

No. 20-1472

---

---

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

—◆—  
BOECHLER, P.C.,

*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

—◆—  
**On Petition For A Writ Of *Certiorari*  
To The United States Court Of Appeals  
For The Eighth Circuit**

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

—◆—  
PROFESSOR T. KEITH FOGG  
DIRECTOR, TAX CLINIC OF THE  
LEGAL SERVICES CENTER OF  
HARVARD LAW SCHOOL  
122 Boylston Street  
Jamaica Plain, Massachusetts  
02130  
(617) 390-2532  
kfogg@law.harvard.edu

CARLTON M. SMITH, ESQ.  
(*Counsel of Record*)  
255 W. 23rd Street,  
Apt. 4AW  
New York, New York 10011  
(646) 230-1776  
carltonsmith@aol.com

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
INTEREST OF THE <i>AMICUS</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I. The Tax Court Needlessly Expends Considerable Judicial Resources Each Month Incorrectly Policing Petition Filing Deadlines as a Jurisdictional Issue .....	7
II. Equitable Tolling Would Be Highly Beneficial to Taxpayers in Typically-Recurring Situations .....	13
CONCLUSION.....	24

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Atuke v. Commissioner</i> , Tax Court Docket No. 31680-15SL (order dated Apr. 15, 2016).....	19
<i>Bailey v. Principi</i> , 351 F.3d 1381 (Fed. Cir. 2003) .....	22
<i>Beaupre v. Commissioner</i> , Tax Court Docket No. 23536-18S (order dated Nov. 8, 2019).....	11
<i>Bull v. United States</i> , 295 U.S. 247 (1935) .....	14
<i>Castaldo v. Commissioner</i> , Tax Court Docket No. 19264-19 (order dated Dec. 19, 2019).....	11
<i>Castillo v. Commissioner</i> , Tax Court Docket No. 18336-19L (order dated Mar. 25, 2020), on appeal Second Circuit Docket No. 20-1635 .....	19
<i>Chappell v. Commissioner</i> , Tax Court Docket No. 20711-19 (order dated Nov. 27, 2019).....	11
<i>Charvat v. Commissioner</i> , Tax Court Docket No. 377-18L (order dated Nov. 14, 2018).....	9
<i>Croker v. Commissioner</i> , Tax Court Docket No. 9070-18S (order dated Nov. 15, 2019).....	11
<i>Cunningham v. Commissioner</i> , 716 Fed. Appx. 182 (4th Cir. 2018).....	17
<i>Davila-Cabrera v. Commissioner</i> , Tax Court Docket No. 19192-19 (order dated Dec. 20, 2019).....	11
<i>Dolan v. United States</i> , 560 U.S. 605 (2010) .....	10
<i>Duggan v. Commissioner</i> , 879 F.3d 1029 (9th Cir. 2018) .....	3, 4, 17

## TABLE OF AUTHORITIES – Continued

	Page
<i>Dunlap v. Commissioner</i> , Tax Court Docket No. 816-18L (order dated Mar. 15, 2018) .....	9
<i>Edmonson v. Commissioner</i> , Tax Court Docket No. 1239-19SL (order dated Nov. 13, 2019) .....	11
<i>Enochs v. Williams Packing &amp; Nav. Co.</i> , 370 U.S. 1 (1962) .....	14
<i>Flight Attendants Against UAL Offset v. Commissioner</i> , 165 F.3d 572 (7th Cir. 1999) .....	14
<i>Garland v. Commissioner</i> , Tax Court Docket No. 17921-19L (order dated Nov. 25, 2019) .....	11
<i>Gitman v. Commissioner</i> , Tax Court Docket No. 5804-19 (order dated Aug. 8, 2019) .....	23
<i>Gonzalez v. Commissioner</i> , Tax Court Docket No. 2256-19S (order dated Nov. 15, 2019) .....	11
<i>Golsen v. Commissioner</i> , 54 T.C. 742 (1970), <i>aff'd</i> , 445 F.2d 985 (10th Cir. 1971) .....	7, 8
<i>Guralnik v. Commissioner</i> , 146 T.C. 230 (2016) .....	15
<i>Haitsuka v. Commissioner</i> , Tax Court Docket No. 14495-15L (order dated Oct. 9, 2015) .....	21
<i>Hamer v. Neighborhood Housing Servs. of Chicago</i> , 138 S. Ct. 13 (2017) .....	10
<i>Harris v. Commissioner</i> , Tax Court Docket No. 1149-18L (order dated May 29, 2018) .....	9
<i>Harris v. Commissioner</i> , Tax Court Docket No. 15979-19S (order dated Dec. 17, 2019) .....	11
<i>Henderson v. Shinseki</i> , 562 U.S. 428 (2011) .....	6

## TABLE OF AUTHORITIES – Continued

	Page
<i>Holland v. Florida</i> , 560 U.S. 631 (2010).....	16
<i>Integrated Event Management, Inc. v. Commissioner</i> , Tax Court Docket No. 27674-16SL (order dated May 31, 2017) .....	18
<i>Irwin v. Dept. of Veterans Affairs</i> , 498 U.S. 89 (1990).....	15
<i>Islam v. Commissioner</i> , Tax Court Docket No. 14099-19S (order dated Feb. 28, 2020) .....	23
<i>Jackson v. Modly</i> , 949 F.3d 763 (D.C. Cir. 2020) .....	8
<i>Jaquay v. Principi</i> , 304 F.3d 1276 (Fed. Cir. 2002) .....	22
<i>Jones v. Commissioner</i> , T.C. Memo. 2003-29.....	16
<i>Mannella v. Commissioner</i> , 631 F.3d 115 (3d Cir. 2011) .....	15, 20, 21
<i>Mansfield v. Commissioner</i> , Tax Court Docket No. 19342-19S (order dated Dec. 23, 2019) .....	11
<i>Matuszak v. Commissioner</i> , 862 F.3d 192 (2d Cir. 2017) .....	18
<i>Myers v. Commissioner</i> , 928 F.3d 1025 (D.C. Cir. 2019) .....	4, 5, 7
<i>Nauflett v. Commissioner</i> , 892 F.3d 649 (4th Cir. 2018) .....	19
<i>Nicholas v. Commissioner</i> , Tax Court Docket No. 908-18L (order dated Apr. 16, 2018).....	9
<i>Pottgen v. Commissioner</i> , Tax Court Docket No. 1410-15L (order dated Mar. 4, 2016) .....	17, 18

## TABLE OF AUTHORITIES – Continued

	Page
<i>Protter v. Commissioner</i> , Tax Court Docket No. 22975-15SL (order dated Sep. 26, 2017) .....	18
<i>RHI Holdings, Inc. v. United States</i> , 142 F.3d 1459 (Fed. Cir. 1998) .....	6, 15
<i>Rodriguez v. Commissioner</i> , Tax Court Docket No. 2098-18L (order dated May 9, 2018).....	9
<i>Rosenthal v. Commissioner</i> , Tax Court Docket No. 18392-19S (order dated Dec. 26, 2019) (order dated Jun. 29, 2020) .....	11, 22, 23
<i>Rubel v. Commissioner</i> , 856 F.3d 301 (3d Cir. 2017) .....	18
<i>Santana-Venegas v. Principi</i> , 314 F.3d 1293 (Fed. Cir. 2002) .....	22
<i>Saporito v. Commissioner</i> , Tax Court Docket No. 8471-17L (order dated May 31, 2017) .....	18
<i>Sebelius v. Auburn Regional Med. Cntr.</i> , 568 U.S. 145 (2012) .....	13
<i>Slavo v. Commissioner</i> , Tax Court Docket No. 19732-19 (order dated Dec. 31, 2019) .....	11
<i>Stephens v. Commissioner</i> , Tax Court Docket No. 20418-19 (order dated Dec. 30, 2019) .....	11
<i>Stone v. White</i> , 301 U.S. 532 (1937) .....	14
<i>Swanson v. Commissioner</i> , Tax Court Docket No. 14406-15S (order dated Jan. 14, 2016).....	17
<i>Tilden v. Commissioner</i> , 846 F.3d 882 (7th Cir. 2017), <i>rev'g</i> T.C. Memo. 2015-188 .....	12

## TABLE OF AUTHORITIES – Continued

	Page
<i>Treas. v. Commissioner</i> , Tax Court Docket No. 12225-19S (order dated Dec. 19, 2019).....	11
<i>United States v. Brockamp</i> , 519 U.S. 347 (1997).....	13, 14, 15
<i>United States v. Rodgers</i> , 461 U.S. 677 (1983) .....	14
<i>Volpicelli v. United States</i> , 777 F.3d 1042 (9th Cir. 2015) .....	14
<i>Wagner v. United States</i> , 353 F. Supp. 3d 1062 (E.D. Wash. 2018) .....	6
<i>Walby v. United States</i> , 957 F.3d 1295 (Fed. Cir. 2020) .....	6
<i>Wallaesa v. Commissioner</i> , Tax Court Docket No. 1179-17L (order dated Apr. 20, 2017) .....	18
<i>Williams v. Commissioner</i> , Tax Court Docket No. 24954-17 (order dated Jan. 26, 2018) .....	12

## STATUTES

## 26 U.S.C. (I.R.C.):

§ 501(c)(3) .....	1
§ 6015(e)(1)(A) .....	8, 19
§ 6213(a) .....	23
§ 6320.....	5
§ 6330(c)(3)(C) .....	5
§ 6330(d)(1).....	2, 16, 19, 24
§ 6511(a) .....	6, 13

## TABLE OF AUTHORITIES – Continued

	Page
§ 6532(a) .....	6, 15
§ 6532(c).....	14
§ 7345(e)(1) .....	7
§ 7463(f)(2) .....	9
§ 7482(b)(1).....	7
§ 7502.....	12
§ 7508A.....	20
§ 7623(b)(4).....	5, 7
§ 7803(a)(3).....	4
§ 7803(a)(3)(E).....	4
§ 7803(a)(3)(J) .....	4
§ 7803(c)(1)(B) .....	1
28 U.S.C. § 2401(a).....	8
 OTHER AUTHORITIES	
CC-2018-005 .....	8
Harold Dubroff & Brant Hellwig, “The United States Tax Court: An Historical Analysis” (2d ed. 2014) .....	8
Internal Revenue Manual § 4.8.9.25.1 (7/9/13) .....	23
IRS Data Book, 2019 .....	6, 7
IRS Memorandum for Director, Campus Collection and Director, Field Collection, Control No. SBSE-05-0920-0063 (Sep. 3, 2020) .....	18



## TABLE OF AUTHORITIES – Continued

	Page
IRS Whistleblower Award Office Fiscal Year 2020 Annual Report, IRS Pub. 5241 (rev. 12- 2020) .....	5
National Taxpayer Advocate 2017 Annual Re- port to Congress .....	4
National Taxpayer Advocate 2020 Annual Re- port to Congress .....	6, 18
National Taxpayer Advocate 2021 Purple Book .....	4
Notice 2011-70, 2011-2 C.B. 135 .....	21
Notice 2020-23, 2020-18 I.R.B. 742 .....	20
Supreme Court Rule 37.6 .....	1
Tax Court Rule 13(c) .....	7, 8
U.S. Tax Court Congressional Budget Justifica- tion Fiscal Year 2021 (Feb. 10, 2020) .....	8

**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).

Counsel for the Center is the Tax Clinic of the Legal Services Center of Harvard Law School (“the Clinic”). The Clinic represents low-income taxpayers before the IRS and in tax matters before the courts. The Clinic regularly represents taxpayers in deficiency, “Collection Due Process” (“CDP”), and “innocent

---

<sup>1</sup> The parties have consented to the filing of this brief. The petitioner provided written consent on April 19, 2021. The Solicitor General, on behalf of respondent, provided written consent on April 22, 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. All parties have been timely notified of the submission of this brief.

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

spouse” cases in the Tax Court and in the courts of appeals and has also filed many *amicus* briefs on its own.

The Center’s purpose in filing this brief is to request that this Court grant the petition for a writ of *certiorari* and hold that the deadline in § 6330(d)(1) in which to file a Tax Court CDP 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.



### **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 petition for a writ of *certiorari* in this case and hold that the Tax Court’s view is incorrect – at least as to CDP suits in the Tax Court. The Tax Court and the Eighth Circuit have 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 CDP 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

Eighth and Ninth Circuits (in *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018)), 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.

A ruling that the CDP filing deadline is nonjurisdictional and is subject to equitable tolling would help taxpayers in several typical, recurring cases, such as cases where taxpayers timely file their Tax Court petition mistakenly with the IRS office that issued the notice of determination or where medical issues (COVID-19 or others) prevented timely filing in the Tax Court.

---

◆

## ARGUMENT

This brief will not repeat the legal arguments made by the petitioner for why the Tax Court CDP suit filing deadline is not jurisdictional. Instead, this brief will primarily attempt to inform this Court of the practical consequences of rulings on the jurisdictional and equitable tolling issues. In this connection, the Center recommends that this Court read Ms. Olson’s National Taxpayer Advocate 2017 Annual Report to Congress, Legislative Recommendation #3 (“Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling. . . .”), Vol. 1, at 283-292 (the “2017 Report”),

available at [www.irs.gov](http://www.irs.gov). Her report detailed, as of December 31, 2017, many conflicting lower court authorities concerning whether judicial tax filing deadlines are jurisdictional. Her recommendation was prompted by some of the adverse Circuit court rulings cited in both the petition and this brief – rulings that, in her view, misapplied this Court’s precedent to several Tax Court filings deadlines and other judicial tax filing deadlines. In her recommendation (at 287), she relied, in part, on what is known as the “Taxpayer Bill of Rights,” enacted in 2015, at § 7803(a)(3), which promises taxpayers “the right to appeal a decision of the Internal Revenue Service in an independent forum” (subparagraph (E)) and “the right to a fair and just tax system” (subparagraph (J)). She also wrote:

Treating the IRC time limits for commencing a judicial proceeding as jurisdictional leads to unfair outcomes. . . . Unrepresented taxpayers in particular may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late, and most Tax Court petitioners do not have representation.

2017 Report, at 291. Ms. Olson’s successor as National Taxpayer Advocate has continued to seek this legislative clarification. National Taxpayer Advocate 2021 Purple Book, at 100-102 (contrasting the CDP rulings in *Duggan, supra*, and this case with the D.C. Circuit’s whistleblower award petition deadline ruling in *Myers*

*v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019)),<sup>3</sup> available at [www.irs.gov](http://www.irs.gov).

Access to the Tax Court in CDP matters *a lot* – because the Tax Court is the only place where a court reviews the IRS’s proposed collection activity of levies *before* the actual harm occurs<sup>4</sup> – a vital issue for low-income taxpayers, small businesses, etc.

Congress requires IRS Independent Office of Appeals employees in CDP to take into consideration “whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.” § 6330(c)(3)(C). Thus, CDP is an equitable area of the Internal Revenue Code. It would be perverse to think that Congress wanted the Tax Court CDP filing deadline in an equitable area to prohibit equitable tolling. The Tax Court’s and Eighth Circuit’s jurisdictional holdings in this

---

<sup>3</sup> For comparison, while lately there are usually about 1,200 CDP petitions filed in the Tax Court each year, there are far fewer whistleblower award petitions filed in that court. IRS Whistleblower Award Office Fiscal Year 2020 Annual Report, IRS Pub. 5241 (rev. 12-2020) at 23, Table 3 (as of September 30, 2020, there were 118 § 7623(b)(4) cases in litigation).

<sup>4</sup> With respect to CDP review of notice of federal tax lien filing, CDP hearings occur after their filing; *see* § 6320; but it is also very important that such filings can get judicial review, since filed notices of tax lien can (1) cause taxpayers to lose or not obtain jobs in certain industries and (2) undermine low-income taxpayer efforts to obtain rental housing. Credit reports always list the existence of such filed notices.

case undermine the congressional intent to expand taxpayer protections, not limit them.

Whether the Article I Tax Court's CDP filing deadline is jurisdictional or subject to equitable tolling are questions of at least equal importance to the issue this Court addressed in *Henderson v. Shinseki*, 562 U.S. 428 (2011) (filing deadline for the Article I Court of Appeals for Veterans Claims held nonjurisdictional).

Further, these questions for the CDP deadline impact far more taxpayers than the also-currently-disputed questions of whether the tax refund deadlines for administrative claims (at § 6511(a)) and suits (at § 6532(a)) are jurisdictional.<sup>5</sup> In the 12-month period ended May 31, 2020, there were 1,185 CDP petitions filed in the Tax Court. National Taxpayer Advocate 2020 Annual Report to Congress at 185. By contrast, in the fiscal year ended September 30, 2019, there were 219 refund suit petitions filed in the district courts and the Court of Federal Claims combined. IRS Data Book, 2019 at 68 (Table 29).

---

<sup>5</sup> Compare *RHI Holdings, Inc. v. United States*, 142 F.3d 1459 (Fed. Cir. 1998) (judicial filing deadline at § 6532(a) is jurisdictional and not subject to estoppel or equitable tolling), with *Wagner v. United States*, 353 F. Supp. 3d 1062 (E.D. Wash. 2018) (§ 6532(a) deadline is not jurisdictional and is subject to equitable tolling under recent opinions of this Court). See also *Walby v. United States*, 957 F.3d 1295, 1299-1300 (Fed. Cir. 2020) (questioning the continuing validity of the Federal Circuit's precedent holding the § 6511(a) deadline to file an administrative refund claim with the IRS jurisdictional in light of recent opinions of this Court).

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

Each year, a small, but significant, number of taxpayers would be affected by a ruling that the Tax Court's CDP 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, 2019, taxpayers filed 24,658 Tax Court petitions. IRS Data Book, 2019 at 68 (Table 29), available at [www.irs.gov](http://www.irs.gov). These petitions were under about 20 different jurisdictions of the Tax Court.

Tax Court Rule 13(c) states: "In all cases, the jurisdiction of the Court also depends on the timely filing of a petition."<sup>6</sup>

---

<sup>6</sup> Parenthetically, the D.C. Circuit, which, under § 7482(b)(1) (flush language), hears all appeals of Tax Court whistleblower award 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 this Court's recent authority. *Myers v. Commissioner*, *supra*. Under its opinion in *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd on other issues*, 445 F.2d 985 (10th Cir. 1971), the Tax Court follows the precedent of the Circuit to which a case is appealable, even if the Tax Court disagrees with that precedent. Also, Congress, at § 7345(e)(1), recently gave the Tax Court jurisdiction to review the IRS' certification to the Department of State that an individual taxpayer has "seriously delinquent tax debt," which triggers passport revocation. Passport actions brought by taxpayers are similarly all appealable from the Tax Court only to the D.C. Circuit. § 7482(b)(1) (flush language). The passport action statute



Three jurisdictions of the Tax Court comprise the vast bulk of its petitions (deficiency, CDP, and innocent spouse), and it has long been the case that deficiency petitions make up the overwhelming majority of all petitions filed. However, CDP actions are the second-most filed in the Tax Court. Harold Dubroff & Brant Hellwig, “The United States Tax Court: An Historical Analysis” (2d ed. 2014) at 909 (Appendix B) (for 2013, taxpayers filed 30,046 deficiency actions, 1,486 CDP actions, and 342 “innocent spouse” actions under § 6015(e)(1)(A)). 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.

Because the Tax Court does not publish statistics breaking down filings under each of its jurisdictions,

---

does not set a filing deadline, so the IRS has opined – no doubt correctly – that the applicable statute of limitations is the catchall 6-year statute of limitations at 28 U.S.C. § 2401(a). CC-2018-005. In light of this Court’s recent precedent on what is jurisdictional, the D.C. Circuit has recently overruled its prior precedent and now holds that § 2401(a)’s filing deadline is not jurisdictional and is subject to equitable tolling. *Jackson v. Modly*, 949 F.3d 763 (D.C. Cir. 2020). Thus, despite Rule 13(c), application of the *Golsen* rule to these two the Tax Court actions requires the result that the Tax Court’s filing deadlines in those actions are not jurisdictional and are subject to equitable tolling. (Because of the essential identity of the statutory language in whistleblower and CDP cases, the deadline for those CDP cases filed by taxpayers living in the District of Columbia will also not be jurisdictional and will be subject to equitable tolling.)

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 CDP petition filing deadline is jurisdictional, the Center reviewed, using the Tax Court's DAWSON online system (available on the Tax Court's website), all Tax Court petitions filed in January 2018 – a month chosen simply to allow likely enough time for jurisdictional issues to have been raised and disposed of in all cases. The 2,155 dockets reviewed were numbers 101-18 (the first of the year) through 2255-18. Of those, 101 dockets comprised CDP actions, identifiable by an “L” (for lien or levy action) or “SL” (for lien or levy action under the small tax case procedures at § 7463(f)(2)) added by the Tax Court to the end of the docket number. Of the 101 CDP dockets, five were dismissed for lack of jurisdiction (or had a tax year within several years dismissed for lack of jurisdiction) on the ground that the petition was untimely filed. In only one of those five dockets was there a suggestion of facts which might give rise to equitable tolling. In *Dunlap v. Commissioner*, Docket No. 816-18L (order dated Mar. 15, 2018), the taxpayer's cited excuse for missing the short 30-day deadline for one taxable year was “severe family illness.”<sup>7</sup>

---

<sup>7</sup> The other four dockets were *Charvat v. Commissioner*, Docket No. 377-18L (order dated Nov. 14, 2018); *Nicholas v. Commissioner*, Docket No. 908-18L (order dated Apr. 16, 2018); *Harris v. Commissioner*, Docket No. 1149-18L (order dated May 29, 2018); and *Rodriguez v. Commissioner*, Docket No. 2098-18L (order dated May 9, 2018).

Thus, floodgates would not open if equitable tolling were allowed to excuse the late filing of a modest number of CDP petitions each year.

Probably, the greater practical effect of a ruling that the Tax Court's CDP suit filing deadline is not jurisdictional would not be the ability to raise equitable tolling, but 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). *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13, 17 (2017).

Every month, the Tax Court dismisses multiple cases only because the court's filing deadlines are currently treated as jurisdictional and so the Tax Court judges, *sua sponte*, police late filing. The court's position that filing deadlines are 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 potentially to dismiss petitions for untimely filing six and eight times, respectively.<sup>8</sup> All 14 such taxpayers – two of whom were CDP petitioners and 12 of whom were deficiency petitioners – lost or almost lost their chance to have their deficiency or CDP cases litigated in the Tax Court only because the judges treated the filing deadlines as jurisdictional. If, as the Center believes, the filing deadlines for Tax Court actions are not jurisdictional, judges have been investing considerable resources over the years engaging in needless policing.

Judges also police jurisdiction when a case settles. About once a month, some taxpayer and the IRS settle

---

<sup>8</sup> See orders in *Beaupre v. Commissioner*, Docket No. 23536-18S (dated Nov. 8, 2019); *Edmonson v. Commissioner*, Docket No. 1239-19SL (dated Nov. 13, 2019); *Croker v. Commissioner*, Docket No. 9070-18S (dated Nov. 15, 2019); *Gonzalez v. Commissioner*, Docket No. 2256-19S (dated Nov. 15, 2019); *Garland v. Commissioner*, Docket No. 17921-19L (dated Nov. 25, 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).

a case on the merits and submit to the Tax Court a proposed stipulated decision, 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 suit.) An example of a show cause order issued in this situation is that in *Williams v. Commissioner*, Docket No. 24954-17 (dated Jan. 26, 2018) (a deficiency action).

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 disagree. For example, in *Tilden v. Commissioner*, 846 F.3d 882 (7th Cir. 2017), *rev'g* T.C. Memo. 2015-188, the parties initially disputed 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 concerned which regulatory provision applied to the case. By the time the Tax Court wrote its opinion, though, the parties agreed that the petition was timely filed. However, the Tax Court disagreed and dismissed the petition for lack of jurisdiction as untimely. In the Seventh Circuit, both parties again argued that the filing was timely. Ultimately, the Seventh Circuit agreed with the parties about the applicable regulation and disagreed with the Tax Court.

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 Tax Court filing deadlines.

## **II. Equitable Tolling Would Be Highly Beneficial to Taxpayers in Typically-Recurring Situations.**

In this case, because the Tax Court would not accept the argument that the CDP filing deadline could be equitably tolled, the taxpayer was not given an opportunity to present facts demonstrating that tolling would be warranted. Presumably, if this Court reverses, the Tax Court will allow for that factual development on remand.

However, given the fact that the parties briefed the issue below, it would be a shame for this Court in this case not to also at this time consider whether the CDP petition filing deadline is potentially subject to equitable tolling. Whether the deadline is subject to equitable tolling is a distinctly separate question from whether it is jurisdictional. *Sebelius v. Auburn Regional Med. Cntr.*, 568 U.S. 145 (2012) (holding a deadline not jurisdictional, but not subject to equitable tolling).

In *United States v. Brockamp*, 519 U.S. 347 (1997), this Court held that the § 6511(a) administrative refund claim filing deadline is not subject to equitable tolling. That opinion does not discuss whether the filing deadline is jurisdictional (presumably, assuming the filing deadline nonjurisdictional). Noting that the

case involved tax collection, *Brockamp* laid out various specific reasons for why the particular deadline was not subject to equitable tolling, but also stated, humorously (and actually, erroneously),<sup>9</sup> “Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.” *Id.* at 352.

Since *Brockamp*, the government usually argues that there can be no equitable tolling anywhere in the Tax Code, especially in tax collection.<sup>10</sup> Two appellate courts have rejected this argument (one in dicta). *Volpicelli v. United States*, 777 F.3d 1042, 1046 (9th Cir. 2015) (wrongful levy suit filing deadline at § 6532(c) is subject to equitable tolling; “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*.”); *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 577 (7th Cir. 1999) (Posner, J.; dicta rejecting the argument that *Brockamp*

---

<sup>9</sup> Long before Congress added CDP to the Tax Code in the year after *Brockamp*, this Court had applied equity in tax collection a number of times. *See, e.g., United States v. Rodgers*, 461 U.S. 677 (1983) (equity applies in tax foreclosure suit); *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1 (1962) (equity exception to tax anti-injunction act); *Stone v. White*, 301 U.S. 532 (1937) (equitable recoupment); *Bull v. United States*, 295 U.S. 247 (1935) (same).

<sup>10</sup> In its brief to the Eighth Circuit in this case, the government (at pp. 42-43) wrote that the quoted sentence from *Brockamp* “is especially true in the area of tax collection in general and administrative levies in particular, where the need for promptness is paramount.”

extends to prohibit equitable tolling throughout the Tax Code).

However, some lower courts have conflated the questions of jurisdiction and equitable tolling and cited *Brockamp* in support of holdings that tax filing deadlines are jurisdictional. See, e.g., *RHI Holdings, Inc. v. United States*, 142 F.3d 1459 (Fed. Cir. 1998) (holding the refund suit filing deadline at § 6532(a) jurisdictional and quoting the sentence from *Brockamp*); *Guralnik v. Commissioner*, 146 T.C. 230, 236 (2016) (holding the CDP petition filing deadline jurisdictional, in part, because of *Brockamp*; “The Supreme Court’s rulings in the tax context indicate that filing periods of the sort involved here are jurisdictional.”).

There are typical, recurring fact patterns where equitable tolling might be of benefit to Tax Court petitioners.

There are three common grounds for equitable tolling:

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); *Holland v. Florida*, 560 U.S. 631, 649 (2010) (“a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing”) (cleaned up; citation omitted).

### **Actively Misled**

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

In the CDP context, § 6330(d)(1) provides: “The person may, *within 30 days of a determination* under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).” (Emphasis added.) For some time after the 1998 enactment of CDP, the IRS notice of determination (the “ticket to the Tax Court”) closely tracked the statutory language, stating: “If you want to dispute this determination in court, you must file a petition with the United States Tax Court for a redetermination *within 30 days from the date of this letter.*” See *Jones v. Commissioner*, T.C. Memo. 2003-29 at \*3 (language from notice issued in 2001; emphasis added). But, then, sometime later, the IRS

redrafted the model notice of determination to read: “If you want to dispute this determination in court, you must file a petition with the United States Tax Court *within a 30-day period beginning the day after the date of this letter.*” (Emphasis added). That is not the statutory language. In fact, it confused at least eight *pro se* taxpayers into thinking that they had 31 days from the date of the notice to mail a petition to the Tax Court. When each mailed a petition on the 31st day, the Tax Court dismissed their petition for lack of jurisdiction for being mailed one day late, despite the taxpayers’ arguments that the notice of determination language actively misled them. Two of the taxpayers appealed.

In *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), the Ninth Circuit did not reach the issue of whether these facts would justify equitable tolling, but held that the filing deadline is jurisdictional, so no equitable tolling could ever be allowed.

In *Cunningham v. Commissioner*, 716 Fed. Appx. 182 (4th Cir. 2018), the Fourth Circuit found these facts would not justify equitable tolling in any event and therefore declined to decide the question whether the filing deadline is jurisdictional.

The other six taxpayers who were also confused by this CDP notice of determination language and dismissed by the Tax Court were: *Swanson v. Commissioner*, Tax Court Docket No. 14406-15S (order dated Jan. 14, 2016);<sup>11</sup> *Pottgen v. Commissioner*, Tax Court

---

<sup>11</sup> The order in *Swanson* does not mention the argument that the taxpayer was misled by the notice language, but an

Docket No. 1410-15L (order dated Mar. 4, 2016); *Wallaesa v. Commissioner*, Tax Court Docket No. 1179-17L (order dated Apr. 20, 2017); *Saporito v. Commissioner*, Tax Court Docket No. 8471-17L (order dated May 31, 2017); *Integrated Event Management, Inc. v. Commissioner*, Tax Court Docket No. 27674-16SL (order dated May 31, 2017); *Protter v. Commissioner*, Tax Court Docket No. 22975-15SL (order dated Sep. 26, 2017).

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.”) These included notices giving taxpayers the right to request a CDP hearing. See IRS Memorandum for Director, Campus Collection and Director, Field Collection, Control No. SBSE-05-0920-0063 (Sep. 3, 2020). While it is not clear that any of these misdated notices were CDP notices of determination, doubtless, this has and will continue to cause considerable taxpayer confusion.

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

---

examination of the notice contained in the Tax Court’s files shows that Mr. Swanson, in explanation of his late filing, quadruple-underlined the words “day after” in the notice of determination sentence.

the wrong last date to file the petition); and *Naufflett v. Commissioner*, 892 F.3d 649 (4th Cir. 2018) (IRS Taxpayer Advocate Service employee orally gave the unrepresented taxpayer the wrong last date to file the petition), provide examples, in the innocent spouse context, of situations in which equitable tolling based on actively misleading the petitioner 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.

### **Extraordinary Circumstances**

Two Tax Court CDP cases with differing fact patterns demonstrate 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); *Castillo v. Commissioner*, Tax Court Docket No. 18336-19L (order dated Mar. 25, 2020), appeal pending at Second Circuit Docket No. 20-1635 (notice of determination mailed by IRS to taxpayer’s last known address but lost and never delivered by post office – case dismissed for lack of jurisdiction due to untimely petition; Second Circuit oral argument not yet scheduled). These cases also present circumstances beyond the taxpayers’ control.

Further, consider the issue of serious illness during the 30-day CDP filing period that might prevent 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 continued and got worse. What if the IRS had mailed a CDP notice of determination to the taxpayer on January 4, 2021, but at the time of the mailing, the taxpayer was in the hospital, intubated and in a coma as a result of COVID-19? Assume that the coma lasted until February 15, 2021, such that by the time the taxpayer awoke from the coma, the time to file a Tax Court petition had 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 CDP petition filing deadline is not jurisdictional and is subject to equitable tolling, the taxpayer would have lost her pre-payment judicial contest rights. Such a holding would only compound the pandemic's tragedies.

*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. Mrs. Mannello's husband hid from her the 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>12</sup> *Mannella* provides an example of someone prevented by extraordinary circumstances from taking an act to protect her interest.

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

A common fact pattern is that of a taxpayer timely mailing his or her Tax Court petition mistakenly to the IRS office that issued the “ticket to the Tax Court.”

In *Haitsuka v. Commissioner*, Tax Court Docket No. 14495-15L (order dated Oct. 9, 2015), a taxpayer who possessed limited English proficiency timely mailed his Tax Court CDP petition mistakenly to the IRS. After the IRS sent the petition back to him, he re-mailed it, this time, to the Tax Court. Arguably, if the CDP filing deadline is subject to equitable tolling, the filing should have been treated as timely under the equitable tolling ground of timely filing in the wrong

---

<sup>12</sup> While the IRS persuaded 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.

forum. *See* 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). But, his case was dismissed for lack of jurisdiction for late filing.

This situation also happens (seemingly about once a month) in deficiency cases.

In *Rosenthal v. Commissioner*, Tax Court Docket No. 18392-19S (order to show cause dated Dec. 26, 2019), the taxpayers had erroneously mailed their deficiency petition to the IRS Laguna Nigel Office that had issued the notice, and that office had, weeks later, forwarded the petition to the Tax Court, where it arrived after the 90-day period to file 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 the above-cited cases involving the Court of Appeals for Veterans Claims that allowed equitable tolling under similar circumstances. The Clinic later withdrew its argument when the IRS issued a replacement notice of deficiency so 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.

Nearly identical fact patterns played out in two other deficiency cases filed with the Tax Court shortly before the *Rosenthal* case: *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)); *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)).

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 forward petitions to the Tax Court that were originally erroneously sent to the IRS. 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.

In sum, the purported jurisdictional nature of the CDP filing deadline (which would bar equitable tolling) with fair regularity will preclude a significant number of Tax Court petitioners from having their cases heard, pre-payment in the Tax Court.





**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 § 6330(d)(1) is not jurisdictional and is subject to equitable tolling.

Respectfully submitted,

PROFESSOR T. KEITH FOGG  
DIRECTOR, TAX CLINIC OF THE  
LEGAL SERVICES CENTER OF  
HARVARD LAW SCHOOL  
122 Boylston Street  
Jamaica Plain, Massachusetts  
02130  
(617) 390-2532  
kfogg@law.harvard.edu

CARLTON M. SMITH, ESQ.  
(*Counsel of Record*)  
255 W. 23rd Street,  
Apt. 4AW  
New York, New York 10011  
(646) 230-1776  
carltonsmth@aol.com

May 2021