

## ‘Boechler’: A Day Late, But Not Necessarily a Dollar Short

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The Internal Revenue Code is filled with deadlines. Taxpayers seeking to challenge some action by the IRS in the U.S. Tax Court must be especially wary of such time limits. By statute, a taxpayer challenging an IRS levy on property is entitled to a “collection due process” hearing before the IRS’s Independent Office of Appeals. If a taxpayer loses in that forum, she may seek relief by filing a petition in Tax Court within 30 days of the date of the administrative determination.

Last month, in *Boechler, P.C. v. Commissioner of Internal Revenue*, 142 S.Ct. 1493, No. 20-1472, 2022 WL 1177496 (April 21, 2022), the Supreme Court unanimously held that this 30-day deadline is not jurisdictional and that the Tax Court can apply principles of equitable tolling in deciding to hear delinquent petitions. This column examines the Supreme Court’s opinion and considers its implications.

### Jurisdictional Deadlines

Jurisdictional deadlines are harsh. As the court noted in *Boechler*, “[j]urisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and ... do not allow for equitable exceptions.” 2022 WL 1177496, at \*3. By contrast, some procedural rules are merely intended to “promote the orderly progress of litigation” and do not restrict a court’s authority to hear a case. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Given the significant consequences that turn on this distinction, Congress must “clearly state[]” that a procedural requirement is intended to be jurisdictional. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006).

The Internal Revenue Code has several jurisdictional provisions. For example, pursuant to 26 U.S.C. §6213, a taxpayer challenging an IRS assessment must petition the Tax Court within 90 days of receiving a notice of deficiency. The statute expressly provides that “[t]he Tax Court shall have no ju-



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isdiction to enjoin any action or proceeding or order any refund ... 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.” The Circuit Courts of Appeals have made clear that §6213(a)’s unambiguous language constitutes a jurisdictional barrier to Tax Court review of IRS assessments. *Organic Cannabis Found. v. Commissioner*, 962 F.3d 1082, 1095 (9th Cir. 2020). Similarly, several Courts of Appeals have agreed that the 90-day deadline to petition for review of an innocent-spouse determination—provided for in 26 U.S.C. §6015(e)(1)(a)—is jurisdictional and thus the Tax Court is without power to hear even compelling

petitions that are not timely filed. See, e.g., *Matuszak v. Comm’r*, 862 F.3d 192 (2d Cir. 2017).

### Background of ‘Boechler’

Boechler, P.C. is a small law firm in Fargo, N.D. In June 2015, the IRS sent the firm a letter noting that it had failed to file copies of its employees’ W-2s and a Form W-3 with the Social Security Administration for 2013. The IRS did not claim that the firm owed any payroll taxes as a result of the “discrepancy” between the withheld taxes reported on the firm’s Form 941 and the wages reported on the absent W-2s and W-3. However, when Boechler failed to respond on a timely basis, the IRS assessed a \$19,250 “intentional disregard” penalty.

A year later, in October 2016, the IRS notified Boechler of its intent to levy the firm’s property to satisfy the penalty. Upon receiving this notification, Boechler requested a collection due process (CDP) hearing before the IRS’s Independent Office of Appeals. At the CDP hearing, Boechler argued that there was no discrepancy in its tax filings and that the penalty was excessive. The Appeals Office sustained the levy and mailed its notice of determination on July 28, 2017.

Under 26 U.S.C. §6330(d)(1), a taxpayer whose CDP request has been rejected “may, within 30 days of [the Appeals Office’s ad-

verse determination], petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).” Thus, Boechler had 30 days from the date that the notice was mailed to file its petition in the Tax Court. While Boechler received the notice of determination on July 31, 2017, it “dropped the ball” and filed its petition one day after the 30-day period expired. Agreeing with the Commissioner that the statutory deadline was jurisdictional, the Tax Court dismissed Boechler’s petition without addressing the merits.

### Judicial Review

In a split decision, the Eighth Circuit affirmed the Tax Court’s dismissal, holding that the filing deadline is jurisdictional and therefore is not subject to equitable tolling. *Boechler, P.C. v. Commissioner*, 967 F.3d 760 (8th Cir. 2020). In doing so, the majority acknowledged that the D.C. Circuit had reached the opposite conclusion in addressing a similarly worded filing deadline in 26 U.S.C. §7623(b)(4), but agreed with the Ninth Circuit that Congress had “spoken *clearly enough* to establish that §6330(d)’s 30-day filing deadline is jurisdictional.” The Supreme Court then granted certiorari to determine “whether Congress has clearly stated that §6330(d)(1)’s deadline

to petition for review of a collection due process determination is jurisdictional.” *Boechler*, 2022 WL 1177496, at \*3.

In a unanimous opinion authored by Justice Amy Coney Barrett, the court rejected the IRS’s argument that the statute imposed a clear jurisdictional limitation on the Tax Court’s ability to entertain late filings. Instead, adding to its existing body of case law, the court reiterated that a procedural requirement will only be jurisdictional where there is a clear Congressional mandate.

In concluding that §6330(d)(1) did not meet this exacting standard, the court devoted approximately five pages of the slip opinion to analyzing the one sentence statutory provision. The court noted that “[t]he only jurisdictional language appears in the parenthetical “(and the Tax Court shall have jurisdiction with respect to such matter)” and addressed whether the phrase “such matter” refers to all petitions for review or only those filed within 30 days of the mailing of the determination of the CDP hearing. Ultimately, the court concluded that “the text does not clearly mandate the jurisdictional reading” and “[i]t is hard to see how it could, given that ‘such matter’ lacks a clear antecedent.”

Having concluded that the statutory language was not sufficient-

ly clear to meet the court's test for jurisdictional limits, the court next turned to the question of equitable tolling. After noting that "nonjurisdictional limitations periods are presumptively subject to equitable tolling," the court rejected the IRS's attempts to rebut that presumption and remanded for further proceedings.

### Potential Impact of the Ruling

Under *Boechler*, the Tax Court has jurisdiction to consider whether an untimely petition to review an adverse decision on a CDP hearing can nonetheless be heard. At oral argument, the government argued that applying equitable tolling would leave the IRS with "no way of knowing whether a particular taxpayer who doesn't pay or doesn't file their petition on time is subject to an equitable circumstance or an extraordinary circumstance" that could warrant tolling. While expressing concern that permitting equitable tolling could impact over 26,000 CDP determinations the IRS issues each year, the government conceded that only around 1,100 to 1,200 petitions addressing CDP determinations are actually filed in Tax Court each year, and only around 300 of those are dismissed for lack of jurisdiction. In the face of this data, the court rejected the government's claim that allowing equitable tolling would affect "the IRS's collection efforts in every

case where a petition could be filed," concluding that it was "not convinced that the possibility of equitable tolling ... will appreciably add to the uncertainty present" in the collection process.

While the number of cases that may be impacted by *Boechler* may be relatively small, both *Boechler* and taxpayer rights advocates as amici curiae emphasized that "Congress enacted [the CDP] regime in order to protect taxpayers from IRS abuses." This is especially significant since approximately 61% of taxpayers who seek review of CDP determinations are proceeding pro se and approximately 90% are individuals.

### 'Castillo'

In *Castillo v. Commissioner*, the taxpayer brought a CDP claim arguing that the assessment in question was based on an IRS computer generated audit notice that wrongly attributed income to her. The IRS mailed a Notice of Determination to Castillo's last known address, but the parties agreed that she never received the notice, and the U.S. Postal Service's tracking information showed that the USPS did not attempt to deliver the notice. When Castillo filed her untimely petition, the Commissioner successfully moved to dismiss for lack of jurisdiction. In May 2020, Castillo appealed to the Second Circuit, which held the case in abeyance

pending the Supreme Court's decision in *Boechler*.

On April 26, 2022, Castillo filed a motion asking the Second Circuit to reverse the Tax Court's dismissal of her petition in light of *Boechler* and to deem it timely based on equitable tolling. Three days later, the Commissioner responded by asking the Second Circuit to vacate the Tax Court's decision and remand the case to allow the Tax Court to address the equitable tolling issue in the first instance. Given the undisputed fact that the taxpayer never received the notice sent to her, *Castillo* may serve as an early barometer of how Courts of Appeals will address cases where the basis for equitable tolling is clear on the existing record.

### Conclusion

Although *Boechler* represents an important win for taxpayers, it is also a valuable reminder for practitioners to be mindful of filing deadlines. Indeed, while *Boechler* was successful in avoiding the jurisdictional bar, it remains to be seen whether it will be able to establish a basis for equitable tolling.

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