



## **With Strikes in the Third and Now the Second and Sixth Circuits, Will the Commissioner Admit He Is Out on the Claim that the 90-Day Deadline for Filing a Tax Court Petition Is Jurisdictional?**

**by Robert S. Horwitz**

On August 14 and August 25, 2025, the Second Circuit in *Buller v. Commissioner*, \_\_\_ F.4th \_\_\_, 2025 WL 2348969, and the Sixth Circuit in *Oquendo v. Commissioner*, \_\_\_ F.4th \_\_\_, 2025 WL 2434542, joined the Third Circuit in *Culp v. Commissioner*, 75 F.4th 196 (2023), in holding that Internal Revenue Code (“IRC”) §6213(a)’s 90-day deadline is not jurisdictional and is subject to equitable tolling. These decisions followed the Supreme Court’s decision in *Boechler, P.C. v. Commissioner*, 596 U.S. 199 (2022), that the 30-day deadline for filing a Tax Court petition in a collection due process case under IRC §6330(d)(1) was not jurisdictional and was subject to equitable tolling. Before discussing the decisions in *Buller* and *Oquendo*, a history lesson.<sup>1</sup>

### **History Lesson**

Before the IRS can assess a deficiency, it must send, by certified or registered mail, a Notice of Deficiency to the taxpayer’s last known address. IRC §6212. A taxpayer who receives a Notice of Deficiency has four options:

1. Accept the determination and pay the tax;
2. Petition the Tax Court for redetermination of the deficiency;
3. Pay the assessment, file a refund claim, and then sue for a refund in district court or the Court of Federal Claims;

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<sup>1</sup>Justice Oliver Wendell Holmes wrote that “a page of history is worth a pound of logic.” *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921) (holding that the tax on the transfer of a net estate of a decedent (i.e., the estate tax) is not an unconstitutional interference in the rights of states to regulate descent and distributions).

4. Do nothing and wait for the IRS to take forced collection action.

*United States v. Baggott*, 463 U.S. 476, 478-479 (1983). If a taxpayer chooses the second option, he or she has 90 days after the Notice of Deficiency within which to petition the Tax Court under §6213(a).

Prior to the Supreme Court’s decision in *Boechler*, every court of appeal that considered the issue held that the 90-day filing deadline of §6213(a) was jurisdictional. As a result, failure to timely petition the Tax Court for redetermination of a deficiency required the dismissal of the case, regardless of the stage of the litigation or the expense incurred by the litigants. See, *Organic Cannabis Foundation, LLC v. Commissioner*, 962 F.3d 1082 (9<sup>th</sup> Cir. 2020); *Tilden v. Commissioner*, 846 F.3d 882 (7<sup>th</sup> Cir. 2017); *Patmon & Young Pro. Corp. v. Commissioner*, 55 F.3d 216 (6<sup>th</sup> Cir. 1995); *Keado v. United States*, 853 F.2d 1209 (1988); *Pugsley v. Commissioner*, 749 F.2d 691 (11<sup>th</sup> Cir. 1983); *Andrea v. Commissioner*, 563 F.2d 365 (8<sup>th</sup> Cir. 1977); *Foster v. Commissioner*, 445 F.2d 799 (10<sup>th</sup> Cir. 1971); *Rich v. Commissioner*, 250 F.2d 170 (5<sup>th</sup> Cir. 1957); *Lingham v. Commissioner*, 242 F.2d 750 (3<sup>rd</sup> Cir. 1970); *Edward Barron Estate v. Commissioner*, 93 F.2d 751 (9<sup>th</sup> Cir. 1937); *Lewis Hall Iron Works v. Blair*, 23 F.2d 972 (D.C. App. 1928). In *Liang v. United States*, 423 U.S. 161 (1976), the Court referred to the Notice of Deficiency as a prerequisite to filing a Tax Court petition for redetermination of the deficiency. IRC §6214(a) gives the Tax Court jurisdiction “to determine the correct amount of the deficiency ... notice of which has been mailed to the taxpayer.”

In *Kontrick v. Ryan*, 540 U.S. 443, 454–455 (2004), the Supreme Court observed:

Courts, including this Court, ... have more than occasionally [mis]used the term “jurisdictional” to describe emphatic time prescriptions in [claim processing] rules .... Classifying time prescriptions, even rigid ones, under the heading “subject matter jurisdiction” can be

confounding. Clarity would be facilitated if courts and litigants used the label “jurisdictional” not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Following *Kontrick v. Ryan*, the Supreme Court endeavored to “bring some discipline” to the use of the term “jurisdictional” as the consequences that attach to the “jurisdictional” label are often drastic. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). It began to routinely grant review in cases presenting the question of whether a statutory filing deadline or other procedural proscription in a federal statute is jurisdictional.<sup>2</sup>

Jurisdictional statutory provisions “describe the classes of cases a court may entertain (subject matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction).” *Fort Bend County v. Davis*, 587 U.S. 541, 543 (2019). Distinct from jurisdictional provisions are “claims processing rules,” which are meant to “promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain time.” *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Unlike jurisdictional provisions, claims processing rules can be forfeited or waived.

The Supreme Court’s recent cases on deadlines enunciated the rule that statutory deadlines are presumptively nonjurisdictional and are subject to equitable

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<sup>2</sup> See e.g., *Fort Bend County v. Davis*, 587 U.S. 401 (2019); *Hamer v. Neighborhood Hou. Servs. of Chicago*, 583 U.S. 17 (2017); *United States v. Wong*, 575 U.S. 402 (2015); *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145 (2013); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Henderson v. Shinseki*, 562 U.S. 428 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowels v. Russell*, 551 U.S. 205 (2007); *Eberhart v. United States*, 546 U.S. 12 (2005); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004).

tolling unless Congress has made a clear statement that the deadline is jurisdictional. *United States v. Wong*, 575 U.S. 402, 409 (2015). Congress must clearly state that a threshold limitation on a statute's scope shall count as jurisdictional. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Absent such a clear statement, courts were instructed to treat the deadline as nonjurisdictional. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). Courts may also treat a deadline as jurisdictional if a "long line of this Court's decisions left undisturbed by Congress attached a jurisdictional label to the prescription." *Fort Bend County, supra*, 587 U.S. at 548 (internal quotation marks omitted).

For there to be a "clear statement" "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Wong, supra*, 575 U.S. at 410. While Congress is not required to "incant magic words," traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences. *Id.*, 575 U.S. at 410. That interpreting the deadline as jurisdictional is plausible or the better reading than a nonjurisdictional reading is not a clear statement. *Id.*

In *Boechler, supra*, the taxpayer, a law firm, received a collection due process notice that the IRS proposed levying to collect an accuracy related penalty. The taxpayer requested a collection due process hearing. The Appeals Office sustained the proposed levy. Under §6330(d)(1), a taxpayer may "within 30 days of a determination ... petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." The taxpayer filed its petition 1 day late. The Tax Court dismissed the case for lack of jurisdiction and the Eighth Circuit affirmed. The Supreme Court reversed, holding that the 30-day filing deadline was not jurisdictional and that equitable tolling applied.

It is against this backdrop of Supreme Court cases that the *Buller* and *Oquendo* courts held that the 90-day filing deadline is not jurisdictional. Both Courts began their analysis with the standard of review and that generally one panel of judges cannot overrule a prior panel unless there is an intervening Supreme Court case requires modification. At this point, the analysis of the Second and the Sixth Circuits diverged.

### **The Facts in *Buller* and *Oquendo***

In *Buller*, the taxpayers filed a joint income tax return for 2018. The IRS audited their return and issued a Notice of Deficiency on August 22, 2022. Their attorney filed a petition for redetermination with the Tax Court nine days late. The Commissioner moved to dismiss the petition for lack of jurisdiction, which the taxpayers opposed, arguing that filing deadlines are nonjurisdictional and are subject to equitable tolling. The Tax Court granted the motion to dismiss for lack of jurisdiction and the taxpayers appealed to the Second Circuit.

In *Oquendo*, the taxpayer filed her 2022 return as head of household. On May 30, 2023, the IRS issued a Notice of Deficiency determining that she was not entitled to file as head of household and improperly claimed earned income tax and childcare credits. Based on these determinations, it proposed a deficiency and asserted accuracy-related and erroneous refund penalties. The Notice of Deficiency listed August 28, 2023, as the last date to petition the Tax Court. The taxpayer filed her petition on November 1, 2023, contesting all the IRS determinations and claiming that she was entitled to equitable tolling because the notice was sent to her former address, and she did not learn about the notice until early October.

On December 18, 2023, the Commissioner moved to dismiss for lack of jurisdiction since the petition was filed 155 days after mailing of the Notice of Deficiency rather than 90 days. The taxpayer opposed the motion. On February

1, 2024, the Tax Court granted the motion and dismissed the case for lack of jurisdiction.

Both the Second and the Sixth Circuits started their analysis by noting that existing circuit precedent held that the 90-day deadline is jurisdictional and that its prior cases were binding on subsequent cases unless overruled by an en banc panel or there is an intervening Supreme Court case. Both Circuits then reviewed the Supreme Court cases on filing deadlines generally being nonjurisdictional claims processing rules. The arguments advanced in each case and the court's analysis differed. The *Buller* court's analysis is discussed first, followed by the court's analysis in *Oquendo*.

### **Why the Buller Court Found the 90-Day Deadline Nonjurisdictional**

The Second Circuit rejected the Commissioner's arguments that §6213(a)'s filing deadline contained a clear jurisdictional statement. The 90-day filing deadline was not clearly imbued with jurisdictional consequences, speaking only to timeliness and not to the court's power to adjudicate. Section 6213(a) states that a taxpayer "may file a petition" and that the Supreme Court had held that similarly permissive language "does not speak in jurisdictional terms." The filing deadline was directed to the taxpayer and not the court, indicative that it did not speak of the Tax Court's jurisdiction. Further, there was no "clear tie" between §6213(a) and the provisions that gave the Tax Court jurisdiction<sup>3</sup> and the relevant sentence in §6213(a) does not contain the word "jurisdiction" and has "no express link to the Tax Court's jurisdiction." Finally, Congress amended §6213 several times since its predecessor was enacted in 1924 and never said anything specific about the filing deadline being jurisdictional.

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<sup>3</sup> The Tax Court is given jurisdiction over deficiency cases by §6714(a). That section contains no reference to a petition.

The Second Circuit gave short shrift to the Commissioner's other arguments. The Commissioner argued that a sentence towards the end of §6213(a) that deprived the Tax Court of jurisdiction to enjoin collection action during pendency of the case unless a timely petition was filed does not make §6213(a) jurisdictional, noting the Supreme Court in *Boechler* rejected a similar argument even when the word "jurisdiction" was in the same sentence as the deadline. Nor did it matter that all courts of appeal that considered the matter found the filing deadline jurisdictional, since court of appeal decisions are not a stand-in for a Supreme Court decision.

The Second Circuit was not persuaded by the claim that reading §6213(a) as nonjurisdictional cannot be reconciled with §7459(d)'s provision that a dismissal, other than one for lack of jurisdiction, "shall be considered as its decision that the deficiency is the amount determined by the Secretary." According to the Second Circuit, this would only come into play if the taxpayer paid the tax and then wanted to seek a refund, something that it termed a "theoretical outcome" that "seldom if ever occurs."

The Second Circuit then turned to the issue of whether §6213(a)'s deadline can be equitably tolled. The Commissioner pointed to *United States v. Brockamp*, 519 U.S. 347 (1997), where the Supreme Court held that the period for filing a claim for refund cannot be equitably tolled. In that case, the time limits were set out "in unusually emphatic form" and in a "highly technical manner that, linguistically speaking, cannot easily be used as containing implicit exceptions." This was not the case with §6213(a). Additionally, there were approximately 90 million refund claims filed each year compared to only 1 million notices of deficiency and 23,000 Tax Court petitions. Thus, *Brockamp* was inapplicable and §6213(a)'s filing deadline can be equitably tolled. *Buller* was reversed and remanded so the Tax Court could determine whether equitable tolling applies.

## **Why the Sixth Circuit Found the 90-Day Deadline Nonjurisdictional**

The Sixth Circuit noted that it had not considered whether §6213(a)'s filing deadline is jurisdictional in light of the Supreme Court's "newest guidance about jurisdictional requirements." As a result of that guidance the Court had to reassess the line between jurisdictional and claims processing requirements in several settings, which meant its prior opinions' reference to §6213(a) as jurisdictional did not merit "controlling weight."

The Commissioner argued that since a Notice of Deficiency is a predicate for jurisdiction, §6213(a)'s statement that "[w]ithin 90 days --- after the Notice of Deficiency ... is mailed... the taxpayer may file a petition for redetermination of the deficiency" meant that the 90-day deadline was also a predicate for jurisdiction. The Sixth Circuit found this argument meritless: "Noticeably absent from this language is a directive to courts, a reference to jurisdiction and language demarcating a court's power." (Internal quotation marks deleted.) Thus, §6213(a) lacks the classical markers which indicate subject matter jurisdiction. The Sixth Circuit found its conclusion bolstered by *Boechler*, which found the statute nonjurisdictional even though it contained the parenthetical phrase "and the Tax Court shall have jurisdiction with respect to such matter" since there was no clear antecedent to "subject matter." Unlike §6330(d)(1), the relevant phrase in §6213(a) does not refer to jurisdiction and the only jurisdictional language in §6213(a) is several sentences away from the sentence containing the deadline. Thus, the Sixth Circuit concluded that it was difficult to make the case that the jurisdictional reading of §6213(a) is clear.

The Sixth Circuit noted that the Supreme Court, in considering whether a requirement is jurisdictional, has looked at factors such as a deadline's place within the statute and the characteristics of Congress' review schemes. The Commissioner points to §7459(d)'s provision that a dismissal of a deficiency proceeding is a decision



“that the deficiency is the amount determined by the Secretary” unless it is a dismissal for lack of jurisdiction. The Sixth Circuit was unconvinced that this presented “a quagmire either unconsidered by Congress or incompatible with its statutory scheme.” The Commissioner’s argument on this point and his other contextual arguments only convinced the Sixth Circuit that Congress did not make the point clear, which was insufficient to make §6213(a)’s 90-day deadline jurisdictional.

The Sixth Circuit ended its jurisdictional discussion by noting that the two post-*Boechler* circuit court decisions on §6213(a), *Buller* and *Culp*, held that §6213(a) was not jurisdictional, while pre-*Boechler* decisions of the Seventh Circuit in *Tilden v Commissioner*, 846 F.3d 882, and the Ninth Circuit in *Organic Cannabis Foundation, LLC v. Commissioner*, 962 F.3d 1082, both held §6213(a) was jurisdictional because the courts in both those cases felt themselves bound by prior case law.

The Sixth Circuit next turned to equitable tolling. Since §6213(a)’s filing deadline was not jurisdictional, it was presumptively subject to equitable tolling under *Boechler*. Equitable tolling is not automatically applied and is made on a case-by-case basis that is best left to the lower court. Since the Tax Court did not consider equitable tolling because it felt itself bound by then-existing Sixth Circuit precedent, it reversed and remanded the case to the Tax Court to undertake the equitable tolling analysis. On remand, Ms. Oquendo would have to affirmatively establish that she was entitled to equitable tolling, which is only available in circumstances involving no fault of the requesting litigant. Note that the argument that under *Brockamp* equitable tolling should be unavailable was addressed by the Second Circuit but not the Sixth Circuit.

## **Conclusion**

It is unlikely the Commissioner will stop filing motions to dismiss untimely petitions for lack of jurisdiction in any case where the precedent in the circuit to which the case is appealable is that it is jurisdictional. And since jurisdiction cannot be waived and can be raised *sua sponte*, the Tax Court may dismiss untimely petitions appealable to those circuits. Therefore, it may be a number of years before the issue is a dead letter.

The *Buller* and *Oquendo* cases raise several questions for me. First, did the Government overlook §6213(c), which states that if a petition is not filed within 90 days, “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.” An argument that the requirement that the deficiency be assessed and paid if a timely petition was not filed bolsters the claim that §6213(a)’s filing deadline is jurisdictional, since a proceeding to redetermine a deficiency would be pointless if the Secretary is required to assess and collect the deficiency regardless if the petition is untimely.

Second, what happens if, on remand, the Tax Court in *Oquendo* or *Buller* finds that equitable tolling is unavailable? Because the dismissal would not be for lack of jurisdiction, would it be a decision on the merits that taxpayer owes the amount of the deficiency? If the Tax Court holds it is a decision on the merits, in a subsequent collection due process case a taxpayer may not be allowed to challenge the liability because the dismissal would be a decision on the merits and *res judicata* on the liability.

Third, in collection due process cases a taxpayer may challenge the liability on the merits if he or she did not receive a Notice of Deficiency “or otherwise have an opportunity to dispute such tax liability.” §6330(c)(2)(B). Taxpayers frequently challenge the liability on the merits and are allowed to do so if they did not receive a Notice of Deficiency in time to petition the Tax Court. To take this point to the likely position of the IRS, in future collection due process cases the Commissioner may argue that a taxpayer who did not receive a Notice of Deficiency in time to file in Tax Court cannot contest the underlying liability since he or she could have filed a late petition, claimed equitable tolling and, if equitable tolling was proven, had “an opportunity to dispute such tax liability.” The end result of *Buller* and *Oquendo* may be “be careful what you wish for.”

Note: Carlton Smith reported recently in Tax Notes that the Tax Court has apparently suspended dismissing cases for lack of jurisdiction since *Buller*.<sup>4</sup>

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<sup>4</sup>“ Tax Court Again Suspends Dismissing Late-Filed Deficiency Petitions,” Tax Notes Today Federal, August 29, 2025.