

Justices Revive Law Firm's Day-Late IRS Levy Challenge

By **Theresa Schliep**

Law360 (April 21, 2022, 10:14 AM EDT) -- The U.S. Supreme Court on Thursday found that the U.S. Tax Court had the authority to consider a North Dakota law firm's day-late challenge to an IRS levy, reversing an Eighth Circuit decision that sided with the agency.

Boechler PC's suit challenging the IRS collection action is not barred by a 30-day deadline under Internal Revenue Code Section 6330(d)(1) for bringing lien and levy challenges in the Tax Court, the justices said in a unanimous opinion. That deadline isn't a jurisdictional bar that needs to be cleared to get in front of the Tax Court, according to the justices.

Moreover, equitable tolling — which can extend the statute of limitations in certain circumstances — can apply to the Section 6330(d)(1) deadline, the opinion said, remanding the case for further proceedings on whether equitable tolling should apply to Boechler's petition.

"The text does not clearly mandate the jurisdictional reading," Justice Amy Coney Barrett said in the court's opinion. The statute's "30-day time limit to file a petition for review of a collection due process determination is an ordinary, nonjurisdictional deadline subject to equitable tolling."

The dispute between Boechler and the Internal Revenue Service centers on a notice Boechler received in 2015 from the agency communicating a discrepancy between information Boechler reported to the IRS and to the Social Security Administration, according to court filings. The firm did not respond to the correspondence from the IRS, which thereafter assessed a penalty of about \$19,000 under IRC Section 6721 that the firm failed to pay.

The IRS indicated it would levy the firm's property, and the agency affirmed that determination in collection due process hearings, which are a means of challenging IRS collection actions like property levies and liens. The firm was required to file a petition with the Tax Court challenging that determination by Aug. 28, 2017, but it filed that case Aug. 29, according to court filings.

The Tax Court dismissed Boechler's case because of this missed deadline in a decision ultimately affirmed by the Eighth Circuit. A three-judge panel said Congress intended for Section 6330's deadline to be jurisdictional based on the actual language of the statute, although U.S. Circuit Judge Jane Kelly noted concerns about the ruling's potential impact on low-income taxpayers.

Some taxpayer clinics have likewise argued in briefs with the high court that interpreting Section 6330(d)(1) as creating a jurisdictional hurdle has the potential to disproportionately harm low-income

people and those representing themselves in the Tax Court. The government has rejected some of those arguments, contending that the data do not obviously support that low-income people are most likely to use collection due process procedures.

Oral arguments in the case centered in part on the grammar of the statute, which says in a parenthetical that "the Tax Court shall have jurisdiction with respect to such matter." The firm and the U.S. government disagreed specifically over what "such matter" refers to and, more importantly, the phrase's jurisdictional implications.

In the opinion Thursday, Justice Barrett wrote that statutes must obviously state that a particular deadline is jurisdictional in order for them to be considered such. But Section 6330(d)(1)'s filing deadline doesn't clearly connect to the authority given to the Tax Court to consider collection due process cases, rendering it nonjurisdictional, the court said.

"It is not enough that his interpretation of the statute is plausible, or that some might even think it better than Boechler's," the opinion said. "To satisfy the clear-statement rule, the commissioner's interpretation must be clear, and it is not."

The lack of a clear connection between the statute's jurisdictional grant to the Tax Court and the 30-day filing deadline stems from the absence of a clear antecedent for the phrase "such matter," according to the opinion, which noted that the "the last-antecedent rule instructs that the correct antecedent is usually 'the nearest reasonable' one."

"Boechler links 'such matter' to the phrase immediately preceding the jurisdictional parenthetical, while the commissioner stretches back one phrase more," the high court said. "This is hardly a slam dunk for Boechler, but it is one reason to prefer its reading — or at least to regard the commissioner's as not clearly right."

The justices also found that the statute is subject to equitable tolling, which they said is generally available for nonjurisdictional deadlines. And the court rejected arguments from the IRS that making equitable tolling available would complicate collection efforts in collection due process cases, saying the justices were "not convinced that the possibility of equitable tolling for the relatively small number of petitions at issue in this case will appreciably add to the uncertainty already present in the process."

Melissa Arbus Sherry of Latham & Watkins, who is representing Boechler in the dispute, told Law360 the team is "thrilled with the court's unanimous decision, which fully vindicates our client's position that the Tax Court filing deadline is not jurisdictional and is subject to equitable tolling."

"We are especially gratified that all taxpayers, and especially low-income and pro se taxpayers, will now be given a fair opportunity to have their day in court," Sherry said.

The U.S. Department of Justice declined to comment.

Boechler is represented by Melissa Arbus Sherry, Caroline A. Flynn and Amy Feinberg of Latham & Watkins LLP.

The U.S. government is represented by Elizabeth B. Prelogar, Jonathan C. Bond and Curtis E. Gannon of the U.S. Solicitor General's Office and David A. Hubbert, Francesca Ugolini, Joan I. Oppenheimer, Janet A. Bradley and Judith A. Hagley of the U.S. Department of Justice, Tax Division.

The case is Boechler PC v. Commissioner of Internal Revenue, case number 20-1472, in the Supreme Court of the United States.

--Additional reporting by Emlyn Cameron, Dylan Moroses and David Hansen. Editing by Brian Baresch and Aaron Pelc.

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