whether the filing deadline in § 6213(a) is jurisdictional under recent Supreme Court case law, but the attorneys did not know about such

case law. Then, two of the judges gave their tentative views that the § 6213(a) filing deadline appeared not to be jurisdictional. *See* Marie Sapirie, “News Analysis: Will the Seventh Circuit Unsettle Tax Court Timing Rules?”, *Tax Notes Today* (Oct. 24, 2016) (“‘This appears to be a timing rule, but timing rules aren’t jurisdictional,’ [Judge] Easterbrook said. [Chief Judge] Wood observed that for at least the last decade, the Supreme Court has been telling courts not to ‘put everything in the jurisdictional box’ because many rules that may have previously been carelessly referred to as jurisdictional are really claims processing rules. ‘If it’s a claims processing rule, it’s just a fact. You can concede it. The world doesn’t come to an end, and the case goes on,’ Wood said.”). After the oral argument, the parties in *Tilden* submitted supplementary briefs on the issue of whether the § 6213(a) filing deadline is jurisdictional under current Supreme Court case law. The judges then changed their minds and, in their opinion, held the filing deadline jurisdictional and then proceeded to reverse the Tax Court on the § 7502 issue.

In sum, too much judicial time is being needlessly spent in policing late filing only because of the lower courts’ misunderstanding of how this Court’s presumption that filing deadlines are no longer jurisdictional applies to the deficiency filing deadline.

## **II. The § 7459(d) Concern of the Ninth Circuit Is Almost Entirely Theoretical and Not of Practical Impact on Taxpayers.**

Section 7459(d) provides:

If a petition for a redetermination of a deficiency has been filed by the taxpayer, 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. An order specifying such 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]

In its opinion in *Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1095 (9th Cir. 2020), the Ninth Circuit cited the existence of § 7459(d) as supporting its holding that the deficiency petition filing deadline is jurisdictional because, if it were otherwise, § 7459(d) might require that a Tax Court petition dismissed as late on nonjurisdictional grounds precludes by *res judicata* a taxpayer from later paying the deficiency and suing for a refund. While that may be true (though no court has yet so held), the panel ignores three points.

First, timely filing is one of many current grounds treated as jurisdictional, so the subsection exception for jurisdictional dismissals is not rendered superfluous if timely filing is not treated as one of those jurisdictional issues. For example, the most obvious

situation is where a petition is dismissed for lack of jurisdiction because the notice of deficiency was invalid because the IRS did not send it to the taxpayer's last known address. *See, e.g., Crum v. Commissioner*, 635 F.2d 895 (D.C. Cir. 1980). Other examples include situations where the petition is barred by the automatic stay in bankruptcy, *see, e.g., Halpern v. Commissioner*, 96 T.C. 895 (1991); where a corporation lacks capacity to file the petition at the time; *see, e.g., Vahlco Corp. v. Commissioner*, 97 T.C. 428 (1991) (Texas law); *Condo v. Commissioner*, 69 T.C. 149 (1977) (California law); where the filing fee has not been paid; and where the taxes have been paid before the notice of deficiency was issued.

Second, the predecessor of § 7459(d) is Revenue Act of 1926, § 1000, which amended Revenue Act of 1924, § 906(c). That 1926 amendment contained no jurisdictional dismissal exception. The exception for jurisdictional dismissals was enacted by Congress only in Revenue Act of 1928, § 601, which revised Revenue Act of 1924 § 906(c), as amended in 1926. The legislative history of the 1928 amendment adding the jurisdictional exception does not explain the purpose of the exception; *see* H. Rept. 2, 70th Cong., 1st Sess. at 30 (discussion of §§ 601 and 602); S. Rept. 960, 70th Cong., 1st Sess. at 37-38 (discussion of § 601); H. Rept. (Conf.) 1882, 70th Cong., 1st Sess. (no discussion of § 601); so it is pure speculation by the Ninth Circuit concerning what Congress intended about the ability of taxpayers who file late in the Tax Court to later, after dismissal, pay the deficiency and not be precluded from

suing for a refund. The panel does not like the “peculiar outcome”; *Organic Cannabis, supra*, at 1095; that might flow from the taxpayer’s argument that the petition filing deadline is not jurisdictional. But, that is a legislative issue, not one for the courts to decide. It is not for the courts to strive for a taxpayer-favorable ruling as to how § 7459(d) should apply when that ruling also hurts many more taxpayers as to how § 6213(a) should apply.

Third, even though the Ninth Circuit identified a potential problem, that problem is, realistically, not a significant problem because taxpayers filed only 219 refund suits in the fiscal year ended September 30, 2019 in all courts. IRS Data Book, 2019 at 68 (Table 29), available at [www.irs.gov](http://www.irs.gov). It is unclear that any taxpayer filed a refund suit after the taxpayer first filed a late Tax Court petition, had her suit dismissed, and then paid the deficiency in order to bring the refund suit. Neither professor ever recalls seeing an opinion describing such a fact pattern (though they concede that it might be possible that it has happened on very rare occasion).

### **III. Equitable Tolling Would Be Highly Beneficial to Taxpayers in Other More Typical Cases.**

Like many equitable tolling cases, this one presents a rare fact pattern. But there are more common fact patterns where equitable tolling might be of benefit to taxpayers in the Tax Court.

It is generally conceded that there are three common grounds for allowing equitable tolling of non-jurisdictional filing deadlines:

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

*Mannella v. Commissioner*, 631 F.3d 115, 125 (3d Cir. 2011) (cleaned up). *Accord Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) (“We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.”) (footnote omitted).

### **Affirmatively Misled**

The IRS occasionally makes mistakes, and those mistakes can affirmatively mislead taxpayers into filing a Tax Court deficiency petition on the wrong date.

The cases of *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017) (IRS, in written correspondence, told the taxpayer the wrong date to file the petition); *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017) (IRS employee orally gave the unrepresented taxpayer

the wrong date to file the petition); and *Nauflett v. Commissioner*, 892 F.3d 649 (4th Cir. 2018) (IRS Taxpayer Advocate Service employee orally gave the unrepresented taxpayer the wrong date to file the petition), provide examples, in the innocent spouse context, of situations in which equitable tolling based on misleading the plaintiff possibly would have been granted, but was not because the courts determined that the Tax Court innocent spouse petition filing deadline at § 6015(e)(1)(A) is jurisdictional.

Further, because of COVID-19 interruptions to IRS operations, the IRS belatedly sent out millions of notices without changing dates thereon. *See* National Taxpayer Advocate 2020 Annual Report to Congress at p. v (“Millions of taxpayers received late notices bearing dates that had passed and, in many cases, response deadlines that also had passed.”) While it is not clear that any of these misdated notices were notices of deficiency, doubtless, this has and will continue to cause considerable taxpayer confusion.

### **Extraordinary Circumstances**

*Mannella v. Commissioner, supra*, provides an example of an extraordinary circumstance preventing the taxpayer from timely filing a request for innocent spouse relief, which is a predicate to filing a Tax Court innocent spouse petition. Her husband hid from the taxpayer IRS mail coming into the house, which prevented her from an awareness of an outstanding joint IRS debt. Under the innocent spouse regulation in

place at the time of the *Mannella* case, her failure to act within two years of an IRS collection notice about which she knew nothing prevented her from moving forward with her case. Although *Mannella* is not itself an equitable tolling case involving the filing of a Tax Court petition, after upholding the validity of the regulation's two-year deadline, the Third Circuit had remanded the case to the Tax Court to see if the two-year period was subject to equitable tolling.<sup>5</sup> *Mannella* provides an example of someone prevented by extraordinary circumstances from taking an act to protect her interest.

A trio of Tax Court CDP cases with differing fact patterns demonstrates the difficulty taxpayers experience when they do not timely receive mail from the IRS, even when the IRS sends such mail to their last known address. *See Atuke v. Commissioner*, Tax Court Docket No. 31680-15SL (order dated Apr. 15, 2016) (notice of determination under § 6330(d)(1) mailed to taxpayer in Nairobi, Kenya did not arrive until after the time for petitioning the Tax Court – case dismissed for lack of jurisdiction due to untimely petition); *Berkun v. Commissioner*, 890 F.3d 1260 (11th Cir. 2018) (levy notice mailed to taxpayer's home address while he was in prison for tax crimes, causing him not to receive notice in time to timely request administrative CDP hearing

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<sup>5</sup> Although the IRS got the Third Circuit to uphold the regulation's validity, the IRS later abandoned enforcing the regulation; Notice 2011-70, 2011-2 C.B. 135; and the taxpayer eventually obtained full innocent spouse relief without the Tax Court deciding whether equitable tolling could apply on the facts of the case.

– case dismissed for lack of jurisdiction due to “equivalent hearing” letter he was given after the hearing not being treated as a notice of determination that could be the subject of a Tax Court petition); *Castillo v. Commissioner*, Docket No. 18336-19L (order dated Mar. 25, 2020) (notice of determination mailed by IRS to taxpayer’s last known address but never delivered by post office – case dismissed for lack of jurisdiction due to untimely petition) (appeal pending at Second Circuit Docket No. 20-1635). These cases also present circumstances beyond the taxpayers’ control and which may also occur in deficiency cases.

Further, consider the issue of serious illness during the 90 days preventing timely filing. Under § 7508A, the IRS granted a COVID-19 extension to file a Tax Court petition because of a Presidentially-declared disaster, but only from April 1, 2020 to July 15, 2020. Notice 2020-23, 2020-18 I.R.B. 742, § III.C. No further extension is anticipated, yet the pandemic continues and has only gotten worse. What if the IRS had mailed a notice of deficiency to the taxpayer on August 1, 2020, which the taxpayer received on August 4, 2020? When the taxpayer got the notice, she was too sick with COVID-19 to prepare a Tax Court petition that day and instead went to a hospital, where she was placed into a coma and intubated for 95 days. By the time the taxpayer awoke from the coma, the time to file a Tax Court petition would have expired. Clearly, this would have been a circumstance beyond the taxpayer’s control that prevented timely filing. Absent this Court’s holding that the Tax Court deficiency petition filing

deadline is not jurisdictional and is subject to equitable tolling, the taxpayer will have lost her pre-payment judicial contest rights.<sup>6</sup> Such a holding would only compound the pandemic’s tragedies.

### **Timely Filing in Wrong Forum**

For a common Tax Court fact pattern (which appears to occur about once each month), *see Rosenthal v. Commissioner*, Tax Court Docket No. 18392-19S (order to show cause dated Dec. 26, 2019). There, the taxpayers had erroneously mailed their petition to the IRS Laguna Nigel Office, and that office had, weeks later, forwarded it to the Tax Court, where it arrived after the 90-day period had expired. The Clinic entered an appearance for the taxpayers in that case and found that the petition bore an IRS “received” stamp showing a date well before the expiration of the 90 days. The Clinic initially argued that the filing should be treated as timely under the equitable tolling ground of timely filing in the wrong forum, citing cases involving the Court of Appeals for Veterans Claims allowing equitable tolling under similar circumstances. *Bailey v. Principi*, 351 F.3d 1381, 1382 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002); *Jaquay v. Principi*, 304 F.3d 1276, 1289 (Fed. Cir. 2002). The Clinic later withdrew its argument when the IRS issued a replacement notice of deficiency so

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<sup>6</sup> Because she received the notice of deficiency, she has also lost her rights under CDP to contest the underlying tax, prepayment, in the Tax Court. § 6330(c)(2)(B).

that the taxpayers could timely file a new petition. The Tax Court dismissed the initial petition for lack of jurisdiction as untimely. *See* order of dismissal dated Jun. 29, 2020.

A nearly identical fact pattern played out in two other deficiency cases filed with the Tax Court shortly before the *Rosenthal* case: *Gitman v. Commissioner*, Tax Court Docket No. 5804-19 (order dated Aug. 8, 2019) (dismissing petition as untimely after it was timely mailed to Tax Court's New York City courtroom instead of the Clerk in Washington, D.C. and did not get to Clerk's Office within the 90-day period of § 6213(a)) and *Islam v. Commissioner*, Tax Court Docket No. 14099-19S (order dated Feb. 28, 2020) (dismissing petition as untimely after it was timely mailed to IRS, but not received by Tax Court within the 90-day period of § 6213(a)). Indeed, the *Rosenthal* fact pattern arises with sufficient frequency that the IRS has issued Internal Revenue Manual § 4.8.9.25.1 (7/9/13) to guide its employees to send misdirected petitions to the Tax Court. The *Rosenthal* case provides an example of a situation in which an IRS employee purported to follow the Manual provision, but only after waiting for weeks after receipt of the petition – causing the petition to arrive late at the Tax Court.

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## CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of *certiorari* in this case

and hold that the filing deadline in § 6213(a) is not jurisdictional and is subject to equitable tolling.

Respectfully submitted,

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