

## Third Circuit: Tax Court Filing Deadline for Deficiency Petitions Not Jurisdictional

***The Third Circuit challenges the long-held view that the timing requirements for Tax Court review of a notice of deficiency preclude any extension or delay of the filing deadline.***

### Key Points:

- When the IRS sends a taxpayer a notice of deficiency, the taxpayer generally has 90 days to petition the Tax Court to review the IRS's arguments. On July 19, 2023, the US Court of Appeals for the Third Circuit held in *Culp v. Commissioner* that this 90-day deadline does not affect the power of the Tax Court to hear the case.
- *Culp* signals, for the first time, that equitable relief from the 90-day filing deadline may now be available.
- The decision builds on the reasoning of *Boechler v. Commissioner*, in which the US Supreme Court held that the 30-day deadline to petition the Tax Court after an unfavorable "collection due process" hearing did not affect the Tax Court's jurisdiction and could be equitably tolled.
- In 2022, the full Tax Court reaffirmed its conclusion that the 90-day filing deadline is jurisdictional, which prevents it from entertaining late-filed petitions. The Tax Court could continue to follow its own analysis in cases outside the Third Circuit.
- These conflicting conclusions will likely be further tested in a post-*Boechler* world.

*Culp v. Commissioner* is the first case in which a circuit court has held that the filing deadline for a taxpayer seeking judicial review of a deficiency notice is not a jurisdictional requirement. If a deadline is *not* jurisdictional, then presumptively it may be equitably tolled. There is no such leniency for jurisdictional deadlines. The Third Circuit's decision in *Culp* could indicate a growing trend recognizing that Tax Court deadlines are subject to the same equitable treatment as other filing deadlines.

## Background

### Notices of Deficiency

After examining a tax return and determining that additional tax may be due, the IRS sends the taxpayer a statutory notice of deficiency.<sup>1</sup> This notice is sometimes colloquially called a "ticket to the Tax Court," because it triggers the taxpayer's opportunity to seek review in the Tax Court before paying the proposed deficiency. A taxpayer who receives a notice of deficiency has two primary options for contesting an alleged liability: pay the proposed deficiency, file a refund claim, and challenge the assessment in a refund forum;<sup>2</sup> or timely petition the Tax Court for a redetermination.<sup>3</sup>

The right to petition the Tax Court for redetermination of a deficiency is governed by I.R.C. § 6213. Subsection 6213(a) sets out a number of requirements, including that the petition generally be filed “within 90 days” (or 150 days for taxpayers outside the United States).<sup>4</sup>

The relevant deadline is in the first sentence of § 6213(a): “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.”<sup>5</sup> Section 6213(a) concludes: “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.”

What happens if the taxpayer does not file the petition on time? This question recently arose for septuagenarian taxpayers Isobel Berry Culp and David Culp.

### History of the *Culp* Case

Married taxpayers Isobel Berry Culp and David Culp each received \$8,826.30 in 2015 from LaSalle University to settle an employment dispute. On November 13, 2017, the IRS sent notice to the taxpayers relating to proposed adjustments, noting that it did not think the taxpayers had reported the payment from LaSalle University. The taxpayers disagreed.<sup>6</sup> What followed was a series of communications with the IRS and the Taxpayer Advocate Service on whether the IRS was attempting to double-tax income that the taxpayers had already accounted for on Line 21 (“Other Income”) as “PRIZES, AWARDS.”<sup>7</sup>

No resolution appears to have been reached, and the IRS mailed a notice of deficiency for their 2015 tax year to the taxpayers on February 5, 2018.<sup>8</sup> The taxpayers apparently attempted to contact the agency via letter many times *after* that date, but they claim never to have received the notice of deficiency.<sup>9</sup>

After receiving a notice of levy, on April 22, 2021, the taxpayers filed a petition in Tax Court for redetermination of the deficiency. On September 1, 2021, the IRS moved to dismiss the petition for lack of jurisdiction due, in relevant part, to the Culpes filing their petition after the usual 90-day deadline. With respect to the notice of deficiency for 2015, the Tax Court concluded that the notice had been properly mailed to the taxpayers. Therefore, on February 15, 2022, the Tax Court dismissed the petition for lack of jurisdiction due to the untimely filing. The taxpayers appealed.

### Filing Deadlines

The Culpes’ appeal implicated a developing body of law. The default position used to be that filing deadlines were treated by trial and appellate courts as “jurisdictional” — immovable, un-waivable deadlines that, if missed, prevented the relevant court from hearing the case. However, “[b]ecause the consequences that attach to the jurisdictional label” are so “drastic,” the Supreme Court has tried “to bring some discipline” to the term.<sup>10</sup> The Court has explained that the “traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.”<sup>11</sup>

The Supreme Court’s 2022 decision in *Boechler v. Commissioner* (a case argued by Latham before the Eighth Circuit and Supreme Court) demonstrated that filing deadlines in the tax context are the same as other filing deadlines: they are jurisdictional if, and *only* if, Congress clearly says so.<sup>12</sup> In that case, the Court addressed § 6330(d)(1), which provides the petition rights of a person under threat of imminent IRS levy (after the IRS has administratively determined that the levy may proceed). “The person may, within

30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).” After careful review of the text, the Supreme Court held that Congress had not made a “clear statement” that the “collection due process” filing deadline was jurisdictional. The Supreme Court emphasized its distinction between “claims-processing rules,” which promote efficient and orderly litigation, and jurisdictional rules, which speak to the capacity of the court. Deadlines that are claims-processing rules are presumptively subject to “equitable tolling,” meaning that they can be extended in appropriate circumstances. *Boechler* held that the 30-day filing deadline at issue was non-jurisdictional and able to be equitably tolled.

For tax aficionados, this quickly raised a new question: is the 90-day deficiency petition deadline jurisdictional, or not? In November 2022, the petitioner in *Hallmark Research Collective* asked the Tax Court to reconsider its longstanding jurisdictional interpretation in light of *Boechler*.<sup>13</sup> The Tax Court analyzed the issue and reaffirmed its longstanding conclusion that the filing deadline is jurisdictional. It emphasized that it was a court of limited jurisdiction and could hear only cases authorized by Congress. The Tax Court found that the statutory text of § 6213(a) is clear, because “[t]he 90-day deadline is embedded in the jurisdictional grant” in the first sentence of the statute: “Within 90 days . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.”<sup>14</sup>

The Tax Court was also persuaded that context supported this textual reading for three reasons: (1) part of subsection (a) conditions the Tax Court’s authority to enjoin tax collection on timely filing, (2) Congress had amended § 6213(a) several times *after* courts had begun treating the 90-day deadline as jurisdictional, and (3) another section of the Code treats dismissal of a deficiency petition as a final decision regarding the amount of tax due, *unless* the dismissal is for lack of jurisdiction.<sup>15</sup> Taking this text, context, and history together, the Tax Court reaffirmed its understanding that the filing deadline is jurisdictional.

The *Culp* appeal offered the Third Circuit an opportunity to consider this issue separately.

### The Third Circuit’s Decision

The Third Circuit disagreed with the Tax Court’s interpretation of § 6213, and reversed the Tax Court’s dismissal of *Culp*. Applying the reasoning of the Supreme Court’s *Boechler* decision, the circuit court held that the Tax Court petition filing deadline was a non-jurisdictional claims-processing rule. It further held that the deadline was subject to equitable tolling.

The decision looked to the “text, context, and relevant historical treatment of the provision,” concluding it is jurisdictional only “if Congress clearly states that it is.”<sup>16</sup> Jurisdictional requirements carry “harsh consequences,” such that courts should not apply the jurisdictional label “casually.”<sup>17</sup>

The Third Circuit found the structure of the statutory text compelling, particularly because the language of the filing deadline was not specifically linked to the Tax Court’s jurisdiction. It explained that the “most pertinent” portion of the text is 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.”<sup>18</sup> Nothing about this sentence speaks to the Tax Court’s jurisdiction. It instead speaks only about the taxpayer. Therefore, “If the [filing] deadline in *Boechler* fell short of being jurisdictional, § 6213(a)’s limit must as well.”<sup>19</sup>

Another sentence in § 6213(a) includes an injunctive provision that *is* specifically linked to the Tax Court’s jurisdiction. That provision states: “[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.”<sup>20</sup>

“So Congress knew how to limit the scope of the Tax Court’s jurisdiction.”<sup>21</sup> *Culp* concluded that Congress had expressly constrained the Tax Court’s injunctive power when a petition is untimely, but did not do so with respect to the Tax Court’s review of untimely petitions.

After resolving whether the filing deadline was jurisdictional, the circuit court addressed whether the deadline was subject to equitable tolling. In some circumstances, a deadline can be non-jurisdictional but a court still cannot extend the deadline for equitable reasons.<sup>22</sup> The best-known tax example relates to refund suits in district court; in *United States v. Brockamp*, the Supreme Court held that the deadlines set out in “unusually emphatic form” and “a highly detailed technical manner” did not contain an implicit equitable exception.<sup>23</sup> In contrast, the deadline here is neither unusually emphatic nor particularly technical.<sup>24</sup> Ultimately, the Third Circuit concluded that nothing in the text or context of § 6213(a) suggested that Congress intended the filing deadline to be “unbending.”<sup>25</sup> To reach that holding, the Third Circuit substantially adopted the equitable tolling analysis from *Boechler*.<sup>26</sup>

The Tax Court has been instructed to consider on remand whether equitable tolling is appropriate for the *Culps*.<sup>27</sup>

## Implications for Deficiency Petitions

### Split Circuits and the Tax Court’s *Golsen* Rule

The Tax Court has explained that “in cases too numerous to mention . . . we have held that the statutorily-prescribed filing period in deficiency cases is jurisdictional.”<sup>28</sup> It reaffirmed this holding in *Hallmark*.<sup>29</sup> In its brief to the Third Circuit in *Culp*, the IRS even argued that “nearly every circuit” has held the same.<sup>30</sup> What then should be made of the Third Circuit’s apparent departure from the standard?

The Third Circuit is the only circuit thus far to have addressed the filing deadline in § 6213(a) in light of the Supreme Court’s decision in *Boechler*. The current state of any pending circuit split is therefore unclear. Previously, the Ninth Circuit in *Organic Cannabis*<sup>31</sup> and the Seventh Circuit in *Tilden*<sup>32</sup> had answered the issue in consideration of the Supreme Court’s pre-*Boechler* jurisdictional analysis. However, both circuits had also concluded that the deadline for filing a collection due process petition was jurisdictional — a conclusion that *Boechler* invalidated. Many other circuits have *assumed* the jurisdictional nature of the filing deadline, without fully evaluating the issue.<sup>33</sup> The Supreme Court has cast doubt on the precedential value of such “drive-by” jurisdictional rulings.<sup>34</sup>

How other courts, and particularly the Tax Court, treat this potential circuit split will be of interest. Under the *Golsen* rule, the Tax Court applies the law of the circuit where a particular taxpayer’s appeal would lie.<sup>35</sup>

While the Tax Court is bound to follow *Culp* in the Third Circuit, it can choose whether to continue to apply its *Hallmark* analysis in circuits that have not made a ruling “squarely in point.”<sup>36</sup> “The *Golsen* rule does not apply where the precedent from the Court of Appeals constitutes *dicta* or contains distinguishable facts or law.”<sup>37</sup> If the Tax Court chooses to apply *Culp* in a case appealable other than to the Third Circuit, it must consider whether it is bound by contrary law in circuits with arguably “drive-by” jurisdictional rulings<sup>38</sup> or in circuits without an on-point holding on this issue.<sup>39</sup>

### IRS Discretion regarding Timeliness Defenses

Separate from the issue of *Culp*’s geographic applicability, the decision raises critical strategic questions about how the IRS will proceed in future cases. Specifically, if the 90-day deadline is not jurisdictional, the

IRS will be able to choose whether to pursue any timely filing defenses. This presents new administrative options for the IRS in cases where timeliness may be an issue.

For example, *Castillo v. Commissioner* involved a collection due process notice of determination that was lost in the mail (the same type of notice at issue in *Boechler*). The underlying facts were favorable to the taxpayer: the IRS was attempting to collect late taxes due by a restaurant, but the taxpayer, Ms. Castillo, had sold the restaurant long before the delinquent tax year. After the collection due process hearing, the IRS sent a notice of determination to Ms. Castillo, and a copy to her lawyer. However, the notice sent to Ms. Castillo was lost in the mail, and the lawyer notice was sent to the wrong attorney. Ms. Castillo (through counsel) filed a petition promptly upon learning of the notice of determination. Nevertheless, the petition was originally dismissed for late-filing because the Tax Court treated the filing deadline as jurisdictional. The taxpayer appealed, and the Second Circuit stayed the case while *Boechler* was heard. After the Supreme Court held the statute non-jurisdictional, the case returned to the Tax Court, where the IRS conceded the entirety of the case.<sup>40</sup> The IRS was able to make the equitable decision not to pursue its timeliness defenses given Ms. Castillo's facts.

### The Prejudicial Late-Filing

If the Tax Court dismisses a petition for redetermination of a deficiency, that dismissal is treated as if the Tax Court had ruled with finality that the deficiency is the amount in the notice of deficiency. This is specified in § 7459(d).<sup>41</sup> That section requires the Tax Court to issue an order specifying that amount, except in two situations: The Tax Court does not need to issue an order specifying the amount of the deficiency if either (1) the Tax Court cannot determine the amount of the deficiency from the record, or (2) the dismissal is for lack of jurisdiction.<sup>42</sup>

The IRS argued before the Third Circuit that if the filing deadline in § 6213(a) is jurisdictional, then taxpayers who are dismissed for late-filing could still pay the tax and request a refund. But, if the filing deadline is *not* jurisdictional, then taxpayers dismissed for late-filing are at the end of the line: the dismissal would constitute a final determination that the amount of the deficiency in the notice was correct and would be preclusive in a refund suit. The IRS raised this argument as evidence that the filing deadline is jurisdictional.

The Ninth Circuit considered this argument in *Organic Cannabis* and held that this provision was additional context for its conclusion that the 90-day petition deadline is jurisdictional. In contrast, the Third Circuit was not persuaded that the 90-day deadline is jurisdictional, and this IRS argument did not alter its reading of the text. It was also persuaded by an *amicus* brief filed by The Center for Taxpayer Rights that taxpayers late-filing and losing their opportunity to challenge the assessment is “seldom, if ever, to occur.”<sup>43</sup> Because *Culp* newly held that the deadline isn't jurisdictional, no court of which the authors are aware has had to confront the question whether a petition dismissed as untimely but not for lack of jurisdiction would have preclusive effect.

### What's Next?

The Supreme Court's 2022 decision in *Boechler* opened the door to a broader consideration of whether Tax Court filing deadlines are jurisdictional. Though the Tax Court has so far refused the invitation to reconsider its precedent, the Third Circuit walked through that door in *Culp*. We can expect to see more litigation on these unanswered questions about requirements previously treated as “jurisdictional” in the Tax Court.

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#### Endnotes

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<sup>1</sup> See I.R.C. § 6212. All references to "Section" or "§" refer to the Internal Revenue Code of 1986, as amended (the I.R.C. or the Code).

<sup>2</sup> See § 7422.

<sup>3</sup> See § 6213.

<sup>4</sup> The full text of § 6213(a) reads as follows (emphasis added):

**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 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.

<sup>5</sup> See § 6213(a).

<sup>6</sup> See *Culp v. Commissioner*, No. 22-1789 (3d Cir., July 19, 2023), Op. at 4 (hereinafter "Op."); *id.*, Appendix at 52, 32-36 (hereinafter "Appendix").

<sup>7</sup> See, e.g., Appendix at 38-39, 30-31; see also IRS Publication 5181.

<sup>8</sup> See Appendix at 130-34.

<sup>9</sup> Op. at 6.

<sup>10</sup> *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

<sup>11</sup> *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015).

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- <sup>12</sup> See *Boechler v. Commissioner*, 142 S.Ct. 1493 (2022). A Latham & Watkins team consisting of Melissa Arbus Sherry, Caroline Flynn, and Amy Feinberg represented the Petitioner.
- <sup>13</sup> *Hallmark Research Collective v. Commissioner*, 159 T.C. No. 6 (T.C. 2022).
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.* (citing § 7459(d)).
- <sup>16</sup> *Op.* at 8 (quoting *Boechler P.C.*, 142 S. Ct. at 1497 (2022) and *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) (internal quotations omitted)).
- <sup>17</sup> *Id.* (citing *Wilkins v. United States*, 143 S. Ct. 870, 876 (2023)).
- <sup>18</sup> *Id.* at 10.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.* (quoting § 6213(a)).
- <sup>21</sup> *Id.*
- <sup>22</sup> 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. Where the pertinent rule or rules invoked show a clear intent to preclude tolling, courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving.”) (internal citations omitted).
- <sup>23</sup> 519 U.S. 347, 350 (1997).
- <sup>24</sup> *Op.* at 13.
- <sup>25</sup> *Id.* at 14-15.
- <sup>26</sup> See, e.g., *id.*
- <sup>27</sup> *Id.* at 17.
- <sup>28</sup> *Guralnik v. Commissioner*, 146 T.C. 230, 238 (2016).
- <sup>29</sup> *Hallmark Research Collective*, 159 T.C. No. 6 (T.C. 2022).
- <sup>30</sup> See *Culp v. Commissioner*, No. 22-1789 (3d Cir., July 19, 2023), Br. R. at 33-34.
- <sup>31</sup> *Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082 (9th Cir. 2020).
- <sup>32</sup> *Tilden v. Commissioner*, 846 F. 3d 882, 886-87 (7th Cir. 2017).
- <sup>33</sup> See, e.g., *Tadros v. Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985); *Pugsley v. Commissioner*, 749 F.2d 691, 692 (11th Cir. 1985).
- <sup>34</sup> See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006).
- <sup>35</sup> *Harvey v. Commissioner*, T.C. Memo 2023-095 (citing *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970)).
- <sup>36</sup> *Best Life Assur. Co. v. Commissioner*, 79 T.C.M. 1909 (T.C. 2000).
- <sup>37</sup> *Id.*
- <sup>38</sup> *Tadros*, 763 F.2d, at 91.
- <sup>39</sup> See *Ferre v. Commissioner*, 718 F.2d 6 (1st Cir. 1983) (“[The Tax Court] held accordingly that he was required to file within 90 days, and, the statute being jurisdictional, dismissed the action. We agree.”),
- <sup>40</sup> See *Castillo v. Commissioner*, 160 T.C. No. 15 (June 5, 2023).
- <sup>41</sup> See § 7459(d). The full text reads:
- If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court unless the Tax Court cannot determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.
- <sup>42</sup> See § 7459(d).
- <sup>43</sup> *Op.* at 11 (citing *Amicus Br. of Center for Taxpayer Rights* at 14-16).