

IN THE SUPREME COURT OF THE UNITED STATES

No. 23A____

COMMISSIONER OF INTERNAL REVENUE, APPLICANT

v.

ISOBEL BERRY CULP AND DAVID R. CULP

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General respectfully requests a 22-day extension of time, to and including March 19, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The opinion of the court of appeals (App., infra, 1a-10a) is reported at 75 F.4th 196. The order of the Tax Court (App., infra, 11a-15a) is not reported.

The court of appeals denied rehearing on November 28, 2023 (App., infra, 16a-17a). Unless extended, the time within which to file a petition for a writ of certiorari will expire on February 26, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. Ordinarily, a person who wants to dispute the assessment or collection of a federal tax can do so "only after he pays it, by suing for a refund." CIC Services, LLC v. IRS, 593 U.S. 209, 212 (2021). As to some taxes, however, Congress has provided taxpayers with an additional path to judicial review. For income, estate, gift, and certain other taxes, Congress has directed the Secretary of the Treasury to issue a "notice of * * * deficiency" to a taxpayer whom she determines has not reported all the tax owed for the year. 26 U.S.C. 6212(a). Under 26 U.S.C. 6213, the taxpayer can then petition the Tax Court for a "redetermination of the deficiency" before the Secretary may assess or collect the tax. 26 U.S.C. 6213(a).

Section 6213(a) reads in relevant part as follows:

Within 90 days * * * after the notice of deficiency authorized in section 6212 is mailed * * * , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in [specified sections,] no assessment of a deficiency in respect of any [covered tax] and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day * * * period, * * * nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in a court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such

petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

26 U.S.C. 6213(a).

Other provisions address the consequences of a taxpayer's choice about whether to invoke the Tax Court's deficiency jurisdiction. "If the taxpayer does not file a petition with the Tax Court within the time prescribed in [Section 6213(a)], the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary." 26 U.S.C. 6213(c). Upon such assessment, the United States obtains a statutory lien in its favor "upon all property and rights to property * * * belonging to [the taxpayer]." 26 U.S.C. 6321; see 26 U.S.C. 6322. The taxpayer is free, however, to challenge the Secretary's calculation of the tax in a refund suit. See 26 U.S.C. 7422.

On the other hand, "[i]f the taxpayer files a petition with the Tax Court" but is unsuccessful, 26 U.S.C. 6215(a), the Tax Court's decision precludes further litigation about the amount of the deficiency. See ibid. (providing that "the entire amount redetermined as the deficiency by the decision of the Tax Court * * * shall be assessed and shall be paid"); 26 U.S.C. 6512(a) ("[I]f the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) * * * no credit or refund [of tax] * * * in respect of which the Secretary has determined

the deficiency shall be allowed or made and no suit by the taxpayer for recovery of any part of the tax shall be instituted in any court except" to recover amounts paid or collected in excess of the deficiency determined by the Tax Court). That preclusive effect applies not only where the Tax Court agrees with the Secretary's calculation of the deficiency on the merits, but also where the Tax Court dismisses a petition for redetermination on nonjurisdictional procedural grounds, such as a taxpayer's failure to prosecute her case before the Tax Court. See 26 U.S.C. 7459(d) ("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."). But Congress expressly carved out circumstances in which "the dismissal is for lack of jurisdiction," ibid., such that a Tax Court dismissal on jurisdictional grounds will not preclude a taxpayer from relitigating the amount of the deficiency in future proceedings.

2. In 2015, respondents David and Isobel Berry Culp received \$17,652 to settle an employment-related lawsuit against La Salle University. See App., infra, 4a; C.A. Doc. 24, at 34, 41 (June 21, 2022). Respondents included that payment on their 2015 tax return, listing it in the category of "Other income" and describing it as "PRIZES, AWARDS." App., infra, 4a (citation omitted). Because the amount and description of the settlement reported on the return did not match information the Internal Revenue

Service (IRS) had received from La Salle University, however, the IRS initially concluded -- incorrectly -- that respondents had failed to report the settlement as taxable income. Ibid. The IRS also determined -- correctly -- that they had not paid self-employment tax that the IRS concluded was owed on the settlement amount. See C.A. Doc. 24, at 35.

The IRS sent respondents a letter proposing to increase their tax for 2015. C.A. Doc. 24, at 34-38. After they failed to respond within 30 days, the IRS sent them a notice of deficiency by certified mail on February 5, 2018. App., infra, 4a, 13a-14a. The notice explained the IRS's determination that, given the settlement income, respondents owed \$3363 in additional income and self-employment tax, plus interest and a late-filing penalty. C.A. Doc. 24, at 132-139. The notice also stated that respondents had until May 7, 2018, to file a petition for redetermination with the Tax Court. App., infra, 14a; C.A. Doc. 24, at 132-133; see 26 U.S.C. 6212 note (requiring Secretary to include deadline for filing a petition for redetermination in all notices of deficiency).

Respondents did not file a petition with the Tax Court within 90 days of the notice of deficiency. App., infra, 4a, 14a. The IRS therefore assessed the amount stated in the notice of deficiency, as required under Section 6213(c) when a "taxpayer does not file a petition with the Tax Court within the time prescribed in [Section 6213(a)]." 26 U.S.C. 6213(c).

The IRS subsequently determined that respondents had included the settlement amount on their 2015 tax return and had also paid income tax (but not self-employment tax) on that amount. C.A. Doc. 24, at 57-59. The IRS accordingly abated a portion of the assessment, leaving a balance due of \$2087 for self-employment tax, a late-filing penalty, and interest. Id. at 57-58. The IRS collected the balance due through levy and administrative offset, including withholding from respondents' 2018 tax refund. See App., infra, 4a. By November 2019, their remaining tax debt for 2015 had been satisfied. See C.A. Doc. 24, at 22, 111.

3. On April 22, 2021 -- almost three years after the deadline to seek a redetermination under Section 6213(a) -- respondents filed a petition with the Tax Court. App., infra, 12a. They asserted that, under 26 U.S.C. 6512(b), the Tax Court could order a "refund of all payments made under protest, or levied on, or executed on by the IRS." App., infra, 4a (citation omitted); see 26 U.S.C. 6512(b)(1) (providing that if the Tax Court in a deficiency case finds "that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall * * * be credited or refunded to the taxpayer"). Respondents later claimed that they never received the February 2018 notice of deficiency. App., infra, 14a.

The Tax Court dismissed the case for lack of jurisdiction. App., infra, 11a-15a. In doing so, it pointed to longstanding Tax

Court precedent and Rule 13 of the Tax Court's Rules of Practice and Procedure, under which the Tax Court's jurisdiction depends on the filing of a petition for redetermination within the time set out in Section 6213(a). See App., infra, 12a-3a (citing, inter alia, 26 U.S.C. 6213; Tax Court Rule 13(c) ("[T]he jurisdiction of the Court * * * depends on the timely filing of a petition."); Monge v. Commissioner, 93 T.C. 22, 27 (1989) ("[A] valid notice of deficiency and a timely petition are essential to our deficiency jurisdiction and we must dismiss any case in which one or the other is not present.")).

The Tax Court found that the record demonstrated the IRS had mailed a notice of deficiency to respondents' last known address on February 5, 2018. App., infra, 13a-14a. It therefore rejected their claim "that the Notice was never issued." Id. at 14a. And because they had not filed their petition with the Tax Court within 90 days of the mailing, the court determined that it "lack[ed] jurisdiction over any challenge to the Notice of Deficiency." Ibid.

4. The court of appeals reversed the Tax Court's dismissal for lack of jurisdiction and remanded for further proceedings. App., infra, 1a-10a; see 26 U.S.C. 7482(a)(1) (providing for review of decisions of the Tax Court in the courts of appeals).

The court of appeals agreed with the Tax Court's findings that the IRS had "properly sent the notice" of deficiency and that respondents "filed their petition after § 6213(a)'s 90-day period

lapsed.” App., infra, 5a. But pointing to this Court’s decision in Boechler, P.C. v. Commissioner, 596 U.S. 199 (2022), the court of appeals held that the 90-day deadline is not jurisdictional and that the Tax Court should have determined whether respondents are entitled to equitable tolling. App., infra, 5a-10a.

In Boechler, this Court held that the 30-day time limit to file a Tax Court petition seeking review of a collection-due-process determination under 26 U.S.C. 6330(d)(1) “is an ordinary, nonjurisdictional deadline subject to equitable tolling.” 596 U.S. at 211. The court of appeals found that “[i]f the § 6330(d)(1) deadline in Boechler fell short of being jurisdictional, § 6213(a)’s limit must as well.” App., infra, 6a. It concluded that the first sentence of Section 6213(a), which establishes the 90-day deadline, contains “[n]othing” that “links the deadline to the Court’s jurisdiction.” Id. at 7a. And while Section 6213(a) does state that “[t]he Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed,” 26 U.S.C. 6213(a), the court of appeals found that that jurisdictional limitation pertains only to the remedies that the Tax Court can order and does not “expressly * * * limit the Tax Court’s power to review untimely redetermination petitions.” App., infra, 7a.

The court of appeals acknowledged that its interpretation means that, under the preclusion rule in 26 U.S.C. 7459(d) for

nonjurisdictional dismissals, if a "redetermination petition is dismissed for untimeliness, the assessed amount would have preclusive effect in a refund suit." App., infra, 7a; see pp. 3-4, supra. But the court thought that such a scenario was unlikely to arise often, "and therefore does not move the needle." App., infra, 7a.

The court of appeals was likewise unpersuaded by the government's argument that the Tax Court and every court of appeals to have addressed the question have "held that the statutorily-prescribed filing period in deficiency cases is jurisdictional" in "cases too numerous to mention, dating back to 1924." Gov't C.A. Br. 33 (quoting Guralnik v. Commissioner, 146 T.C. 230, 238 (2016)); see id. at 33-34 (citing published decisions from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits and unpublished decisions from the First, Fourth, and Tenth Circuits). The court stated that the only "relevant historical treatment" is "our precedent" -- that is, Third Circuit precedent. App., infra, 7a. The court acknowledged that it had "previously referred to" the deadline as jurisdictional "in passing," but determined that it had "never * * * so held." Ibid. (citing, as an example, Sunoco Inc. v. Commissioner, 663 F.3d 181, 187 (3d Cir. 2011)).

In addition to concluding that the deadline itself is not jurisdictional, the court of appeals found that the Tax Court's jurisdiction was unaffected by the fact that "the IRS had already

collected a portion of the deficiency via levy” by the time the respondents filed their petition for redetermination. App., infra, 5a n.2 (citing 26 U.S.C. 6213(b)(4)). And the court saw nothing else in the statute sufficient to establish that the deadline is exempt from equitable tolling. See id. at 7a-10a. It therefore reversed the Tax Court’s dismissal of the case for lack of jurisdiction and remanded to allow the Tax Court to determine in the first instance whether equitable tolling is warranted on the facts here. Id. at 10a.

5. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed to continue consultation within the government and to assess the legal and practical impact of the court of appeals’ ruling. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

FEBRUARY 2024

seeking relief other than money damages” against an agency or officer of the United States.

[6] We disagree with Gillette that the Superior Court is a court of the United States for two reasons. First, we look to the Revised Organic Act of the Virgin Islands. Specifically, the Revised Organic Act distinguishes between the District Court of the Virgin Islands, which “shall have the jurisdiction of a District Court of the United States,” and “the local courts of the Virgin Islands,” which are “established by local law.”¹⁵ Indeed, the Organic Act contemplates that “local law” will vest “local courts” with jurisdiction over certain matters, and, for any matter in which local law has not vested local courts with jurisdiction, the Organic Act vests original jurisdiction in the District Court.¹⁶ As for jurisdiction over “offenses against the criminal laws of the Virgin Islands,” the District Court shares concurrent jurisdiction with “the courts of the Virgin Islands established by local law.”¹⁷ In short, the Revised Organic Act contemplates the Superior Court being a creature of “local law”—not a federal court or a court of the United States.

[7] Second, we look to the removal statute itself. The removal statute applicable here permits a “civil action . . . that is commenced in a *State court*” to be removed.¹⁸ That statute defines “State court” to include “a court of a United States territory or insular possession.”¹⁹ Thus, the removal statute does not contemplate the Superior Court to be a federal court or court of the United States; instead, it considers the Superior Court to be effectively the same as a “State court.”

15. Compare 48 U.S.C. § 1612(a); *id.* § 1612(b).

16. *Id.* § 1612(b).

17. *Id.* § 1612(c).

In sum, under the Revised Organic Act, the Superior Court is a court established by Virgin Islands local law; and, under the removal statute, Gillette’s subpoena-enforcement action came to federal court from a “State court.” Thus, the Superior Court is neither a federal court nor a court of the United States. For that reason, § 702 provides no basis for a waiver of the United States’s sovereign immunity.

Given that Gillette points to no waiver of the United States’s sovereign immunity, the United States has not waived its sovereign immunity over Gillette’s subpoena-enforcement action.

III.

For the foregoing reasons, we will dismiss Gillette’s appeal for lack of jurisdiction.



**Isobel Berry CULP; David
R. Culp, Appellants**

v.

**COMMISSIONER OF INTERNAL
REVENUE**

No. 22-1789

United States Court of Appeals,
Third Circuit.

Argued on March 7, 2023

(Opinion filed: July 19, 2023)

Background: Taxpayers petitioned for redetermination of a tax deficiency asserted

18. *Id.* § 1442(a) (emphasis added).

19. *Id.* § 1442(d)(6).

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by Internal Revenue Service (IRS). The United States Tax Court, Eunkyong Choi, J., dismissed for lack of jurisdiction. Taxpayers appealed.

Holdings: The Court of Appeals, Ambro, Circuit Judge, held that:

- (1) as matter of first impression, the 90-day deadline to petition for redetermination of a tax deficiency was nonjurisdictional, and
- (2) 90-day deadline was subject to equitable tolling.

Reversed and remanded.

1. Internal Revenue ⇌4705

Court of Appeals gives a fresh look to Tax Court's dismissal for lack of subject matter jurisdiction.

2. Internal Revenue ⇌4706.1

Court of Appeals reviews Tax Court's factual determinations for clear error.

3. Federal Courts ⇌2031

Jurisdictional requirements mark the bounds of a court's adjudicatory authority.

4. Federal Courts ⇌2031

If a jurisdictional requirement is unmet, the court lacks power to hear the case.

5. Federal Courts ⇌2031

Because an unfulfilled jurisdictional requirement carries harsh consequences, courts do not apply the "jurisdictional" label casually to a statutory procedural requirement.

6. Federal Courts ⇌2031

To determine whether a statutory deadline is jurisdictional or claims-processing in nature, the Court of Appeals examines the text, context, and relevant historical treatment of the provision.

7. Federal Courts ⇌2031

Court of Appeals will treat a procedural requirement as jurisdictional only if Congress clearly states that it is.

8. Federal Courts ⇌2031

Court of Appeals does not look for magic words in determining whether a statutory procedural requirement is jurisdictional, but the traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.

9. Internal Revenue ⇌4651

Internal Revenue Code's 90-day requirement for filing a petition for redetermination of a tax deficiency was a nonjurisdictional claims-processing rule, and therefore taxpayers' late filing of petition did not deprive Tax Court of jurisdiction to consider petition, where there was no clear tie between the deadline and the jurisdictional grant, Congress expressly limited Tax Court's jurisdiction relating injunctions and refunds elsewhere in the statutory provision, and the theoretical possibility of an assessed amount having preclusive effect in a refund suit due to the nonjurisdictional nature of the dismissal of a taxpayer's redetermination petition for untimeliness seemed seldom, if ever, to occur. 26 U.S.C.A. §§ 6213(a), 7422, 7459(d).

10. Internal Revenue ⇌4650

Taxpayers' failure to argue equitable tolling in Tax Court did not result in a forfeiture or waiver of their argument, on appeal, that the Internal Revenue Code's 90-day deadline to petition for redetermination of a tax deficiency was subject to equitable tolling, where the parties' squabble in Tax Court was limited to whether the deadline was jurisdictional, and thus taxpayers had no logical reason to assert their claims might have been tolled. 26 U.S.C.A. § 6213(a).

11. Federal Civil Procedure ¶755

Statute of limitations defense is an affirmative defense that respondents must raise.

12. Limitation of Actions ¶104.5

“Equitable tolling doctrine” pauses the running of, or “tolls,” a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.

See publication Words and Phrases for other judicial constructions and definitions.

13. Limitation of Actions ¶104.5

Nonjurisdictional limitations periods are presumptively subject to equitable tolling.

14. Limitation of Actions ¶43

A statute that sets forth its time limitations in unusually emphatic form and a highly detailed technical manner cannot easily be read as containing implicit exceptions.

15. Limitation of Actions ¶104.5

When a legislature lays out an explicit listing of exceptions to a deadline, it shows its intent for courts not to read other unmentioned, open-ended, equitable exceptions into the statute.

16. Internal Revenue ¶4651

Internal Revenue Code’s nonjurisdictional 90-day deadline to petition for redetermination of a tax deficiency was subject to equitable tolling, where deadline was not emphasized or set it out in a technical way, deadline was targeted at the taxpayer rather than the Tax Court, deadline was short, and deadline applied to a scheme in which laymen, unassisted by trained lawyers, often initiated the process. 26 U.S.C.A. § 6213(a).

17. Limitation of Actions ¶104.5

Presumption that nonjurisdictional time limits are subject to equitable tolling is stronger when the limitations period is short.

On Appeal from the United States Tax Court (Tax Court Docket No. 21-14054), Tax Court Judge: Eunkyong Choi

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Before: SHWARTZ, BIBAS, and AMBRO, Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge

Isobel Berry Culp and David Culp filed a petition for redetermination of a tax deficiency in the United States Tax Court. Because the Culp’s failed to file it within the time prescribed by 26 U.S.C. § 6213(a), the Tax Court dismissed their petition for lack of jurisdiction. However, because Congress did not clearly state that § 6213(a)’s deadline is jurisdictional, we hold it is not. Nor do we understand it to be unbending, as nonjurisdictional time limits are presumptively subject to equitable tolling and that presumption has not been rebutted here. We thus reverse the Tax Court’s order and remand for it to determine

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whether the Culpas are entitled to equitable tolling.

I. BACKGROUND**A. Legal Background**

Taxpayers pay taxes in an amount determined by, among other things, their annual income, deductions, and credits. Taxpayers self-report that information, and the Internal Revenue Service may check it. *See* 26 U.S.C. §§ 6212, 7602. If the IRS concludes a taxpayer owes additional taxes, it may send him or her a notice of deficiency stating the additional tax owed. 26 U.S.C. § 6212(a). If the taxpayer disputes the purported deficiency, he or she may, per 26 U.S.C. § 6213(a), petition the Tax Court to step in and redetermine the amount owed, if any.

Section 6213(a) of the Tax Code also sets the timeline for this process. It provides most taxpayers 90 days to file redetermination petitions, starting on the date the IRS mails the notice of deficiency.¹ 26 U.S.C. § 6213(a). During that time, the IRS may not levy on the taxpayer's property or move to collect the amount purportedly owed. *Id.* And if the taxpayer files a redetermination petition, the IRS must await a ruling from the Tax Court before levying on property or attempting to collect the purportedly deficient amount. *Id.* But if the taxpayer does not file a petition within the time allotted by § 6213(a), "the deficiency . . . shall be assessed, and shall be paid upon notice and demand from the Secretary [of the Treasury]." 26 U.S.C. § 6213(c).

B. Factual Background

In 2015, Isobel and David Culp each received \$8,826.30 to settle a lawsuit. The couple reported their payments as "Other

income" and described it as "PRIZES, AWARDS" in their 2015 tax return. A52. However, the IRS later came to believe the Culpas failed to report those payments. Thus, in November 2017 it sent them a letter proposing to increase their taxes owed for 2015 to reflect the perceived underpayment. It gave the Culpas 30 days to respond and told them it would send a notice of deficiency if they failed to do so. When the Culpas did not respond, the IRS mailed them a notice of deficiency alleging a \$3,363 underpayment for 2015, plus a \$1,324 penalty under 26 U.S.C. § 6651(a). That notice informed the Culpas of their right to challenge the IRS's determination by filing a petition in the Tax Court within 90 days of the date of the notice.

This process repeated in 2018. In May, the IRS sent the Culpas another letter stating they owed only \$2,087 in 2015 taxes, penalties, and interest—less than the amount previously assessed. It again gave them 30 days to respond, and again the couple failed to do so. Thus, the IRS levied on their property, collecting approximately \$1,800 in total from the Culpas' Social Security payments and 2018 tax refund.

Upset at the IRS for levying on their property, the Culpas filed a petition in the Tax Court seeking, among other things, a "refund of all payments made under protest, or levied on, or executed on by the IRS." A20. The Tax Court dismissed their petition for lack of jurisdiction, reasoning its "jurisdiction depends upon the issuance of a valid notice of deficiency and the timely filing of a petition." A157 (citing 26 U.S.C. §§ 6212, 6213, 6214). It found the petition was untimely because the Culpas did not file it within 90 days of the date the IRS sent them the second notice of deficiency. They timely appealed.

1. If the IRS addresses a statutory notice of deficiency to a person outside the United

States, that individual has 150 days to file a petition. 26 U.S.C. § 6213(a).

II. JURISDICTION & STANDARD OF REVIEW

[1, 2] We have jurisdiction under 26 U.S.C. § 7482(a)(1).² We give a fresh look to the Tax Court’s dismissal for lack of subject matter jurisdiction, *see Rubel v. Comm’r*, 856 F.3d 301, 304 n.3 (3d Cir. 2017), and review its factual determinations for clear error, *Lattera v. Comm’r*, 437 F.3d 399, 401 (3d Cir. 2006).

III. DISCUSSION

The Culps challenge the dismissal of their petition on multiple grounds. First, they assert the IRS failed to mail them a notice, and thus § 6213(a)’s 90-day clock had yet to start. Second and third, they contend § 6213(a)’s timeline is not jurisdictional and that it is subject to equitable tolling. We address each in turn.

A. The Culps’ Petition Was Untimely.

We agree with the Tax Court that the Culps’ petition was untimely. To repeat, § 6213(a) provides that taxpayers may file a petition for redetermination of a deficiency “[w]ithin 90 days . . . after the notice of deficiency . . . is mailed.” The Culps contend that the IRS never sent the notice of deficiency or, if it was sent, they never received it. Thus, in their view, the 90-day clock never started ticking, and so their petition must have been timely.

We are not persuaded. The Tax Court did not err, let alone clearly err, in its determination that the IRS properly mailed the notice. The record contains not only copies of it, but also a U.S. Postal Service Form 3877 showing the IRS sent it. *See Hoyle v. Comm’r*, 136 T.C. 463, 468 (2011) (“[E]xact compliance with Postal Service Form 3877 mailing procedures raises a presumption of official regularity

in favor of the Commissioner and is sufficient, absent evidence to the contrary, to establish that a notice of deficiency was properly mailed.”). As for the Culps’ contention that they never received the notice, “actual receipt of [it] by the taxpayers is not required in order that the statutory filing period commence.” *Bocuto v. Comm’r*, 277 F.2d 549, 552 (3d Cir. 1960). In short, the Culps filed their petition years after the IRS properly sent the notice; thus we will not disturb the Tax Court’s finding that they filed their petition after § 6213(a)’s 90-day period lapsed.

B. Section 6213(a)’s Deadline is Not Jurisdictional.

The central question in this appeal is whether the Culps’ late filing deprives the Tax Court of jurisdiction to consider their petition. Put another way, is § 6213(a)’s 90-day requirement jurisdictional or is it a claims-processing rule?

[3, 4] “Jurisdictional requirements mark the bounds of a ‘court’s adjudicatory authority.’” *Boechler, P.C. v. Comm’r*, 596 U.S. 199, 142 S. Ct. 1493, 1497, 212 L.Ed.2d 524 (2022) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004)). If a jurisdictional requirement is unmet, the court lacks power to hear the case. *See Jaludi v. Citigroup & Co.*, 57 F.4th 148, 151 (3d Cir. 2023) (“[V]iolating a jurisdictional procedural requirement locks the courthouse doors.”).

[5–8] Because an unfulfilled jurisdictional requirement carries harsh consequences, courts do not apply the “jurisdictional” label casually. *Wilkins v. United States*, 598 U.S. 152, 143 S. Ct. 870, 876, 215 L.Ed.2d 116 (2023). To determine whether a statutory deadline is jurisdictional or claims-processing in nature, we

2. The Tax Court retained jurisdiction over the Culps’ deficiency petition even though the

IRS had already collected a portion of the deficiency via levy. *See* 26 U.S.C. § 6213(b)(4).

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examine the “text, context, and relevant historical treatment” of the provision, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010), and will “treat a procedural requirement as jurisdictional only if Congress ‘clearly states’ that it is,” *Boechler*, 142 S. Ct. at 1497 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)). We do not look for “magic words,” *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013), but the “traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences,” *United States v. Kwai Fun Wong*, 575 U.S. 402, 410, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015).

Boechler represents the Supreme Court’s approach on whether a deadline is jurisdictional. The Court analyzed § 6330(d)(1)’s 30-day time limit to petition the Tax Court for review of collection due process determinations. That provision reads that “[t]he 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).” 26 U.S.C. § 6330(d)(1).

The Supreme Court held the deadline is not jurisdictional. In its view, the plausible interpretations of the statute—one supporting a jurisdictional reading and one weighing against it—suggest “the text does not clearly mandate the jurisdictional reading.” *Boechler*, 142 S. Ct. at 1498. Moreover, § 6330(d)(1)’s deadline speaks to what the taxpayer may do, while the parenthetical at the end of the provision contains the jurisdictional grant and speaks to the Tax Court’s power to hear the case. *Id.* Further, other tax provisions passed contemporaneously with § 6330(d)(1) “much more clearly link their jurisdictional grants

to a filing deadline.” *Id.* at 1498–99 (citing 26 U.S.C. § 6404(g)(1) (1994 ed., Supp. II) (the Tax Court has “jurisdiction over any action . . . to determine whether the Secretary’s failure to abate interest under this section was an abuse of discretion . . . if such action is brought within 180 days”); § 6015(e)(1)(A) (1994 ed., Supp. IV) (“The individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed during the 90-day period.”)).

[9] Returning to our issue, § 6213(a) reads in relevant part:

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . . [N]o assessment of a deficiency . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. . . . The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

If the § 6330(d)(1) deadline in *Boechler* fell short of being jurisdictional, § 6213(a)’s limit must as well. For one, there is no “clear tie between the deadline and the

jurisdictional grant.” *Boechler*, 142 S. Ct. at 1499. The most pertinent part of § 6213(a) provides that “[w]ithin 90 days . . . after the notice of deficiency . . . is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.” Nothing in that language links the deadline to the Court’s jurisdiction. Yet, elsewhere in § 6213(a), Congress specified that “[t]he Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.” 26 U.S.C. § 6213(a). So Congress knew how to limit the scope of the Tax Court’s jurisdiction. It expressly constrained the Tax Court from issuing injunctions or ordering refunds when a petition is untimely. But it did not similarly limit the Tax Court’s power to review untimely redetermination petitions.

Context does little to bolster the IRS’s case for the deadline being jurisdictional. True, if it is not jurisdictional, and a taxpayer’s redetermination petition is dismissed for untimeliness, the assessed amount would have preclusive effect in a refund suit under 26 U.S.C. § 7422. *See* 26 U.S.C. § 7459(d) (“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 . . . unless the dismissal is for lack of jurisdiction.”). But this situation presents itself only if a taxpayer files a late petition for redetermination of a deficiency, the Tax Court dismisses his or her petition, the taxpayer then pays the disputed deficiency, files for a refund, gets denied, and then sues in federal court challenging the denial. That theoretical possibility seems seldom, if ever, to occur, *see* Center for

Taxpayer Rights Amicus Br. at 14–16, and therefore does not move the needle. *See Boechler*, 142 S. Ct. at 1499 (“[T]he Commissioner’s interpretation must be not only better, but also clear.”). *But see Organic Cannabis Found., LLC v. Comm’r*, 962 F.3d 1082, 1095 (9th Cir. 2020) (interpreting this context to demonstrate that § 6213(a)’s deadline is jurisdictional).

Nor are we persuaded by the Commissioner’s argument that relevant historical treatment (that is, our precedent) compels us to treat § 6213(a)’s deadline as jurisdictional. Although we have previously referred to it as such in passing, *see, e.g., Sunoco Inc. v. Comm’r*, 663 F.3d 181, 187 (3d Cir. 2011), never have we so held. This is the first published opinion to address squarely whether § 6213(a)’s deadline for redetermination petitions is jurisdictional, and we hold it is not.

C. Section 6213(a)’s Time Limit May Be Equitably Tolled.

[10, 11] We next consider whether § 6213(a)’s deadline may be equitably tolled. We do so because we disagree with the Commissioner’s contention that the Culps failed to preserve this issue. True, they never argued equitable tolling in the Tax Court. But they had no occasion to do so. The statute of limitations defense is an affirmative defense that respondents must raise. *See Day v. McDonough*, 547 U.S. 198, 207–08, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). In the Tax Court, the Commissioner never argued that, if § 6213(a) is not jurisdictional, the Court should still dismiss the Culps’ petition because the limitation period ran. Thus, because the parties’ squabble in the Tax Court was limited to whether the deadline is jurisdictional, the Culps had no logical reason to assert their claims may be tolled. As such, they neither forfeited nor waived this argument.

[12, 13] The equitable tolling doctrine “pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.” *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10, 134 S.Ct. 1224, 188 L.Ed.2d 200 (2014). It “is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods.” *Boechler*, 142 S. Ct. at 1500. Thus, “nonjurisdictional limitations periods are presumptively subject to equitable tolling.” *Id.*; accord *Young v. United States*, 535 U.S. 43, 49, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002) (“It is hornbook law that limitations periods are customarily subject to equitable tolling.” (cleaned up)).

Given this presumption, we ask whether there is “good reason to believe that Congress did *not* want the equitable tolling doctrine to apply.” *Arellano v. McDonough*, 598 U.S. 1, 143 S. Ct. 543, 548, 214 L.Ed.2d 315 (2023) (emphasis in original) (internal quotation marks omitted). We glean intent by looking to the relevant provision’s text, context, and place in the broader statutory scheme.

[14, 15] We begin with the text. *See Nutraceutical Corp. v. Lambert*, — U.S. —, 139 S. Ct. 710, 714, 203 L.Ed.2d 43 (2019) (“Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility.”). A statute that “sets forth its time limitations in unusually emphatic form . . . [and] a highly detailed technical manner

. . . cannot easily be read as containing implicit exceptions.” *United States v. Brockamp*, 519 U.S. 347, 350, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997). Moreover, when a legislature lays out an “explicit listing of exceptions” to a deadline, it shows its intent for “courts [not to] read other unmentioned, open-ended, ‘equitable’ exceptions into the statute.” *Id.* at 352, 117 S.Ct. 849; *see also Arellano*, 143 S. Ct. at 550 (“That Congress accounted for equitable factors in setting effective dates strongly suggests that it did not expect an adjudicator to add a broader range of equitable factors to the mix.”). Finally, express language signifying that the only exceptions are those in the statute signals that courts should not permit equitable tolling. *See Arellano*, 143 S. Ct. at 551 (a statute requiring a receipt date to begin a filing period “[u]nless specifically provided otherwise” suggests the statute’s enumerated exceptions are exclusive).

[16] Applying these rules, there is insufficient textual evidence to persuade us that Congress sought to bar § 6213(a)’s deadline from being equitably tolled. The filing period is neither emphasized nor set out in a technical way. And though Congress provided for three equitable exceptions to the deadline,³ there is good reason to believe these exceptions are not exhaustive. Unlike the statutory deadlines examined in *Brockamp* and *Arellano*, both of which the Supreme Court held not subject to equitable tolling, § 6213(a)’s exceptions are neither many (the three here are less than the six in *Brockamp* and fifteen in

3. They are as follows. First, a taxpayer may file a redetermination petition after § 6213(a)’s deadline if it is within the date specified on the notice of deficiency he or she receives, even if that date is after the statutory deadline. *See* 26 U.S.C. § 6213(a). Second, the filing period does not run when the taxpayer is precluded from filing a redetermination

petition because he or she is in bankruptcy. *See* 26 U.S.C. § 6213(f)(1). Third, the limitations period pauses for “any period during which the Secretary has extended the time allowed for making correction[s] [to certain excise taxes] under section 4963(e).” 26 U.S.C. § 6213(e).

Arellano), nor are they set out explicitly or “in a highly detailed technical manner,” and they do not contain “substantive limitations” on the amount of recovery. *Brockamp*, 519 U.S. at 350, 352, 117 S.Ct. 849; see *Arellano*, 143 S. Ct. at 549. Finally, no express language in the statute suggests the enumerated exceptions are exhaustive.

[17] The statutory context also suggests that Congress did not intend § 6213(a)’s filing limit to be unbending. The deadline is targeted at the taxpayer, not the Tax Court. See *Boechler*, 142 S. Ct. at 1500 (holding that a time limit directed at the taxpayer supports equitable tolling). Moreover, “[t]he presumption favoring equitable tolling is stronger when the limitations period is short,” *Hedges v. United States*, 404 F.3d 744, 749 (3d Cir. 2005), and § 6213(a)’s 90-day time limit (or 150 days for notices sent to those outside the United States) fits the bill. Compare *Boechler*, 142 S. Ct. at 1500 (describing 30-day time limit as “short”), with *United States v. Beggerly*, 524 U.S. 38, 48–49, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998) (holding that an “already generous [12-year] statute of limitations” cannot be tolled). It is also important that this deadline applies to “a scheme in which ‘laymen, unassisted by trained lawyers,’ often ‘initiate the process.’” *Boechler*, 142 S. Ct. at 1500 (quoting *Auburn*, 568 U.S. at 154, 133 S.Ct. 817); see United States Tax Court, Congressional Budget Justification, Fiscal Year 2024, at 23 (Feb. 1, 2023) (explaining that in Fiscal Year 2022 80% of the Tax

Court petitions were filed by taxpayers proceeding *pro se*).

We also believe the IRS’s arguments that permitting equitable tolling would be inadministrable are overstated. Section 6213(c) directs the Commissioner to demand payment of deficient taxes “[i]f the taxpayer does not file a petition with the Tax Court within” § 6213(a)’s filing period. 26 U.S.C. § 6213(c). The Commissioner contends that, if we permit equitable tolling, “the United States would never have certainty about the amount of taxes it will collect for a given tax year.” IRS Br. at 47. But after the Commissioner issued approximately two million notices of deficiency in Fiscal Year 2021, taxpayers filed only 34,049 redetermination petitions in the Tax Court.⁴ Because taxpayers timely file the vast majority of these petitions, permitting equitable tolling would only affect a small subset of deficiency petitions filed after § 6213(a)’s period. This subset is quite small,⁵ therefore indicating § 6213(a)’s deadline “serves a . . . limited and ancillary role in the tax collection system.” *Boechler*, 142 S. Ct. at 1501. And we doubt our holding will encourage more taxpayers to file untimely petitions in the (longshot) hopes of bringing a successful equitable tolling argument.

Nor do we perceive that the IRS’s ability to collect deficient taxes will be thwarted if taxpayers can assert their tardy petitions are timely due to equitable tolling. That is because a taxpayer’s challenge will not undo the IRS’s lien unless and until the taxpayer’s challenge is successful. Af-

4. See Table 22, Information Reporting Program, Fiscal Year 2021, *Internal Revenue Service Data Book, 2021* (May 2022), available at [https://perma.cc/YB5F-UHZ8] (number of notices of deficiency sent in 2021); United States Tax Court, Congressional Budget Justification, Fiscal Year 2023, at 19 (Feb. 28, 2022), available at [https://perma.cc/WWD3-RUYR]

(number of deficiency redetermination petitions filed in Fiscal Year 2021).

5. Amicus Center for Taxpayer Rights concluded, based on its analysis, that the Tax Court dismisses approximately 600 redetermination petitions per year for being untimely. See Center for Taxpayer Rights Amicus Br. at 14–15, 17.

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ter the IRS provides a taxpayer notice of the deficiency's existence and amount, 26 U.S.C. § 6212, and the taxpayer does not file a petition within the time prescribed by § 6213(a), the deficiency shall be assessed, 26 U.S.C. § 6213(c), and becomes a lien on the taxpayer's property, § 26 U.S.C. § 6321. That lien "arise[s] at the time the assessment is made and shall continue until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322. Thus, the IRS's power to collect a deficiency will not be frustrated if a taxpayer could argue that § 6213(a)'s deadline should be equitably tolled.

For all these reasons, we hold that § 6213(a)'s deadline is subject to equitable tolling. We remand this case to the Tax Court to decide whether the Culps are entitled to that relief.

* * * * *

Missing a statutory filing deadline is never ideal for the filer. But the specific consequence for doing so depends on the legislature's intent. If the statute clearly expresses the deadline is jurisdictional, the filer's tardiness deprives a court of the power to hear the case. Without a clear statement, courts will treat a filing period to be a claims-processing rule that is presumptively subject to equitable tolling. Because we discern no clear statement that § 6213(a)'s deadline is jurisdictional, we hold it is not. And because the presumption that nonjurisdictional time limits are subject to equitable tolling has not been rebutted here, we hold it may be tolled. We thus reverse the Tax Court's dismissal for lack of jurisdiction and remand for that Court to determine whether the Culps are entitled to equitable tolling.



Kevin B. SAPP; Jamie Hopper,
Appellants

v.

INDUSTRIAL ACTION SERVICES,
LLC; Reladyne, LLC

No. 22-2181

United States Court of Appeals,
Third Circuit.

Argued April 13, 2023

(Opinion filed July 20, 2023)

Background: Seller of business brought action in Texas state court against buyer for breach of contract, tortious interference, and declaratory relief. Case was removed, and venue was transferred. Buyer then moved to compel arbitration. The United States District Court for the District of Delaware, Richard G. Andrews, J., 2020 WL 2813176, granted buyer's objections to report and recommendation of Burke, United States Magistrate Judge, granted buyer's motion to compel arbitration, and, after conclusion of arbitration, denied seller's motion to vacate arbitration award. Seller appealed.

Holdings: The Court of Appeals, Ambro, Circuit Judge, held that under Delaware law, dispute-resolution provisions of purchase agreement, requiring that certain disputes, including those as to variable payments during three-year period that were denominated earn-out consideration, be resolved by "an independent accounting firm," constituted an agreement to an expert determination rather than to arbitration.

Reversed and remanded.

1. Alternative Dispute Resolution ⇌368

District court order denying business seller's motion to vacate arbitration award

**United States Tax Court**

Washington, DC 20217

ISOBEL BERRY CULP & DAVID CULP,

Petitioners

v.

Docket No. 14054-21.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

Pending before the Court is respondent's Motion to Dismiss for Lack of Jurisdiction, filed September 1, 2021. Therein, respondent requests that this case be dismissed for lack of jurisdiction on the following grounds: (1) to the extent petitioners seek to challenge any collection activity by respondent for the 2015 taxable year, no notice of determination concerning collection action has been issued to petitioners for such year that would permit them to invoke the jurisdiction of this Court; (2) to the extent petitioners may seek redetermination of the deficiency determined in petitioners' federal income tax for the 2015 taxable year by Notice of Deficiency dated February 5, 2018, the Petition in this case is untimely; (3) to the extent petitioners may seek to dispute respondent's denial of a penalty abatement request made by Berry and Culp, P.C., relating to an addition to tax assessed against that entity for the 2016 taxable year, no notice has been issued to petitioners that would permit them to invoke the jurisdiction of this Court; and (4) no other determination has been made for petitioners' 2015 taxable year that would permit them to invoke the jurisdiction of this Court.

By Order served September 3, 2021, the Court directed petitioners to file an objection, if any, to the Motion. On September 27, 2021, petitioners filed a Response, therein objecting to the granting of the Motion to Dismiss. Among other things, petitioners argue that they never received a copy of the Notice of Deficiency issued to them for the 2015 taxable year, and that respondent's Motion to Dismiss was not timely filed.¹

¹ To the extent petitioners argue that respondent's Motion to Dismiss should be denied as untimely, we are unpersuaded. It is well settled that this Court may

(continued)

For the reasons set forth below, we must grant respondent's Motion and dismiss this case for lack of jurisdiction.

Background

On April 22, 2021, petitioners filed the Petition to commence this case. Therein, petitioners checked the box indicating that they were disputing a purported notice of determination concerning collection action issued to them by respondent for the 2015 taxable year. No such notice of determination was attached to the Petition, nor was any other notice issued by respondent so attached. Instead, petitioners attached an 18-page document titled "Petition", which identifies as "petitioners" not only Mr. Culp and Mrs. Berry Culp, but also their law firm, Berry and Culp, P.C., and raises as an issue a penalty apparently assessed by respondent against that firm for failure to file a timely tax return for the 2016 taxable year. The Petition arrived at the Court via U.S. Postal Service, in an envelope bearing a postmark of April 19, 2021.

Discussion

The Tax Court is a court of limited jurisdiction, and we may exercise our jurisdiction only to the extent authorized by Congress. *See* I.R.C. § 7442;² *Guralnik v. Commissioner*, 146 T.C. 230, 235 (2016). Where this Court's jurisdiction is duly challenged, as here, our jurisdiction must be affirmatively shown by the party seeking to invoke that jurisdiction. *See David Dung Le, M.D., Inc. v. Commissioner*, 114 T.C. 268, 270 (2000), *aff'd*, 22 F. App'x 837 (9th Cir. 2001); *Romann v. Commissioner*, 111 T.C. 273, 280 (1998); *Fehrs v. Commissioner*, 65 T.C. 346, 348 (1975). To meet this burden, the party "must establish affirmatively all facts giving rise to our jurisdiction." *David Dung Le, M.D., Inc.*, 114 T.C. at 270.

I. Notice of Determination Concerning Collection Action for 2015

Our jurisdiction in the collection due process context depends upon the issuance of a valid notice of determination and the timely filing of a petition. *See* I.R.C. §§ 6320(c), 6330(d)(1); Rule 330(b); *Orum v. Commissioner*, 123 T.C. 1, 8 (2004), *aff'd*, 412 F.3d 819 (7th Cir. 2005); *Offiler v. Commissioner*, 114 T.C. 492, 498 (2000). It follows that when a valid notice of determination has not been issued to the taxpayer, we are obliged to dismiss the case for lack of jurisdiction. *See Offiler*, 114

proceed in a case only if it has jurisdiction and that either party, or the Court *sua sponte*, may raise jurisdiction at any time. *See Brown v. Commissioner*, 78 T.C. 215, 217-218 (1982) (rejecting the same argument); *Grana v. Commissioner*, T.C. Memo. 1985-608 (same); *Hollister v. Commissioner*, T.C. Memo. 1979-35 (same).

² All statutory references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

T.C. at 498; *Moorhous v. Commissioner*, 116 T.C. 263, 270-271 (2001).

To the extent petitioners seek to challenge any collection activity by respondent for the 2015 taxable year, they have failed to demonstrate that respondent has issued a notice of determination concerning collection activity for such year. No such document is attached to the Petition, nor to petitioners' Response to the Motion to Dismiss. As petitioners have failed to introduce a notice of determination for the 2015 taxable year, and respondent reports that IRS records contain no evidence that any such notice of determination has been mailed to petitioners, there is no determination for this Court to review and no basis for our jurisdiction under section 6330(d) for such year.

II. Notice of Deficiency for 2015

In a case seeking redetermination of a deficiency, our jurisdiction depends upon the issuance of a valid notice of deficiency and the timely filing of a petition. See I.R.C. §§ 6212, 6213, and 6214; Rule 13(a) and (c); *Monge v. Commissioner*, 93 T.C. 22, 27 (1989). A notice of deficiency generally will be deemed valid for this purpose if it is mailed to the taxpayer at his last known address. See I.R.C. § 6212(b); *Pietanza v. Commissioner*, 92 T.C. 729, 736 (1989), *aff'd*, 935 F.2d 1282 (3d Cir. 1991); *Frieling v. Commissioner*, 81 T.C. 42, 52 (1983). In order to be timely, a petition generally must be filed within 90 days of the date on which the Commissioner mails a valid notice of deficiency. See I.R.C. § 6213(a); *Brown v. Commissioner*, 78 T.C. 215, 220 (1982).³ We have no authority to extend this 90-day period. See *Joannou v. Commissioner*, 33 T.C. 868, 869 (1960); see also *Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1093-1095 (9th Cir. 2020). However, under certain circumstances, a timely mailed petition may be treated as though it were timely filed. See I.R.C. § 7502; Treas. Reg. § 301.7502-1.

In his Motion to Dismiss, respondent asserts that he has attached, as Exhibits A and B, copies of (1) a Notice of Deficiency dated February 5, 2018, determining a deficiency in petitioners' Federal income tax for the 2015 taxable year,⁴ and (2) a U.S. Postal Service Form 3877, respectively, together showing that the Notice of Deficiency was sent by certified mail on February 5, 2018, to petitioners' last known

³ If the notice of deficiency is addressed to a person outside the United States, a petition must be filed within 150 days of mailing of the notice. See I.R.C. § 6213(a); *Smith v. Commissioner*, 140 T.C. 48 (2013); *Lewy v. Commissioner*, 68 T.C. 779 (1977). There is no indication in the record—nor have petitioners asserted, after having been given an opportunity to do so—that they were outside the United States at or about the time that the Notice of Deficiency in this case was mailed. In any event, the Petition in this case was untimely filed under either applicable period.

⁴ The Notice of Deficiency states that the last date to petition this Court is May 7, 2018.

address. A review of the foregoing documents establishes⁵ that respondent sent the Notice of Deficiency to petitioners by certified mail on February 5, 2018, to a PO Box in Montrose, Pennsylvania. That same address is listed on various and sundry of the documents attached to petitioners' Response, including a copy of petitioners' Form 1040, U.S. Individual Income Tax Return, for the 2015 taxable year. Moreover, petitioners have not disputed that the aforementioned address was their last known address. We therefore take it as established.

In their Response, petitioners assert that they never received the Notice of Deficiency issued to them for the 2015 taxable year. Furthermore, petitioners challenge whether such Notice was ever issued. However, a notice of deficiency is valid, even if it is not received by the taxpayer, where, as here, it is mailed to the taxpayer's last known address. *See Mollet v. Commissioner*, 82 T.C. 618, 623-24 (1984). Therefore, even assuming that petitioners never received the Notice of Deficiency in this case, that Notice is valid in view of having been mailed to petitioners' last known address. To the extent petitioners argue that the Notice was never issued in the first place, we are unpersuaded on the record before us. As noted, attached to respondent's Motion to Dismiss are copies of the Notice of Deficiency and a U.S. Postal Service Form 3877. Moreover, we note that the certified mail numbers listed on the separate copies of the Notice sent to Mr. Culp and Mrs. Berry Culp match the numbers listed on the corresponding entries on the Form 3877.

In view of the fact that the Notice of Deficiency was mailed to petitioners' last known address on February 5, 2018, the last date to file a petition with this Court was May 7, 2018, as stated in the Notice of Deficiency. As noted, the Petition in this case was filed on April 22, 2021. And, although a petition that is delivered to the Court after the expiration of the period provided by section 6213(a) shall be deemed timely if it bears a timely postmark, *see* I.R.C. § 7502, the envelope in which the Petition was mailed to the Court bears a postmark of April 19, 2021. Consequently, the Petition was not filed within the period prescribed by sections 6213(a) and 7502, and we lack jurisdiction over any challenge to the Notice of Deficiency.

⁵ A properly completed U.S. Postal Service Form 3877 (or its equivalent) is direct evidence of both the fact and date of mailing and, in the absence of contrary evidence, is sufficient to establish proper mailing of the notice of deficiency. *See Clough v. Commissioner*, 119 T.C. 183, 187-191 (2002); *Stein v. Commissioner*, T.C. Memo. 1990-378; *see also Keado v. United States*, 853 F.2d 1209, 1213 (5th Cir. 1988); *United States v. Zolla*, 724 F.2d 808, 810 (9th Cir. 1984); *Coleman v. Commissioner*, 94 T.C. 82, 91 (1990). The document attached as Exhibit B to respondent's Motion to Dismiss appears to be properly completed and bears sufficient indicia of authenticity, such as a U.S. Postal Service postmark date of February 5, 2018. Finding no evidence to the contrary, we accept the foregoing document as presumptive proof of its contents.

III. Berry and Culp, P.C. Penalty Abatement Denial for 2016

As noted, the 18-page document titled “Petition” attached to the Petition in this case raises as an issue a penalty apparently assessed by respondent against the law firm Berry and Culp, P.C., for failure to file a timely tax return for the 2016 taxable year. In his Motion to Dismiss, respondent argues that these claims appear to relate to respondent’s denial of a penalty abatement request made by Berry and Culp, P.C., with respect to an addition to tax assessed against the entity under section 6699(a) for failure to file an S corporation return for the 2016 taxable year. Among other things, respondent argues that this Court lacks jurisdiction to consider petitioners’ related claim on two grounds: (1) Berry and Culp, P.C. is not a party to this case and the addition to tax is not a liability of petitioners; and (2) deficiency procedures do not apply with respect to assessment and collection of the failure to file penalty imposed under section 6699(a).

We agree with respondent. First, Mr. Culp and Mrs. Berry Culp, as individuals, are the party-petitioners in this case. Berry and Culp, P.C., against which the section 6699(a) penalty was apparently imposed for the 2016 taxable year, is not such a party. Second, even assuming that the penalty was imposed against Mr. Culp and Mrs. Berry as individuals, section 6699(d) states that deficiency procedures do not apply in respect of the assessment and collection of any penalty imposed under section 6699(a). Accordingly, we lack jurisdiction to consider this issue to the extent it has been raised in the Petition.

IV. No Other Basis on Which to Invoke the Court’s Jurisdiction for 2015

As noted, in his Motion to Dismiss, respondent asserts that no other determination has been made by respondent that would permit petitioners to invoke the jurisdiction of this Court for the 2015 taxable year. After having been apprised of respondent’s jurisdictional allegations, and given an opportunity to respond, petitioners have not provided any notice of deficiency, notice of determination, or any other notice sufficient to confer jurisdiction on this Court. As petitioners have failed to carry their burden to “establish affirmatively all facts giving rise to our jurisdiction”, *David Dung Le, M.D., Inc.*, 114 T.C. at 270, we must dismiss this case for lack jurisdiction.

Upon due consideration of the foregoing, it is

ORDERED that respondent’s above-referenced Motion to Dismiss is granted, and this case is dismissed for lack of jurisdiction.

(Signed) Eunkyong Choi
Special Trial Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-1789

ISOBEL BERRY CULP; DAVID R. CULP,
Appellants

v.

COMMISSIONER OF INTERNAL REVENUE

(Tax Court Docket No. 21-14054)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE,
RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-
REEVES, and CHUNG, Circuit Judges and AMBRO*, Senior Judge

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

* Judge Ambro's vote is limited to panel rehearing only.

s/Thomas L. Ambro
Circuit Judge

Dated: November 28, 2023

kr/cc: All Counsel of Record