
Tax Procedure

Taxpayer Victories: 2022 and 2023 in Review

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> *By simply giving taxpayers the opportunity to argue their cases before the Tax Court or the highest court in the land or even by not relegating a case to a per curiam opinion, the federal judiciary is standing up for taxpayers and forcing the government to follow the law.*

The last two years have shown courts' growing appetite to curtail the IRS's authority to tax. Cases like *Boechler P.C. v. Commissioner*, *Culp v. Commissioner*, *Farhy v. Commissioner*, *Bittner v. United States*, and *Moore v. United States*, reflect the judiciary's increasingly commonly held belief that tax procedure is not so exceptional (equitable tolling applies to tax, too), the government is constrained by the Code when imposing penalties, and the authority to tax may actually have some Constitutional limitations.

Ticket to Tax Court: Taxpayers Can Get into Court Using Equitable Tolling

Boechler and *Culp* each removed a procedural hurdle preventing taxpayers from challenging IRS determinations in court. *Boechler*, which was issued in 2022, overturned decades of Tax Court precedent to hold that the 30-day filing deadline to challenge a collection due process notice of determination is not jurisdictional. Building on that victory, in the 2023 case of *Culp*, the Third Circuit held that neither is the deadline for challenging a notice of deficiency.

Boechler P.C. v. Commissioner — Equitable Tolling for Collection Due Process Challenges

In *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022), the Supreme Court held that IRC section 6330(d)(1) 's 30-day deadline is non-jurisdictional and therefore subject to equitable tolling.

In *Boechler*, the taxpayer failed to respond to communications from the IRS regarding a purported discrepancy in the taxpayer's tax filings. When the taxpayer did not respond, the IRS assessed an "intentional disregard" penalty and informed the taxpayer of its intent to levy the taxpayer's property in order to satisfy the penalty. After requesting and receiving a collection due process hearing under IRC section 6330(b) and losing, the taxpayer had 30 days to file a petition to the Tax Court for review under IRC section 6330(d)(1) . However, the taxpayer filed its petition one day late. The Tax Court subsequently dismissed the petition for a lack of jurisdiction, stating that IRC section 6330(d)(1) 's 30-day filing deadline is jurisdictional and therefore could not be equitably tolled. The Eighth Circuit affirmed before the Supreme Court granted cert.

At issue in *Boechler* was whether the 30-day filing requirement contained in IRC section 6330(d)(1) was jurisdictional. Although the IRS argued that even if the requirement were non-jurisdictional, the Tax Court would lack the authority to accept a late petition via the doctrine of equitable tolling, ostensibly a holding that the requirement was non-jurisdictional would permit late filings. The distinction matters because jurisdictional requirements cannot be waived, and generally do not allow for equitable exceptions.

The Court began its analysis by noting that not all procedural requirements are jurisdictional. Citing *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), the Court observed that certain non-jurisdictional, procedural rules simply "promote the orderly progress of litigation," but do not weigh on a court's power. Instead, the Court will consider a procedural requirement to be jurisdictional *only if* Congress "clearly states" so. Courts are to consider all the "traditional tools" of statutory construction when making this determination.

Turning next to the actual text of IRC section 6330(d)(1) , the Court contemplated whether the statute clearly stated whether it was jurisdictional, finding that the sole jurisdictional language was contained in a parenthetical at the very end of the sentence: "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*). " (Emphasis added).

The Court's analysis hinged on its construction of the phrase "such matter". Employing canons of construction such as the last-antecedent rule, the Court found that the language of the provision indicated that the 30-day filing timeline was non-jurisdictional.

Further, the Court rejected the IRS's arguments on grounds that, although the IRS's interpretation was plausible, plausible is not enough. Even if the IRS's interpretation were better than the taxpayer's, this would still not be enough. Rather, under the clear-statement rule, "the jurisdictional condition must be just that: clear."

Culp v. Commissioner — Equitable Tolling for Deficiency Proceedings

In *Culp v. Commissioner*, 75 F.4th 196 (3rd Cir. 2023), the Third Circuit recently held that IRC section 6213(a) 's 90-day period for filing a Tax Court petition for redetermination of a deficiency is non-jurisdictional and subject to equitable tolling. Relaxing strict compliance with the often draconian filing rule would allow taxpayers to have their day in court even if they fail to meet the 90-day deadline. Under the *Golsen* rule, however, the holding in this case is currently binding on only those Tax Court cases appealable to the Third Circuit. Because of the Supreme Court's similar holding regarding Tax Court petitions filed under IRC section 6330(d)(1) in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022), other circuits may take similar approaches, thereby expanding access to the court consistent with Congress's intent.

The appellants were a husband and wife, Isobel and **David** Culp. In 2015, Isobel and **David** each received a little less than $9,000 from a lawsuit, which the couple claimed to have reported as prizes or awards on their 2015 income tax returns. The IRS determined that the couple failed to report those awards, and in 2017 issued a notice of deficiency reflecting an underpayment of tax and a penalty. The notice of deficiency stated that Culps had 90 days to petition the Tax Court to re-determine the amounts reflected on the notice. The Culps did not file a petition within that 90-day period, prescribed by IRC section 6213(a) , which expired in May 2018.

On April 22, 2021, the Culps petitioned the Tax Court to re-determine the 2015 deficiency. In September 2021, the IRS filed a motion to dismiss for lack of jurisdiction. Without citing any law, the Commissioner argued that the Tax Court lacked jurisdiction over the case because it was filed outside the 90-day period prescribed by IRC section 6213(a) . Section 6213(a) provides: "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."

The Commissioner's motion implicitly argued IRC section 6213(a) 's deadline was jurisdictional, which was consistent with well-established Tax Court precedent at the time, such as *Monge v. Commissioner*, 93 T.C. 22 (1989), and *Pietanza v. Commissioner*, 92 T.C. 729 (1989). Special Trial Judge Choi granted the Commissioner's motion and dismissed the case in February 2022. The Culps timely appealed the dismissal to the Third Circuit.

As circuit courts often do when they review Tax Court decisions, the unanimous panel of Judges Ambro, Shwartz, and Bibas analyzed IRC section 6213(a) 's time limitation with fresh eyes and reversed and remanded. The Culps advanced two arguments on appeal: (1) that the IRS never mailed the notice of deficiency and (2) that IRC section 6213(a) 's deadline is not jurisdictional and is subject to equitable tolling. Writing for the court, Judge Ambro quickly dispensed with the Culps' first argument—the Commissioner proffered a U.S. Postal Service Form 3877 that showed the IRS had sent the notice.

Judge Ambro framed the Culps' second argument as whether "§ 6213(a)'s 90-day requirement jurisdictional or . . . a claims-processing rule." Judge Ambro began his analysis by first citing *Boechler* to explain what was at stake. In the context of statutes with timing requirements, such as IRC section 6213(a) 's 90- or 150-day deadline, if those statutes are jurisdictional, then absent strict compliance with the filing deadline, a court lacks power to decide the merits of the case. *Henderson v. Shinseki*, 562 U.S. 428, 436-38 (2011). Deeming a statute jurisdictional is drastic given that its strict compliance can foreclose parties from having their day in court. By contrast, a claims processing rule "promote[s] the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* Failure to strictly comply with a claims processing rule does not deprive the court of jurisdiction if the rule is subject to equitable tolling and the party proves that it satisfies the test for equitable tolling. To avail itself of equitable tolling, a party must prove "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). In short, if IRC section 6213(a) 's 90-day deadline were jurisdictional or non-jurisdictional but not subject to equitable tolling, the Culps could never see their day in Tax Court.

Although Judge Ambro's analysis was primarily rooted in statutory construction (noting that there were only a few equitable exceptions in IRC section 6213(e)), the holding was also supported by functional or normative considerations about taxpayers' access to the Tax Court. *Culp* expressed two main concerns about rejecting equitable tolling: the 90-day deadline is very short, and many Tax Court petitioners file pro se. Without equitable tolling, it would be very easy for an unrepresented taxpayer to unintentionally forego any pre-payment relief. In a footnote, Judge Ambro noted that about 600 petitions per year are dismissed as untimely, which he suggested would cause minimal burden for the IRS and the Tax Court while providing many people with access to the court. The Third Circuit reversed the Tax Court's decision and remanded to determine whether the Culps satisfied the test for equitable tolling.

Culp is an exciting taxpayer victory, which may extend beyond the Third Circuit and beyond IRC section 6213(a) . Though other Circuits have commented on whether IRC section 6213(a) 's filing deadline is jurisdictional, Courts of Appeals confronting the question of jurisdictionality in the future may look to *Culp* and adopt the same or similar holding, especially in light of the Supreme Court's decision in *Boechler.* Further, in the same way *Culp* translated *Boechler*'s analysis of IRC section 6330(d)(1) to IRC section 6213(a) , taxpayers should monitor whether the holdings in *Boechler* and *Culp* are extended to other Code sections.[1]

The Code Applies to the Government's Authority to Impose Penalties

In 2022 and 2023, the IRS and DOJ saw multiple losses in the realm of penalties applied to U.S. persons with assets outside the United States. *Farhy v. Commissioner* and *Bittner v. United States* forced the Government to actually follow the Code, showing the IRS's practices with respect to penalties are not, in fact, the law.

Farhy v. Commissioner — "Assessable Penalties" Means Something (Or Does It?)

Farhy v. Commissioner, No. 10647-21L, 160 T.C. No. 6 (Apr. 3, 2023), *rev'd* and *remanded*, No. 23-1179 (D.C. Cir. May 3, 2024) concerned the IRS's authority to *assess* penalties under IRC section 6038(b) —with the Tax Court ultimately holding that the IRS lacked statutory authority to do so.

In *Farhy*, the taxpayer owned two foreign corporations. The taxpayer's ownership interests in the foreign corporations obligated him to report his ownership interests under IRC section 6038(a) by filing Form 5471—an obligation the taxpayer "willful[ly] and not due to reasonable cause" failed to meet. Because of this failing, the IRS assessed an initial penalty of $10,000 for each year at issue under IRC section 6038(b)(1) . The IRS then subsequently assessed additional continuation penalties of $50,000 for each year at issue under IRC section 6038(b)(2) .

After the IRS issued to the taxpayer Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing, seeking to collect the IRC section 6038 penalties assessed, the taxpayer timely requested a hearing under IRC section 6330 . As part of this request, the taxpayer disputed the IRS's legal authority to assess penalties under IRC section 6038 . In response, the IRS issued to the taxpayer a Notice of Determination, with the Notice of Determination upholding the IRS's proposed collection. The taxpayer timely filed a Petition with the Tax Court, seeking a review of the determination.

The Tax Court began its analysis by noting that although the statutory scheme found in IRC section 6038(b) imposes the penalties in a manner consistent with how the IRS computed the penalties, there is, however, “no statutory provision, in the Code or otherwise, specifically authorizing *assessment* of these penalties.” (Emphasis added).

Under IRC section 6201(a) , the Secretary is authorized to make assessments “of all taxes (including interest, additional amounts, additions to the tax, and *assessable penalties*)[.]” (emphasis added). Under IRC section 6502(a) , when a tax or a deemed tax (including an assessable penalty) is assessed, the IRS may take certain actions (such as issuing a levy) to collect the tax *administratively.*

Despite this, “assessable penalties” is not defined. Accordingly, it is unclear what penalties qualify as assessable penalties, and therefore what penalties the IRS may assess and ultimately collect through administrative means under IRC section 6502(a) .

Quoting the Supreme Court case of *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022), the Tax Court noted that “[a]gencies have only those powers given to them by Congress[.]” Holding for the taxpayer, the Tax Court determined that IRC section 6038(b) penalties are not “assessable penalties” and therefore may not be assessed. Instead, IRC section 6038(b) penalties must be collected through a civil action.

The Tax Court's reasoning was grounded in the observation that although Congress had explicitly authorized assessment for numerous other penalties, Congress had not done so for IRC section 6038(b) penalties. This finding is consistent with the recent trend of courts elevating Congressional authority over agency discretion.

Although the D.C. Circuit recently reversed the Tax Court's decision, *Farhy* is still good law for Tax Court cases appealable to circuits other than D.C. *See Golsen v. Commissioner*, 54 T.C. 742, 757 (1970) (Tax Court required to "follow a Court of Appeals decision which is squarely on point where appeal from [its] decision lies to that Court of Appeals and to that court alone").

Bittner v. United States — One Report, One Penalty

The Bank Secrecy Act (the “Act”) requires persons possessing foreign accounts with an aggregate balance of more than $10,000 to file an annual report with the U.S. Treasury. Such persons failing to file a timely or accurate annual report are subject under to the BSA to a maximum penalty of $10,000 for *non-willful* violations of the Act. Notably, only one report is filed per year — the existence of multiple accounts does not oblige the filing of more than one report.

In *Bittner v. United States*, 143 S. Ct. 713 (2023), the Supreme Court resolved a circuit split between the Fifth and Ninth Circuits over whether a person, possessing multiple accounts, who fails to timely or accurately file a report is subject to a single $10,000 penalty, or is subject to separate $10,000 penalties for each account not properly reported.

In the view of the Ninth Circuit, penalties accrue on a per-report basis. Accordingly, such a person would only be subject to a sole $10,000 penalty, regardless of how many accounts the report failed to timely or accurately disclose. In other words, penalties accrue on a *per-report* basis. In contrast, the Fifth Circuit took the view that such a person would be subject to multiple $10,000 penalties—one penalty for each account not in compliance with the Act. The Fifth Circuit thus adopted the attitude that penalties accrue on a *per-account* basis.

The Court in *Bittner* took the case on appeal from the Fifth Circuit. In a pro-taxpayer decision, the Court, relying on a careful and close reading of the applicable statutes, confined the power of the government and held that the statutory scheme did not permit the government to apply penalties on a per-account basis. Instead, penalties must be applied on a per-report basis.

Under the Act, the relevant statutory provisions are IRC sections 5314 and 5321 . IRC section 5314 mandates an individual's legal duties under the Act to, among other things, file reports. IRC section 5321 concerns the penalties that follow for failing to comply with IRC section 5314 .

The Court's analysis in *Bittner* heavily relied upon an attentive reading of these provisions, with the Court immediately noting that IRC section 5314 speaks of "records," but not of "accounts." Consequently, the legal duty imposed by IRC section 5314 is simply to file reports. Moving onto IRC section 5321 , the Court—again paying careful attention to the language—observed that the section imposes a penalty of up to $10,000 for "any violation" of IRC section 5314 . The Court again ascertained that this provision speaks of "violation[s]," but not of "accounts." Accordingly, the proper analysis then is when a violation of IRC section 5314 occurs. In the Court's view, because IRC section 5314 only mandates the filing of records, a violation occurs when the appropriate record is not filed. And because the record can contain more than one account, penalties under IRC section 5321 accrue on a *per-record* basis.

In contrast to the Court's close reading of the relevant statutory provisions, the government's argument relied on context. According to the government, because other provisions contained in IRC section 5321 authorize penalties on a per-account basis for willful violations, this purportedly leads to the inference that non-willful violations are also penalized on a per-account basis. However, the Court found that this line of reasoning actually cut against the government, because it demonstrated that when Congress wished to administer penalties on a per-account basis, it knew how to. "Conspicuously, the one place in the statute where the government needs per-account language to appear is the one place it does not." *Bittner*, 143 S. Ct. at 721.[2]

In light of taxpayer victories in *Bittner* and in *Boechler*, on January 22, 2024, the Tax Court proposed removing Rule 13(c) from its Rules of Practice and Procedure. Rule 13(c) requires a petition to be timely filed for the Tax Court to possess jurisdiction. In a press release issued by the Tax Court, "[t]he proposed amendments reflect recent developments concerning the timing requirements for invoking the Court's jurisdiction[.]"

Moore v. United States — The Sixteenth Amendment's Limitations

Standing in a category of its own is *Moore v. United States*, which asked whether the Sixteenth Amendment requires realization. The Court granted certiorari on June 26, 2023 and heard oral arguments on December 5, 2023. Though many commentators believe the Court will ultimately tailor a narrow holding upholding section 965[3] , the challenged Code provision, the Court's willingness to even hear the case suggests an interest in curtailing the government's taxing authority.

As part of the Tax Cuts and Jobs Act of 2017, the TCJA instituted a one-time transition tax on certain income held overseas. The transition tax was implemented by increasing subpart F income by CFCs' historic earnings and profits (dating back to 1986). IRC section 965(a) , (c). Calendar year taxpayers were to include their CFCs' earnings and profits in income for their 2017 taxable year, and fiscal year taxpayers were to include the CFCs' earnings and profits in income for taxable years ending sometime in 2018. In effect, IRC section 965 created a "deemed dividend" in the amount of all CFC E&P dating back to 1986. That E&P was included in income. In *Moore v. United States*, the taxpayers (the Moores) have challenged the constitutionality of that tax, arguing that the tax violates the Sixteenth Amendment. According to petitioners, "income," as used in the Sixteenth Amendment, necessarily implies a realization event. Petitioners assert that the TCJA's transition tax was a tax on unrealized income.

The Moores are U.S. shareholders of a CFC that provided equipment to small farmers located in India. Having fully paid their IRC section 965 transition tax liability in 2017, the Moores subsequently requested a refund. Generally, the Moores argued that IRC section 965 is unconstitutional because they did not actually realize income under the Sixteenth Amendment. Rather, Congress enacted IRC section 965 , and due to the deemed dividend, the Moores were required to include their portion of KisanKraft's historic E&P in their income for 2017. Additionally, the Moores contended that because they lacked the ability to compel any kind of distribution from the Indian company they did not, and could not, receive anything tantamount to "income" as that term is used in the U.S. Constitution.

In district court, the Government prevailed, and a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit affirmed. *Moore v. United States*, 36 F.4th 930, 936 (9th Cir. 2022). In the denial of the Moores' request for en banc review, four judges dissented. *Moore v. United States*, 53 F.4th 507 (9th Cir. 2022) (Bumatay, J., dissenting). In his dissent, Judge Bumatay wrote that "by dispensing with the realization requirement for income without offering any other limiting principle, we open the door to expansion of the federal taxing power beyond the limits placed by the Constitution." *Id.* at 508. This concern about the Government's taxing power was well received by some members of the Supreme Court during the December 5, 2023 hearing.

In their briefing to the Supreme Court, the Moores framed the main issues as whether the TCJA's transition tax violates the Apportionment Clause of the Constitution or is authorized under the Sixteenth Amendment. Under the Apportionment Clause, any "direct tax" levied by the Federal government must be apportioned so that every state pays a pro rata share of the tax based on each state's population, relative to the population of the United States as a whole. According to the Moores, the TCJA's transition tax is an unapportioned direct tax, and therefore is in contravention with the Constitution's Apportionment Clause.

In the alternative, the Moores also argued that, as was held by the Supreme Court in *Eisner v. Macomber*, 252 U.S. 189 (1920), that under the Sixteenth Amendment, "income" only includes income that was realized. According to the Moores, the income they received under the mechanics of IRC section 965 was never realized by them. Therefore, the TCJA's transition tax is unconstitutional.

Despite this, in the Ninth Circuit's consideration of the Moores' case, that court found that income could be *constructively* realized. Further, during oral arguments heard by the Supreme Court on December 5, 2023, the Government argued that the TCJA's transition tax was constitutional because it taxes income realized by the foreign corporation, which is properly attributable to its U.S. shareholders.

At oral arguments, most of the Justices were concerned that interpreting the Sixteenth Amendment to require realization would upend large swaths of the Code, such as subchapter K, subchapter S, subpart S, as well as certain mark-to-market regimes. Those regimes dispense with a realization requirement as to the ultimate taxpayer. For example, a partnership may realize income in its ordinary course of business, but the partner is the person who pays the tax on that income. However, not all of the Justices led with that concern.

Justices Thomas, Alito, and Gorsuch all asked questions of both parties to probe the Constitutional limits of the Government's authority to tax. The Moores (and Judge Bumatay of the Ninth Circuit) framed realization as an important check on the taxing power. In questioning Solicitor General Prelogar, who argued the case for the Government, Justice Alito said, "I just want to understand how far your argument goes," Tr. 69:2, and posed a question about taxing stock that had appreciated in value over twenty years. He asked whether the Government could "reach back and tax all of that?" Tr. 70:2-3. Justice Thomas similarly asked could "the increase in value of real property . . . be a taxable event?” Tr. 58:20-21. Though most commentators doubt that the Court will hold the transition tax unconstitutional, the Court's willingness to even hear the case and interrogate the Constitutionality of what the Ninth Circuit articulated a rule of administrative convenience, *Moore v. United States*, 36 F.4th 930, 937 (9th Cir. 2022), is exciting.

The Supreme Court's opinion is expected to be issued sometime during the Spring of 2024.

Closing Thoughts

Each case addresses a different aspect of tax—whether procedural or substantive, filing returns or petitions—but the common thread among them is the courts' willingness to hear the challenge to the Government's monopoly on tax power, either to tee up a circuit split as in *Culp* or resolve one as in *Bittner.* By simply giving taxpayers the opportunity to argue their cases before the Tax Court or the highest court in the land or even by not relegating a case to a per curiam opinion, the federal judiciary is standing up for taxpayers and forcing the government to follow the law.

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1 The Third Circuit's decision in *Culp* set up a circuit split, because the Eleventh Circuit held in *Allen v. Commissioner* that the statutory deadline in section 6213(a) is not subject to equitable tolling. No. 22-12537, 130 A.F.T.R.2d 2022-6775 (11th Cir. Dec. 21, 2022).

2 Demonstrating similar leniency, the Department of Justice in *Wrzesinski v. United States*, No. 2:22-cv-03568 (E.D. Pa. dismissed Mar. 30, 2023) filed a Status Report in Lieu of Answer conceding the matter.

3 *See* Rosenbloom and Child, "Future Perfect Taxation: After Reversal in Moore," Tax Notes International, Vol. 112, December 4, 2023

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