No.

In the Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ISOBEL BERRY CULP AND DAVID R. CULP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 26 U.S.C. 6213(a) grants the Tax Court jurisdiction to review an untimely petition for redetermination of a tax deficiency?

2. Even assuming that the Tax Court has jurisdiction to review some untimely petitions for redetermination of tax deficiencies, whether that jurisdiction extends to a petition filed after the Internal Revenue Service has already assessed the previously determined deficiency, as it is required to do under 26 U.S.C. 6213(c) "[i]f the taxpayer does not file a petition with the Tax Court within the time prescribed."

RELATED PROCEEDINGS

United States Tax Court:

Culp v. *Commissioner*, No. 14054-21 (Feb. 15, 2022)

United States Court of Appeals (3d Cir.):

Culp v. *Commissioner*, No. 22-1789 (Nov. 28, 2023)

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 75 F.4th 196. The order of the Tax Court dismissing respondents' petition for redetermination (App., *infra*, 16a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2023. A petition for rehearing was denied on November 28, 2023 (App., *infra*, 25a-26a). On February 9, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 19, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 27a-34a.

STATEMENT

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 Servs., LLC* v. *IRS*, 593 U.S. 209, 212 (2021). For some taxes, however, Congress has provided taxpayers with an additional path to judicial review. For income, estate, gift, and certain other taxes, Congress has authorized 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). The taxpayer may 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).

This case concerns the limits that Congress has imposed on that additional pre-assessment, pre-collection option for judicial review. Section 6213(a), which authorizes redetermination of the deficiency by the Tax Court, 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 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).[1]

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 assessment, the United States obtains a statutory lien for that amount "upon all prop-

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[1] In situations where "the notice is addressed to a person outside the United States," Section 6213(a) provides a longer deadline of 150 days after mailing to seek redetermination of the deficiency. 26 U.S.C. 6213(a). For simplicity's sake, this petition focuses on the 90-day deadline applicable in cases, like this one, in which the notice of deficiency is mailed to a person in the United States.

erty and rights to property * * * belonging to [the taxpayer]." 26 U.S.C. 6321; see 26 U.S.C. 6322. The taxpayer may, however, still challenge the Secretary's calculation of the tax in a suit seeking a refund or in bankruptcy proceedings. See 26 U.S.C. 7422; 11 U.S.C. 505(a).

On the other hand, "[i]f the taxpayer files a petition with the Tax Court" and 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 collected in excess of the deficiency determined by the Tax Court).

That preclusive effect of an unsuccessful petition for redetermination of a deficiency applies not only where the Tax Court affirmatively agrees with the Secretary's calculation of the deficiency on the merits, but also where the Tax Court dismisses a petition on nonjurisdictional 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 excepted any case in which "the dismissal is for lack of jurisdiction." *Ibid.*

As a result, a Tax Court dismissal on jurisdictional grounds does not result in an order that would preclude the taxpayer from relitigating the amount of the deficiency in a future proceeding, such as a refund suit.

2. In 2015, respondents David and Isobel Berry Culp received $17,652 to settle an employment-related lawsuit against La Salle University. App., *infra*, 3a; 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*, 3a (citation omitted). Because the amount and description of the settlement reported on respondents' 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 respondents 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 respondents failed to respond within 30 days, the IRS sent a notice of deficiency to respondents by certified mail on February 5, 2018. App., *infra*, 3a, 5a, 20a-21a. 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*, 3a; 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, 22a. 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 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 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*, 3a. By November 2019, respondents' 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*, 3a, 17a. 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*, 3a-4a (citation omitted); see 26 U.S.C. 6512(b) (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 notice of deficiency. App., *infra*, 21a.

The Tax Court dismissed the case for lack of jurisdiction. App., *infra*, 16a-24a. 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*, 19a (citing, *inter alia*, 26 U.S.C. 6213, T.C. R. 13(c) ("[T]he jurisdiction of the Court * * * depends on the timely filing of a petition."), and *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 demonstrates the IRS mailed a notice of deficiency to respondents' last known address on February 5, 2018. App., *infra*, 21a-22a. It therefore rejected respondents' claim "that the Notice was never issued." *Id.* at 22a. And because respondents 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 and remanded for further proceedings. App., *infra*, 1a-15a; 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 mailed 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-15a.

In *Boechler*, this Court held that the 30-day time limit to file a petition with the Tax Court 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*, 8a. 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 [Tax] Court's jurisdiction." *Ibid.* 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*, 8a.

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*, 9a; see pp. 4-5, *supra*. But the court thought that such a scenario was unlikely to

arise often "and therefore does not move the needle." App., *infra*, 9a.

The court of appeals was likewise unpersuaded by the Commissioner'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 of appeals stated that the only "relevant historical treatment" is "our precedent"—that is, Third Circuit precedent. App., *infra*, 9a. 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 *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, by the time respondents filed their petition for redetermination, "the IRS had already collected a portion of the deficiency via levy." App., *infra*, 4a n.2 (citing 26 U.S.C. 6213(b)(4)). And the court of appeals saw nothing else in the statute sufficient to establish that the deadline is exempt from equitable tolling. See *id.* at 9a-14a. It therefore reversed the Tax Court's dismissal of respondents' petition 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 14a.

The Commissioner filed a petition for rehearing, which the court of appeals denied on November 28, 2023. App., *infra*, 25a-26a.

REASONS FOR GRANTING THE PETITION

Until the Third Circuit's decision in this case, the courts of appeals had "uniformly adopted a jurisdictional reading of [26 U.S.C.] 6213(a) or its predecessor since at least 1928." *Organic Cannabis Found., LLC* v. *Commissioner*, 962 F.3d 1082, 1095 (9th Cir. 2020), cert. denied, 141 S. Ct. 2596, and 141 S. Ct. 2598 (2021). Statutory text and context strongly support that jurisdictional understanding, and Congress repeatedly ratified it by enacting amendments that assume the deadline's jurisdictional status.

In reaching a contrary conclusion, the Third Circuit misunderstood the relevant statutory text and context; it erroneously refused to consider any "historical treatment" of Section 6213(a) beyond its own precedent, App., *infra*, 9a; and it misapplied this Court's decision in *Boechler, P.C.* v. *Commissioner*, 596 U.S. 199 (2022). Because the decision below conflicts with the decisions of other courts of appeals on an important question of federal tax procedure, this Court should grant the petition for a writ of certiorari and reverse.

A. The Court Of Appeals' Decision Is Wrong

In determining whether a procedural requirement carries jurisdictional significance, this Court "look[s] to the condition's text, context, and relevant historical treatment." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010). Where those "'traditional tools of statutory construction * * * plainly show that Congress imbued a procedural bar with jurisdictional consequences,'" the Court gives effect to Congress's clear in-

tent. *Boechler*, 596 U.S. at 203 (quoting *United States* v. *Wong*, 575 U.S. 402, 410 (2015)).

That heightened standard is satisfied here. The text of Section 6213 indicates that filing a petition for redetermination within the time set out in the statute is a necessary prerequisite to the Tax Court's deficiency jurisdiction. To the extent that Section 6213 itself leaves any uncertainty on the question, that uncertainty disappears in light of surrounding statutory context and Congress's clear acceptance of lower-court precedent uniformly treating the deadline as jurisdictional for nearly a century. Moreover, even if the deadline itself were not jurisdictional, by the time respondents filed their petition, the IRS had already assessed their deficiency, as Section 6213(c) requires "[i]f the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a)." 26 U.S.C. 6213(c). As a result, there was no longer a deficiency for the Tax Court to exercise any jurisdiction to redetermine.

1. "Congress may make * * * prescriptions jurisdictional by incorporating them into a jurisdictional provision." *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1849 (2019). Congress did so, for example, with the amount-in-controversy requirement for federal diversity jurisdiction. See *ibid.* (citing 28 U.S.C. 1332(a)). And Congress has done the same thing with the statutory deadline for filing a petition for redetermination under Section 6213(a).

The first sentence of Section 6213(a) provides that "[w]ithin 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." 26 U.S.C. 6213(a). That sentence supplies the sole basis for the Tax Court's juris-

diction to review a taxpayer's claim that the deficiency determined by the Commissioner is too high. Rather than including a separate provision that expressly empowers the Tax Court to review petitions for redetermination, Congress has instead conveyed jurisdiction on the Tax Court implicitly: By authorizing taxpayers to "file a petition with the Tax Court for a redetermination of the deficiency" "[w]ithin 90 days * * * after the notice of deficiency * * * is mailed," Congress made clear that the Tax Court should have authority to resolve petitions that comply with that statutory standard. *Ibid.*[2]

Nothing in Section 6213(a) or any other provision confers jurisdiction on the Tax Court to consider petitions for redetermination that do *not* comply with the statutory standard. And because "[c]ourts created by statute can have no jurisdiction but such as the statute confers," *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 449 (1850), it follows that the Tax Court lacks jurisdiction to review petitions for redetermination that are filed after

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[2] When Congress established the Board of Tax Appeals, the predecessor to the Tax Court, in the Revenue Act of 1924, ch. 234, 43 Stat. 253, it expressly provided that "[t]he Board and its divisions shall hear and determine appeals * * * under" specified provisions, including the one authorizing petitions for redetermination. § 900(e), 43 Stat. 337. Two years later, however, Congress removed the "hear and determine" language expressly establishing the Board's deficiency jurisdiction. See Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 105-106 (amending Section 900 of the Revenue Act of 1924). No express grant of jurisdiction comparable to the one contained in the 1924 Act exists today. Although Section 6214(a) clarifies that the Tax Court has "[j]urisdiction as to *increase* of deficiency, *additional* amounts, or *additions* to tax" when a taxpayer has already invoked the Tax Court's deficiency jurisdiction, 26 U.S.C. 6214(a) (emphasis altered), Section 6213(a) is what provides the basis for the Tax Court's jurisdiction to *reduce* a deficiency at the taxpayer's request.

the statutory deadline, just as federal district courts lack jurisdiction to review diversity cases in which the amount in controversy is less than $75,000. See *Fort Bend County*, 139 S. Ct. at 1849.

2. The surrounding statutory context—including other parts of Section 6213 as well as related provisions—confirms that the deadline in the first sentence of Section 6213(a) is jurisdictional.

a. In addition to authorizing petitions for redetermination, Section 6213(a) bars the Secretary from assessing or taking certain actions to collect deficiencies until the "90-day * * * period" for filing a petition has expired. 26 U.S.C. 6213(a). "[I]f a petition has been filed with the Tax Court," that prohibition remains in effect "until the decision of the Tax Court has become final." *Ibid.* The Tax Court may enjoin assessment or collection activities that would violate that prohibition, and it may order a refund of any amount the IRS erroneously collected during the period of the prohibition. See *ibid.* Congress specifically provided, however, that "[t]he Tax Court shall have no jurisdiction to [provide such remedies] unless a timely petition for redetermination of the deficiency has been filed." *Ibid.* Thus, as Judge Collins observed for the Ninth Circuit in *Organic Cannabis Foundation,* Section 6213(a) "use[s] the magic word 'jurisdiction' with respect to one aspect of the Tax Court's power concerning deficiency redeterminations, thereby confirming that the provision as a whole should be understood as speaking to the manner in which the Tax Court acquires subject matter jurisdiction in such cases." 962 F.3d at 1093 (emphasis omitted).

Treating the 90-day deadline as jurisdictional is also necessary to harmonize Section 6213(a) with Section

6213(c). Section 6213(c) provides in relevant part that "[i]f the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency * * * shall be assessed" by the IRS. 26 U.S.C. 6213(c). Under a jurisdictional understanding of the 90-day deadline, that "shall" command fits perfectly with the prohibition in Section 6213(a): Section 6213(a) prohibits any assessment during the 90-day period in which the Tax Court may accept a petition for filing, while Section 6213(c) requires that an assessment be made if a petition is not filed within that time.

Treating Section 6213(a)'s deadline as a nonjurisdictional claim-processing rule under which the Tax Court has discretion to accept a late petition for filing, however, would place Sections 6213(a) and (c) in conflict. On the Third Circuit's understanding, if a petition for redetermination were filed 91 days after the mailing of the notice of deficiency, then Section 6213(a) would prohibit the Secretary from making an "assessment of [the] deficiency" (because the petition would have "been filed with the Tax Court"). 26 U.S.C. 6213(a). Yet, Section 6213(c) would *require* the Secretary to make that very same assessment. See 26 U.S.C. 6213(c) ("If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency * * * shall be assessed."). Given "this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another," *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 502 (2018), the Court should not adopt a reading of Section 6213(a) that would produce such an incompatibility with Section 6213(c).

b. Nonjurisdictional treatment of the 90-day statutory deadline would also lead to anomalous results under the preclusion provision in 26 U.S.C. 7459(d).

As discussed above, pp. 4-5, *supra*, when the Tax Court dismisses a petition for redetermination "for lack of jurisdiction," its dismissal does not have preclusive effects in other proceedings between the taxpayer and the government. 26 U.S.C. 7459(d). By contrast, when the Tax Court dismisses a petition on nonjurisdictional grounds, its dismissal is treated as a determination by the Tax Court that the deficiency calculated by the Commissioner was correct, which means that it will preclude the taxpayer from contesting the tax in other proceedings in the future. See *ibid.*

Given that statutory context, the court of appeals' nonjurisdictional treatment of Section 6213(a)'s 90-day deadline would produce adverse consequences for taxpayers who file untimely petitions with the Tax Court. Unless such a taxpayer can establish that equitable tolling is warranted in light of "extraordinary circumstances," App., *infra*, 10a (citation omitted)—something that, by definition, a taxpayer will ordinarily be unable to do—the Tax Court will still be required to dismiss her petition. Under a jurisdictional understanding of Section 6213(a), the effect of such a dismissal would be confined to the Tax Court proceeding itself. But under the court of appeals' nonjurisdictional understanding, the dismissal will carry farther-reaching consequences: The taxpayer's failure to meet the Tax Court deadline will not only cost her the opportunity to obtain Tax Court review but will also, for example, have "the perverse effect of barring the taxpayer from later challenging the amount in a refund suit." *Organic Cannabis Found.*, 962 F.3d at 1095. As the Ninth Circuit has observed, treating the Section 6213(a) deadline as nonjurisdictional would thus "ironically yield[] precisely the sort of 'harsh consequence' that the Supreme Court's

recent 'jurisdictional' jurisprudence has sought to avoid." *Ibid.* (quoting *Wong*, 575 U.S. at 409) (brackets omitted).

The court of appeals here acknowledged that its non-jurisdictional understanding will mean that an untimely petition in the Tax Court will foreclose the taxpayer from mounting challenges in Article III courts. App., *infra*, 9a. But the court concluded that the interaction between Sections 6213(a) and 7459(d) "does not move the needle" because it believed that taxpayers would "seldom" pursue such challenges anyway. *Ibid.*

That reasoning was wrong in two respects. First, as we explain below, see pp. 19-20, *infra*, it ignores that Congress enacted the jurisdictional exception to Section 7459(d) specifically to address the dismissal of untimely claims. Even if the court of appeals were correct that the exception rarely matters in practice, Section 7459(d) still provides a strong indication that Congress understood the time limit in Section 6213(a) to be jurisdictional. The court erred in disregarding that statutory context. See *Reed Elsevier*, 559 U.S. at 166 (explaining that in assessing whether a requirement is jurisdictional, a court must consider the surrounding "context").

Second, and in any event, the court of appeals significantly underestimated how often its reading will produce adverse effects for taxpayers. Contrary to the court's understanding, the preclusive effect of its non-jurisdictional approach will not just bar refund suits. Rather, as a member of the Tax Court recently explained, there are other "common scenarios that the [Third Circuit's opinion in this case] did not consider." *Sanders* v. *Commissioner*, 161 T.C. No. 8, at *7 (2023) (Buch, J., concurring). Most significantly, under the

Third Circuit's approach, the preclusive effect of Section 7459(d) would prevent taxpayers from seeking an administrative refund from the IRS—relief that is substantially more accessible than a refund suit. See *id.* at *8. The court of appeals identified no reason why Congress would have intended an untimely filing in the Tax Court to deprive a taxpayer of other, ordinarily available opportunities. But as the court of appeals acknowledged, its nonjurisdictional reading requires that result because Congress prescribed preclusive effects for a dismissal of a petition for redetermination of a deficiency whenever the dismissal is on nonjurisdictional grounds. App., *infra*, 9a.

3. The history of Sections 6213(a) and 7459(d) reinforces the jurisdictional treatment of the deadline for filing a petition for redetermination. That history demonstrates that the deadline for seeking pre-collection review in the Tax Court was understood as a jurisdictional limitation since virtually the moment of its enactment; that courts uniformly treated it as such for nearly a century; and that Congress repeatedly accepted that jurisdictional understanding when making relevant amendments.

a. Congress established the predecessor of the Tax Court—the Board of Tax Appeals (Board)—in the Revenue Act of 1924, ch. 234, § 900, 43 Stat. 336. At the same time, Congress authorized the Commissioner to provide taxpayers with notice of tax deficiencies, and (in the precursor to what is now Section 6213(a)) authorized the Board to redetermine those deficiencies if taxpayers filed appeals within 60 days. See § 274(a), 43 Stat. 297 ("[W]ithin 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by Section 900.").

From the start, the Board treated the 60-day limit as jurisdictional. In just the twelfth published decision the Board ever issued, it confronted a case in which the taxpayer had mailed his appeal to the Board on a Friday, 58 days after the Commissioner mailed the notice of deficiency. See *Appeal of Satovsky*, 1 B.T.A. 22, 23 (1924). Because the mail was not delivered on Sunday (the 60th day) or Monday (a holiday), the Board did not receive the appeal until the 62nd day. *Ibid.* The Board held that the appeal was untimely and that it accordingly lacked jurisdiction to redetermine the deficiency. *Id.* at 24-25. Relying on decisions interpreting, *inter alia*, the statutory deadline for filing an appeal from a district court to a court of appeals, see Circuit Court of Appeals (Evarts) Act, ch. 517, § 6, 26 Stat. 828, the Board determined that "it was the understanding and intention of Congress that all Sundays should be counted as part of the time limit[] within which an act is to be done under their legislation." *Satovsky*, 1 B.T.A. at 25. Having found that "[t]he language of the Act [establishing the 60-day deadline] is inflexible and upon it depends the jurisdiction of the Board," the Board concluded that it was "without power to grant an extension of the time." *Id.* at 24.

Two years later, the Board addressed the consequences of that jurisdictional treatment for the predecessor to Section 7459(d), then contained in Section 906(c) of the Revenue Act of 1924. At the time, the preclusion provision contained no express exception for jurisdictional dismissals. It stated simply that "[i]f a petition for redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall * * * be considered as its decision that the deficiency is the amount determined by the Com-

missioner," and directed that "[a]n order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the pleadings." Revenue Act of 1926 § 1000, 44 Stat. 107 (amending Section 906(c)). Nevertheless, in *Appeal of United Paper Co.*, 4 B.T.A. 257 (1926), the Board held that that rule did not apply where the petition for redetermination was jurisdictionally out of time. The Board explained that "[t]he petition not having been filed within the time prescribed [by statute], * * * the Board had no jurisdiction to hear and determine any issue, and without such jurisdiction the filing of the petition can not constitute an appeal to the Board." *Id.* at 258. The Board thus held that while it would enter an order noting the lack of jurisdiction, that order would not qualify as a dismissal within the meaning of then-Section 906(c) (and therefore would not be preclusive of other challenges to the deficiency in the future). *Ibid.*

b. Congress quickly codified the Board's understanding. In 1928, Congress added an express exception for circumstances in which "the dismissal is for lack of jurisdiction"—an exception that remains in effect today. Revenue Act of 1928, ch. 27, § 601, 45 Stat. 872 (26 U.S.C. 1217(c) (Supp. II 1928)); see *Hallmark Research Collective* v. *Commissioner*, 159 T.C. No. 6, at *15 (2022) (discussing history); 26 U.S.C. 7459(d) (retaining exception where "the dismissal is for lack of jurisdiction"). While the amendment did not explicitly state that the jurisdictional dismissals it covered would include dismissals on timeliness grounds, Congress's adoption of the amendment in the wake of the Board's decision in *United Paper* made that understanding obvious—particularly because, as the Tax Court recently

observed, no Board decision addressing the preclusion provision had found a lack of jurisdiction based on "any jurisdictional issue other than the untimeliness of a petition." *Hallmark Research Collective*, 159 T.C. No. 6, at *15.

While the response to *United Paper* was the clearest early congressional ratification of the Board's jurisdictional treatment, other early amendments further indicated Congress's acceptance of that treatment. Shortly after the Board's decision in *Satovsky*, Congress amended the deadline so as not to "count[] Sunday as the sixtieth day." Revenue Act of 1926 § 74(c), 44 Stat. 55. Later, it extended the filing period to 90 days, "not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day," Revenue Act of 1934, § 272, 48 Stat. 741, and it eventually excluded terminal Saturdays as well, International Organizations Immunities Act, § 203, 59 Stat. 673. See *Hallmark Research Collective*, 159 T.C. No. 6, at *17-*19 (chronicling amendments). Those amendments all reflected Congress's recognition of the Board's underlying premise that the deadline was jurisdictional and therefore could not be extended even to account for the fact that the Board's offices were closed (and thus unable to accept a filing) on the deadline specified by statute. See, *e.g.*, *Satovsky*, 1 B.T.A. at 24.

c. The courts of appeals consistently adopted a jurisdictional understanding of the deadline as well.

Even before Congress ratified the Board's view through its amendment of what was then Section 906(c), the D.C. Circuit adopted a jurisdictional understanding of the time limit in *Lewis-Hall Iron Works* v. *Blair*, 23 F.2d 972, cert. denied, 277 U.S. 592 (1928). There, the court determined that the Board had dismissed a peti-

tion for redetermination on an improper basis, but nevertheless affirmed the dismissal on the alternative ground (not reached by the Board nor apparently even raised by the Commissioner) that the petition for redetermination had been untimely. In doing so, the court explained that "the requirement that such petitions shall be filed within 60 days after the mailing of notice of the deficiency, is statutory and jurisdictional and is not merely procedural." *Id.* at 974. The untimeliness could therefore be considered for the first time in the court of appeals under "the rule that 'the want of jurisdiction apparent on the face of the record will be taken notice of by the appellate court, whether set up and relied on as a defense in the court below or not.'" *Id.* at 975 (citation omitted).

Over the ensuing decades, other courts of appeals uniformly followed the Board in declaring the time limit to be jurisdictional. See, *e.g.*, *Poyner* v. *Commissioner*, 81 F.2d 521, 522 (5th Cir. 1936); *Continental Petroleum Co.* v. *United States*, 87 F.2d 91, 94 (10th Cir. 1936), cert. denied, 300 U.S. 679 (1937); *Edward Barron Estate Co.* v. *Commissioner*, 93 F.2d 751, 753 (9th Cir. 1937); *Commissioner* v. *Rosenheim*, 132 F.2d 677, 679-680 (3d Cir. 1942); *Central Paper Co.* v. *Commissioner*, 199 F.2d 902, 903 (6th Cir. 1952); *Mindell* v. *Commissioner*, 200 F.2d 38, 39 (2d Cir. 1952) (per curiam).

Thus, by 1954, when Congress moved the provision authorizing petitions for redetermination to Section 6213 of the Internal Revenue Code, see ch. 736, § 6213, 68A Stat. 771, the Tax Court and 7 of the 11 then-extant courts of appeals had all afforded jurisdictional significance to the statutory requirement that such petitions be filed within 90 days of the notice of deficiency. Congress's "repetition of the same language" in Section

6213(a) indicated its "intent to incorporate [those] administrative and judicial interpretations." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); see *Texas Dep't of Hous. & Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 536-537 (2015) (when Congress "perpetuat[es] the wording" of a provision without relevant change in the face of a "uniform interpretation by inferior courts," the provision should be "presumed to carry forward that interpretation") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 322 (2012)).

d. After the 1954 codification in Section 6213(a) of the Tax Court's authority to consider a petition for redetermination of a deficiency, the courts of appeals continued, uniformly, to treat its 90-day deadline as jurisdictional, including in several circuits that had not addressed the jurisdictional status of the predecessor versions. See, *e.g.*, *Underwriters, Inc.* v. *Commissioner*, 215 F.2d 953, 954 (3d Cir. 1954) (per curiam); *Teel* v. *Commissioner*, 248 F.2d 749, 751 (10th Cir. 1957); *DeWelles* v. *United States*, 378 F.2d 37, 39 (9th Cir.), cert. denied, 389 U.S. 996 (1967); *DiViaio* v. *Commissioner*, 539 F.2d 231, 234 (D.C. Cir. 1976); *Andrews* v. *Commissioner*, 563 F.2d 365, 366 (8th Cir. 1977) (per curiam); *Johnson* v. *Commissioner*, 611 F.2d 1015, 1018 (5th Cir. 1980); *Pugsley* v. *Commissioner*, 749 F.2d 691, 692 (11th Cir. 1985) (per curiam); *Tadros* v. *Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985); *Patmon & Young Prof'l Corp.* v. *Commissioner*, 55 F.3d 216, 217 (6th Cir. 1995). The Tax Court continued to treat the deadline as jurisdictional as well, even adopting a rule of practice and procedure in 1973 that expressly stated that "[i]n all cases, the jurisdiction of the Court * * * depends on the timely filing of a petition." T.C. R. 13 (1973); see 60 T.C. 1057, 1072 (1973).

By 1998, therefore, the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits had all declared (and in many cases repeatedly reaffirmed) that the deadline in Section 6213(a) and its precursors was jurisdictional. To the government's knowledge, no court had ever concluded otherwise.

e. Against the background of that uniform Tax Court and circuit precedent, Congress adopted the most recent amendment to Section 6213(a) as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685. That statute adopted a new requirement that the Commissioner include in each notice of deficiency "the date determined by [the Commissioner] as the last day on which the taxpayer may file a petition [for redetermination] with the Tax Court." § 3463(a), 112 Stat. 767 (26 U.S.C. 6212 note). Congress simultaneously amended Section 6213(a) to add, at the end of the provision, an express statement that "[a]ny 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." § 3463(a), 112 Stat. 767 (26 U.S.C. 6213(a)).

That 1998 amendment, like the 1926-1954 enactments discussed above, reflected Congress's understanding that the deadline for filing a petition for redetermination imposes a jurisdictional limit on the Tax Court's authority. If the limit were *not* jurisdictional, a taxpayer who filed by the deadline indicated by the Commissioner (as required by statute) would have had a very strong argument for application of equitable tolling. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (indicating that equitable tolling is generally appropriate "where the complainant has been

induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"). The Conference Report accompanying the amendment explained, however, that "the Tax Court does not have jurisdiction to consider the petition" if it "is not filed within" the period specified by Section 6213. H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 289 (1998). Accordingly, it was necessary for Congress to specify in the statute itself that a petition filed by the date indicated by the Commissioner would be timely—and Congress did just that. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3463(a), 112 Stat. 767.

4. In the decision below, the court of appeals failed to consider any of that considerable and persuasive history when reaching its conclusion that Section 6213(a) establishes a nonjurisdictional claim-processing rule. The court declared that the only "relevant historical treatment" was Third Circuit precedent that had engaged with the issue only in *dicta*. App., *infra*, 9a. And as already discussed, see pp. 16-17, *supra*, the court's brief discussion of statutory context was likewise deficient, resting solely on its (incorrect) prediction that the anomalies that its reading produces under Section 7459(d) will "seldom" matter in practice. App., *infra*, 9a.

Instead, the court of appeals based its decision almost entirely on its view that the text of Section 6213(a), taken in isolation, is not more clearly jurisdictional than the text of 26 U.S.C. 6330(d)(1), the provision regarding review of collection-due-process determinations that this Court held was not jurisdictional in *Boechler*. App., *infra*, 8a. The court concluded that "[i]f the § 6330(d)(1)

deadline in *Boechler* fell short of being jurisdictional, § 6213(a)'s time limit must as well." *Ibid.*

Although Section 6213(a) and Section 6330(d)(1) share some common textual features, the court of appeals' approach was too simplistic. In *Boechler*, this Court acknowledged that Section 6330(d)(1)'s text might be "better" read as establishing a jurisdictional limit. 596 U.S. at 206. But the Court held that "in this context, better is not enough," *ibid.*, and emphasized that there was nothing in the statutory context or history of Section 6330(d)(1) that could provide the additional clarity needed, see *id.* at 206-208. Here, in contrast, the statutory context and history discussed above clearly demonstrate Congress's acceptance and ratification of the lower courts' jurisdictional treatment of Section 6213(a).

5. Finally, even if the Tax Court retained jurisdiction to review an untimely petition for redetermination of a tax deficiency in some circumstances, that jurisdiction could not extend to cases, like this one, in which the IRS had already assessed (and collected) the tax by the time the petition was filed. See App., *infra*, 3a; C.A. Doc. 24, at 22, 111.

As discussed above, see pp. 3, 13-14, *supra*, Section 6213(c) provides that "[i]f the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency * * * shall be assessed, and shall be paid upon notice and demand from the Secretary." 26 U.S.C. 6213(c). That mandatory assessment is "made 'by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary.'" *Hibbs* v. *Winn*, 542 U.S. 88, 100 (2004) (quoting 26 U.S.C. 6203). And once the IRS has made the assessment, the tax in

question "becomes no longer a deficiency but now a liability for which the IRS may issue notice and demand for payment." *Hallmark Research Collective*, 159 T.C. No. 6, at *37 n.29; see 26 U.S.C. 6211(a) (defining "'deficiency'" as the amount by which the correct tax exceeds the sum of (A) the amount shown by the taxpayer on his return plus (B) "the amounts previously assessed (or collected without assessment) as a deficiency").

Even if the 90-day deadline in Section 6213(a) were not jurisdictional on its own, therefore, an assessment by the IRS carried out as required by Section 6213(c) creates an independent jurisdictional barrier to Tax Court review. As this Court has explained, the Tax Court's jurisdiction in this context "depends on the existence of a deficiency." *Baral* v. *United States*, 528 U.S. 431, 439 n.2 (2000). Accordingly, when a deficiency has been "wiped out" through assessment or payment, *ibid.*, there is ordinarily no longer any basis for the Tax Court to review the Commissioner's calculation of the tax in question because there is no longer a "deficiency" to "redetermine," 26 U.S.C. 6213(a). See *Baral*, 528 U.S. at 439 n.2 (explaining that "in order to preserve jurisdiction in the Tax Court," it is sometimes necessary for taxpayers to avoid payments that would "wipe[] out" a deficiency).

In concluding that the Tax Court retained jurisdiction here "even though the IRS had already collected a portion of the deficiency via levy," the court of appeals pointed to Section 6213(b)(4). See App., *infra*, 4a n.2. But Section 6213(b)(4) addresses the materially different circumstance in which a taxpayer voluntarily pays an outstanding tax balance during the period in which Section 6213(a) bars the Commissioner from assessing the tax or taking certain collection actions. It provides

that "[a]ny amount paid as a tax * * * may be assessed upon the receipt of such payment notwithstanding the provisions of [section 6213(a)]," and that "[i]n any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment." 26 U.S.C. 6213(b)(4). It thus ensures that a taxpayer may voluntarily pay the tax before the time for seeking Tax Court review has run without giving up the opportunity to proceed in the Tax Court; in that circumstance, neither the voluntary payment ("such payment") nor the post-payment assessment by the Commissioner ("such assessment") deprives the Tax Court of jurisdiction. *Ibid.*

Here, though, the assessment that eliminated respondents' deficiency was not one authorized by Section 6213(b)(4) after respondents voluntarily paid their outstanding tax balance while pursuing Tax Court review. Instead, the assessment was required by Section 6213(c) because respondents had failed to petition for a redetermination within 90 days. That pre-payment assessment "wiped out" the deficiency, *Baral*, 528 U.S. at 439 n.2, such that by the time respondents eventually sought Tax Court review several years later, there was no longer a deficiency for the Tax Court to redetermine.

B. The Decision Below Creates A Clear Circuit Conflict On An Important And Recurring Question

In addition to being wrong, the decision below creates a clear circuit conflict on a recurring question of exceptional importance for tax administration.

Until the Third Circuit's decision in this case, the courts of appeals had "uniformly adopted a jurisdictional reading of § 6213(a) or its predecessor since at

least 1928." *Organic Cannabis Found.*, 962 F.3d at 1095; see pp. 20-23, *supra*. That uniform treatment included multiple decisions affording jurisdictional treatment to Section 6213(a) "under [this] Court's current approach to distinguishing truly jurisdictional limits * * * from case-processing rules." *Tilden* v. *Commissioner*, 846 F.3d 882, 886 (7th Cir. 2017) (Easterbrook, J.); see *Organic Cannabis Found.*, 962 F.3d at 1095 ("Considering the '"text, context, and relevant historical treatment" of the provision at issue,' we conclude that Congress has indeed done 'something special' to 'plainly show' that [Section] 6213's time limit is 'imbued . . . with jurisdictional consequences.'") (citations omitted); *Allen* v. *Commissioner*, No. 22-12537, 2022 WL 17825934, at *2 (11th Cir. Dec. 21, 2022) (per curiam) ("*Boechler* did not overrule our precedent * * * holding the timely filing of a petition to challenge the notice of deficiency is a jurisdictional prerequisite for a suit in the Tax Court."); see also *Atighi* v. *Commissioner*, No. 21-71417, 2022 WL 17223046 (9th Cir. Nov. 25, 2022) (applying pre-*Boechler* precedent on this point without discussing *Boechler*).[3]

In rejecting that previously unbroken consensus, the decision below created a square conflict on a question of substantial importance. Deficiency cases make up approximately 95% of the Tax Court's docket. United

[3] Because every other court to have addressed the question has held that the 90-day deadline is itself jurisdictional, no circuit conflict exists on the second question presented, see p. i, *supra*, concerning whether a post-deadline assessment made in compliance with Section 6213(c) independently deprives the Tax Court of deficiency jurisdiction. But because that question is itself jurisdictional, is closely related to the first question presented, and could not arise in circuits that treat the 90-day deadline as jurisdictional, it should be considered in this case along with the first question presented.

States Tax Court, *Congressional Budget Justification Fiscal Year 2025*, at 18 (Mar. 4, 2024), https://perma.cc/3Z2P-AUB2. In the most recent year for which comprehensive figures are available, the IRS issued more than 1.7 million notices of deficiency, of which more than 27,800 were contested in the Tax Court. See IRS, *2022 Data Book*, at 34-35, 54 & nn.4&8 (Mar. 2023), https://perma.cc/W42H- L8NE; United States Tax Court, *Congressional Budget Justification Fiscal Year 2024*, at 19 (Feb. 1, 2023), https://perma.cc/5S7S-6T8M. And while the IRS does not specifically track the number of petitions that are dismissed on timeliness grounds, an amicus curiae's targeted review of Tax Court decisions identified more than 100 time-based dismissal orders entered over the course of just two months. See C.A. Doc. 14, Center for Taxpayer Rights Amicus Br. 14 (June 13, 2022). That suggests that the question presented could be implicated in more than 600 cases every year.

Absent this Court's review, the treatment of those cases will depend on the circuit in which they originate. For cases appealed to the Third Circuit, the Tax Court will be required to determine whether equitable tolling is warranted. In the mine run of cases in which equitable tolling is *not* warranted, the Tax Court's dismissal orders will then preclude the taxpayer from filing a suit seeking a refund and prevent the IRS from granting an administrative refund. See *Sanders*, 161 T.C. No. 8, at *8 (Buch, J., concurring). Untimely petitioners in other circuits, meanwhile, will remain strictly bound by the 90-day statutory deadline for seeking such relief from the Tax Court, but will be eligible to seek relief through the other avenues Congress has made available.

That difference in treatment could create administrative difficulties for the IRS, which may need to adopt circuit-specific rules about the availability of administrative refunds for taxpayers who file untimely petitions. And at least as importantly, the difference between circuits is likely to cause confusion for taxpayers considering whether to seek Tax Court review in the first place. Approximately 90% of Tax Court petitioners are self-represented. See National Taxpayer Advocate, *Annual Report to Congress* 184 (2022), https://perma.cc/8FS3-BBM3. Among other things, such taxpayers may not fully appreciate the preclusive consequences of a dismissal under the Third Circuit's nonjurisdictional rule, given that dismissals on timeliness grounds are not treated as preclusive in any other circuit in the country.

This Court should grant a writ of certiorari to resolve the conflict among the courts of appeals and once again provide a single rule on the treatment of Section 6213(a)'s statutory deadline.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1789

ISOBEL BERRY CULP; DAVID R. CULP, APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

Argued: Mar. 7, 2023
Opinion Filed: July 19, 2023

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

OPINION OF THE COURT

Before: SHWARTZ, BIBAS, and AMBRO, Circuit Judges

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 Culps 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 nonjuris-

dictional 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 whether the Culps 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

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[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).

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 Culps 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 Culps 30 days to respond and told them it would send a notice of deficiency if they failed to do so. When the Culps 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 Culps 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 Culps 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 Culps' Social Security payments and 2018 tax refund.

Upset at the IRS for levying on their property, the Culps filed a petition in the Tax Court seeking, among other things, a "refund of all payments made under pro-

test, 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 Culps did not file it within 90 days of the date the IRS sent them the second notice of deficiency. They timely appealed.

II. JURISDICTION & STANDARD OF REVIEW

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 defi-

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[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).

ciency . . . 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." *Boccuto 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?

"Jurisdictional requirements mark the bounds of a 'court's adjudicatory authority.'" *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1497 (2022) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (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.").

Because an unfulfilled jurisdictional requirement carries harsh consequences, courts do not apply the "jurisdictional" label casually. *Wilkins v. United States*, 143 S. Ct. 870, 876 (2023). To determine whether a statutory deadline is jurisdictional or claims-processing in nature, we examine the "text, context, and relevant historical treatment" of the provision, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (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 (2006)). We do not look for "magic words," *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (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 (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.")).

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. 2019) (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.

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 (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.

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 (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 (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*, 143 S. Ct. 543, 548 (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.

We begin with the text. *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (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 (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; *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).

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 tech-

nical 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 *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; *see Arellano*, 143 S. Ct. at 549. Finally, no express language in the statute suggests the enumerated exceptions are exhaustive.

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

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[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).

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 (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); *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 defi-

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[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).

ciency 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. After 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.

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[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.

* * * * *

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.

APPENDIX B

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 14054-21

ISOBEL BERRY CULP & DAVID CULP, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

Filed: Feb. 15, 2022

ORDER OF DISMISSAL FOR LACK OF JURISDICITION

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 the 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 Bery 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 the 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]

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

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[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 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); *Grama v. Commissioner*, T.C. Memo. 1985-608 (same); *Hollister v. Commissioner*, T.C. Memo. 1979-35 (same).

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.

[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.

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 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 de-

ficiency 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

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[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 is 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.

petitioners' last known address. A review of the foregoing documents establishes[5] 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

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[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.

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.

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 re-

quest 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

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1789
(Tax Court Docket No. 21-14054)

ISOBEL BERRY CULP; DAVID R. CULP, APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

Filed: Nov. 28, 2023

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.

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

BY THE COURT,

/s/ THOMAS L. AMBRO
THOMAS L. AMBRO
Circuit Judge

Dated: Nov. 28, 2023

kr/cc: All Counsel of Record

APPENDIX D

1. 26 U.S.C. 6212(a), (c)-(d) provides in pertinent part:

Notice of deficiency

(a) In general

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

* * * * *

(c) Further deficiency letters restricted

(1) General rule

If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 tax, (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the

case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) Cross references

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

(A) Deficiency attributable to change of treatment with respect to itemized deductions, see section 63(e)(3).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(2)(C) and (D).

(C) Deficiency attributable to activities not engaged in for profit, see section 183(e)(4).

For provisions allowing determination of tax in title 11 cases, see section 505(a) of title 11 of the United States Code.

(d) Authority to rescind notice of deficiency with taxpayer's consent

The Secretary may, with the consent of the taxpayer, rescind any notice of deficiency mailed to the taxpayer. Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213(a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512(a) (relating to limi-

tations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.

2. 26 U.S.C. 6213(a)-(d) provides:

Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

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. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 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. 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 or-

dered 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 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.

(b) Exceptions to restrictions on assessment

(1) Assessments arising out of mathematical or clerical errors

If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under

this paragraph shall set forth the error alleged and an explanation thereof.

(2) Abatement of assessment of mathematical or clerical errors

(A) Request for abatement

Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter.

(B) Stay of collection

In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph.

(3) Assessments arising out of tentative carryback or refund adjustments

If the Secretary determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback or the amount described in section 1341(b)(1) with respect to which such amount was applied, credited, or refunded, he may assess without regard to the provisions of paragraph (2) the amount of the ex-

cess as a deficiency as if it were due to a mathematical or clerical error appearing on the return.

(4) Assessment of amount paid

Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

(5) Certain orders of criminal restitution

If the taxpayer is notified that an assessment has been or will be made pursuant to section 6201(a)(4)—

(A) such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), section 6212(c)(1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and

(B) subsection (a) shall not apply with respect to the amount of such assessment.

(c) Failure to file petition

If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (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.

(d) Waiver of restrictions

The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

3. 26 U.S.C. 7459(c)-(d) provides:

Reports and decisions

(c) Date of decision

A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court or, in the case of a declaratory judgment proceeding under part IV of this subchapter or under section 7428 or in the case of an action brought under section 6234, the date of the court's order entering the decision. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Secretary, or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

(d) Effect of decision dismissing petition

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 de-

cision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court unless the Tax Court cannot determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.