

NEWS ANALYSIS

What Deadlines? Deficiency Filing Deadline Challenged

by Lee A. Sheppard

The woke neighbor is agitated again, but this time it's not about hunting up that *Handmaid's Tale* outfit in the back of her closet. Nope, reform initiatives on her own side are deleteriously affecting her. That wasn't supposed to happen.

Her son didn't get admitted to an Ivy. The letters went out at the end of March — less than 5 percent of applicants were admitted. It's so unfair! the neighbor wailed. He's the product of two legacies! The kid seems unfazed. He financed his marijuana dispensary business with the bitcoin he mined. Maybe that \$500-per-hour math tutor did some good after all. And when the kid does get to college, he could work his way through school, as long he doesn't get high on his own supply.

Even since Aunt Becky went to jail for writing a six-figure check to the wrong payee and Asian parents sued Harvard, college admissions criteria have been acknowledged to be in need of reform. Trouble is that there are only so many slots. Athletes, plus the progeny of celebrities, billionaires, and politicians, will always have slots. Children of full-paying foreign elites are well taken care of. So any new openings are likely to come at the expense of the children of anxious professional-managerial class members (*Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, No. 20-1199 (S. Ct. 2022)).

Some schools responded by demoting — or in one case, eliminating — legacy admissions. Legacy never guaranteed automatic entry — it had to be accompanied by a sizable check or at least a willingness to pay full tuition — but it was a leg up. Resumé padding was turned into a project. “The so-called meritocracy of admissions has always been a false front with the odds blatantly stacked in favor of those with means,” Nicole LaPorte wrote in *Town & Country*, a

magazine for the affluent but socially insecure (*Town & Country*, May 2022, at 101).

Well, tell us what the admissions criteria are, and we'll hire a tutor to get that result! The neighbor doesn't want to believe that the criteria are whimsical and arbitrary. Lori Loughlin did time so your neighbor wouldn't think the process is corrupt. The process is pretty corrupt (Golden, *The Price of Admission: How America's Ruling Class Buys Its Way Into Elite Colleges — And Who Gets Left Outside the Gates* (2007)).

But the admissions process of a handful of selective colleges is important in determining who becomes the elite of society! If that isn't fair and transparent, then the whole system isn't fair or transparent! Let's quote John F. Kennedy (Harvard): “Life is not fair.” And George Carlin: “It's a big club, and you ain't in it.”

The Supreme Court hasn't been entirely transparent about its thinking in reclassifying manifestly jurisdictional rules as procedural over the last two decades. The Court's criteria are not clearly described, and its decisions appear whimsical. All of this has been an abstraction to taxpayers' representatives until the Court's recent decision on collection due process Tax Court filing deadlines, holding that they are merely procedural and equitable tolling was possible (*Boechler PC v. Commissioner*, No. 20-1472 (S. Ct. Apr. 21, 2022)).

Now the regular 90-day deadline for filing in Tax Court to contest a deficiency (section 6213) is being challenged in a case involving a marijuana dispensary (*Hallmark Research Collective v. Commissioner*, Dkt. No. 21284-21 (T.C. Apr. 1, 2022)). Ironically, the case is governed by another pot dealer's case that the Court just declined to hear. *Hallmark Research* is before Tax Court Judge Maurice Foley. On May 3 Foley ordered the IRS to file a response to the taxpayer's motion by June 2, which is considered an unusually tight deadline.

Jurisdictional Revolution

What has the Supreme Court been doing since 2004?



Aunt Becky went to jail for writing a six-figure check to the wrong payee. (Associated Press)

The Court has basically said that jurisdictional rules that would keep people out of court are not to be enforced that way if the equities weigh in favor of the plaintiff's case. The Court has done this by deeming clearly jurisdictional rules mere claims processing, procedural rules. The Court has held that many nontax filing deadlines are merely procedural, because otherwise the practical result could be unfair to some litigants (*Scarborough v. Principi*, 541 U.S. 441 (2004), *Kontrick v. Ryan*, 540 U.S. 443 (2004)), instead of just saying these rules should be subject to equitable exceptions in compelling cases.

The Court has created a presumption that filing deadlines are merely procedural. The presumption can be rebutted by showing that Congress really meant it (*Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013)). There has to be a clear statement. Even the word "jurisdiction" is not good enough (*Reed Elsevier Inc. v. Muchnick*, 559 U.S. 154 (2010)). A requirement is jurisdictional only if Congress "clearly states" that it is (*Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)). There are no "magic words" that need to be used, but a clear connection between timely filing and jurisdiction would be preferable (*United States v. Kwai Fun Wong*, 575 U.S. 402 (2015)).

Bryan T. Camp of Texas Tech University School of Law has tried to explain and clarify the mess the Court has made and its ramifications for Tax Court filing deadlines. In so doing, he basically laid out the case for treating section 6213

as non-jurisdictional (Camp, "New Thinking About the Jurisdictional Time Periods in the Tax Code," 73 *Tax Lawyer* 1 (2019)).

The Court has held that no rule is jurisdictional unless it relates to a court's *in personam* jurisdiction or subject matter jurisdiction (*Henderson v. Shinseki*, 562 U.S. 428 (2011)). "The new thinking thus requires courts to start with a presumption that a time period is not jurisdictional, and then look to see whether Congress made a 'clear statement' that it intended the time period to govern the scope of a court's personal or subject-matter jurisdiction," Camp restated the rule.

Shouldn't the Court explain to the lower courts what it wants them to do? "One searches in vain for the fabled bright line. One finds instead only the presumption. That is an important first step, but it can be overcome by any one (or more) of four factors. No one factor has proved determinative," Camp wrote.

Camp's four factors divined from the case law are text, precedent, statutory context, and legislative purpose. One would think that statutory text would be the beginning and end of the analysis of a filing deadline, but one would be wrong. Countless questions must be asked about what Congress might have meant, other than file your petition on time or be dismissed. Precedent ought to be self-explanatory, but Camp pointed out that the Court has been reluctant to overrule itself.

Now the regular 90-day deadline for filing in Tax Court to contest a deficiency is being challenged.

What if the statute says "shall"? Not good enough. In *Kwai Fun Wong*, the statute said that tort claims against the United States "shall be forever barred" unless the agency is notified within two years after the claims accrued or an action is begun within six months of the agency's denial of the claim (28 U.S.C. section 2401(b)). The plaintiffs had compelling cases and wanted equitable tolling. The Court didn't need to rewrite the statute. Nope, not jurisdictional. "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," the Court stated.

It's interesting that Camp identified statutory context as a relevant factor, shortly before the Court blatantly ignored it in *Boechler*. In the latter, the IRS commissioner pointed out that a CDP claim that was not timely filed would be ineligible for suspension of collection, so the Court would be creating an anomalous situation in which the late filer would be admitted to Tax Court while the IRS could still seize his property. Justice Amy Coney Barrett pronounced the Court "unmoved." (Prior analysis: *Tax Notes Federal*, May 2, 2022, p. 685.)

Assuming statutory context is still a relevant factor, what does it mean? It seems to mean the court cannot read a statute as a whole. A prisoner filed a habeas corpus petition without getting the statutorily required certificate of appeal (28 U.S.C. section 2253(c)). Well, gee, isn't habeas corpus a constitutional right? One would think that the Court could have resolved the case on Sixth Amendment grounds, but it insisted on torturing the statute. A requirement isn't jurisdictional just because it is in a jurisdictional area of a statute, the Court stated (*Gonzalez v. Thaler*, 565 U.S. 134 (2012)).

Apparently Congress doesn't have the final say about legislative purpose. The Court gets to decide whether a jurisdictional statute fulfills the legislative purpose. So if the legislative purpose is compassionate, and the Court thinks the deadline is too harsh, the deadline will be deemed non-jurisdictional and not enforced. In *Henderson*, the Court held that because the statutory scheme of veterans' benefits was "highly remedial," enforcement of the filing deadlines would "clash sharply" with the benefits scheme. The Court reclassified the deadline as non-jurisdictional, instead of just saying that this particular case deserved equitable relief.

Dissecting the Statute

What does a properly drafted jurisdictional filing deadline statute look like?

Believe it or not, there are some in the code, despite its layers of amendments. The filing deadline for Tax Court petitions challenging IRS failure to abate interest charges is tightly drafted. Section 6404(h)(1) states:

The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought —

A. at any time after the earlier of —

(i) the date of the mailing of the Secretary's final determination not to abate such interest, or

(ii) the date which is 180 days after the date of the filing with the Secretary (in such form as the Secretary may prescribe) of a claim for abatement under this section, and

(B) not later than the date which is 180 days after the date described in subparagraph (A)(i).

Note the phrasing. "The Tax Court shall have jurisdiction . . . if such action is brought. . . ." Not a lot of wiggle room there. The statute spells out what is considered the date of mailing and other important criteria (section 6404(h)(2)).

The basic deadline for filing a petition in Tax Court to challenge a deficiency as determined by the IRS is not so tightly drafted. The product of years of development, it is meandering. Section 6123(a) states:

Time for filing petition and restriction on assessment. 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.

The statute is aimed at restraining assessment or collection while the taxpayer makes a court challenge. “Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency . . . is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.” “Taxpayer may file” makes the filing deadline look optional. As Camp noted, there is nothing special about this sentence.

Then the statute says there will be no assessment or levy after a petition is filed, until the Tax Court issues a final decision. It empowers the Tax Court to enjoin a levy or order a refund of tax collected during that period.

But then it says: “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.” So if the taxpayer doesn’t file on time, the IRS would still be able to assess and collect.

The penalty for late filing is elsewhere in the statute, which permits the IRS to assess and collect tax if the filing is late. It states: “If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), 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” (section 6213(c)).

One would think that statutory text would be the beginning and end of the analysis of a filing deadline, but one would be wrong.

To top it off, the Tax Court’s actual power to redetermine deficiencies is in a separate section, Camp noted (section 6214). This opens the possibility that the court’s power to redetermine deficiencies is not affected or impinged by when the taxpayer filed his petition. Camp pointed out that nothing in section 6213 links the court’s power to determine deficiencies to timely filing. The Court’s new thinking would not give weight to proximity as creating the necessary nexus between timely filing and redetermination, according to Camp.

“A better reading of sections 6213 and 6214 is that the statutes contain two different grants of jurisdiction, or power: power to enforce the section 6213 prohibition on assessment with an injunction, and power to redetermine the deficiency,” Camp wrote, noting that Congress did not give the Tax Court the power to enjoin collection until 1988.

Camp concluded that the Supreme Court would, if confronted with the question, knock section 6123 down to a claims processing rule. But, he cautioned, claims processing rules are not unimportant. Taxpayers who file late with the Tax Court will still have their petitions dismissed. But they will be dismissed for failure to state a claim upon which relief can be granted — that is, not for lack of jurisdiction.

Late filing would become an affirmative defense for the government (FRCP Rule 12(b)(6)). “And if the government messes up and fails to properly and timely object to the late filing, then

the lucky taxpayer will get the opportunity to be heard on the merits of the claim," Camp noted. Or the Tax Court could invoke equitable principles to allow the case to be heard.

The Supreme Court hasn't looked at this question but the Seventh Circuit has, and it considered the drafting conundrum that Camp pointed out (*Tilden v. Commissioner*, 846 F.3d 882 (7th Cir. 2017)). The Seventh Circuit deemed it imprudent to reject years of Tax Court precedent to the effect that section 6213 is jurisdictional (*Guralnik v. Commissioner*, 146 T.C. 230 (2016)).

Camp is correct that the Tax Court has a remedial function. Taxpayers used to have to prove that the commissioner was wrong and then prove the correct deficiency, but then the Court removed the latter requirement. Camp didn't come right out and say that the court exists to find a reason to hold for the taxpayer, but it does. "It was meant to help taxpayers, not throw up obstacles," he wrote.

The Challenge

A marijuana dispensary argues that the Tax Court should vacate dismissal of its case on the grounds of mistake under *Boechler*.

The pot dealer before the court in *Hallmark Research* filed its petition one day late. The IRS notified deficiencies against both the taxpayer and its chief executive, both of which filed Tax Court petitions a day late, but the IRS noticed only the latter's late filing, which it raised with the court. The court itself dismissed the taxpayer's petition. *Hallmark Research* is run by its two founders, one of whom is chief executive. It depended on an enrolled agent to file its tax returns. He didn't do it, and the predictable IRS notices arrived. The taxpayer filed an affidavit of preparer misconduct against him (Form 14157-A).

The taxpayer hired an accountant as its new return preparer. That accountant began settlement negotiations with the IRS and tried to retrieve business records from the local tax authority. The taxpayer says that the IRS cut off communications, and two years later sent the statutory notice of deficiency that the taxpayer challenges in its Tax Court petition. The deficiency asserted is \$624,000 gross income for tax year 2015 and \$775,000 for tax year 2016, with no deduction for cost of goods sold (section 280E).

Penalties were asserted. The taxpayer filed the petition pro se because the accountant was down with COVID-19 for 40 days.

The taxpayer creatively used the court's order to show cause as an opportunity to explain why the court should not dismiss the petition, aside from the filing date. The taxpayer mentioned the then-pending *Boechler* case in its response to the order to show cause, and explained its extenuating circumstances. Foley empathized, saying the court's hands were tied by section 6213(a), and dismissed the petition. Foley wrote that "the Court has no authority to extend the period provided by law for filing a petition 'whatever the equities of a particular case may be and regardless of the cause for its not being filed within the required period'" (*Axe v. Commissioner*, 58 T.C. 256 (1972)).

The *Hallmark Research* taxpayer argues that section 6213(a) is non-jurisdictional and subject to equitable tolling. The Tax Court *sua sponte* vacated a dismissal of a late-filed CDP petition soon after *Boechler* was decided (*Sherman v. Commissioner*, No. 11951-20). *Hallmark Research* is appealable to the Ninth Circuit, so it is governed by the Supreme Court's denial of certiorari in a similar case, to which the Tax Court deferred in dismissing (*Organic Cannabis Foundation LLC v. Commissioner*, 962 F.3d 1082 (9th Cir. 2020), *cert. denied*, Nos. 20-1014 and 20-1031 (May 3, 2021)).

In *Organic Cannabis*, the taxpayers missed the regular Tax Court 90-day deadline by a single day because FedEx let them down (section 7502). The taxpayer challenged an IRS notice of deficiency denying deduction of cost of goods sold, seeking additional tax of more than \$1 million plus penalties for two tax years (section 280E). The Tax Court granted the IRS motion to dismiss and denied the taxpayer's motion to invalidate the notice. The Ninth Circuit affirmed.

The Ninth Circuit rebuffed the taxpayer's argument for equitable tolling of the filing deadline after analyzing it under Supreme Court precedent treating filing rules as non-jurisdictional. Relying on *Kwai Fun Wong*, the court held that Congress had made the special incantations and imbued the procedural bar of section 6213(a) with jurisdictional consequences.

Specifically, Congress used the word jurisdiction, "thereby confirming that the

provision as a whole should be understood as speaking to the manner in which the Tax Court acquires subject matter jurisdiction in such cases,” Circuit Judge Daniel P. Collins wrote. The court also viewed history as being on the side of treating the statute as jurisdictional.

The Ninth Circuit pointed out the conundrum of a late-filing taxpayer still subject to assessment and collection processes even while admitted to Tax Court. “Under Appellants’ non-jurisdictional reading of section 6213(a), this no-collection prohibition would lapse at the end of the 90-day period but would then revive if the Tax Court subsequently decides to accept a late-filed petition. Nothing in the statute suggests that such a discontinuity was contemplated,” Collins wrote, relying on the Seventh Circuit decision in *Tilden*.

“To make matters worse, Appellants’ reading would mean that, having accepted a late-filed petition and having thus reactivated the prohibition on collection, the Tax Court would then unquestionably lack jurisdiction to enjoin violations of that prohibition — thereby necessitating a separate court proceeding in the district court to do so,” Collins wrote.

The court additionally noted that a taxpayer whose Tax Court petition has been dismissed for tardiness can still take his or her case to district court after paying the deficiency if the statute is jurisdictional. That is, dismissal for failure to timely file would fall within the statutory safe harbor for a Tax Court dismissal “for lack of jurisdiction,” because it would not be a decision about the amount of the deficiency (section 7459(d)). So section 6213(a) has to be jurisdictional; otherwise dismissal would preclude a trip to district court (which the taxpayer did not pursue).

The *Hallmark Research* taxpayer argues that *Boechler* undermined the decision in *Organic Cannabis*, and that the Ninth Circuit would reverse itself. The taxpayer points out that the *Boechler* Court rejected a reading that suspension of collection and timely filing should be inexorably connected. In *Boechler*, the argument that it would be incongruous to permit collection after a late-filing taxpayer has been admitted to court was unavailing.

As Camp pointed out, the taxpayer’s memorandum in support of its motion to vacate

the dismissal argued that the section 6213(a) filing deadline is unconnected to the section 6214(a) jurisdictional grant. “Section 6213(a) is non-jurisdictional under the *Boechler* clear statement standard, a conclusion that is also demonstrated by the *Boechler* opinion’s rejection of the Commissioner’s analysis with respect to a statutory provision that is very similar to section 6213(a),” the taxpayer argued.

And the Supreme Court doesn’t have to care what lower courts said about the question, even though they have consistently ruled the same way for many years. Longevity of precedent is not an asset in the Court’s campaign to treat filing deadlines as non-jurisdictional. “The Supreme Court has created a stare decisis exception to its rule that filing deadlines are no longer jurisdictional. The exception is if a long line of Supreme Court authority, stretching back over 100 years, has held the deadline jurisdictional,” the taxpayer argued, alluding to *Boechler*.

But what about what the Ninth Circuit in *Organic Cannabis* said would be the effect of holding section 6213(a) non-jurisdictional? If a taxpayer misses the Tax Court filing deadline and has his or her case dismissed, that would operate as a judgment on the amount of the deficiency that would preclude a district court review. The *Hallmark Research* taxpayer argued that Congress would have to fix the problem, adding that it is rare for a taxpayer to pay the deficiency to get into district court in those circumstances (indeed, refund suits are rare). The national taxpayer advocate has called for Congress to make section 6213(a) non-jurisdictional and to resolve this issue.

“The Ninth Circuit’s interpretation helps no taxpayer. Indeed, would not it make more sense for the courts to try to preserve taxpayers’ first opportunities to contest deficiencies (in Tax Court) than to try to preserve a late-filing taxpayer’s second opportunity to contest deficiencies (by a refund suit)?” the taxpayer’s memorandum argued, referring to *Organic Cannabis*.

Equitable Tolling

Equitable tolling is a separate issue.

Just because a statute is non-jurisdictional does not mean it is automatically subject to

equitable tolling. It is conceivable that the Supreme Court (hearing the case several years from now) could hold that section 6213(a) is non-jurisdictional but that equitable tolling is not allowed.

The *Hallmark Research* taxpayer's bottom line is equitable tolling, but it has to get past *Organic Cannabis* and the *Golsen* rule first. For this argument the taxpayer relied on a Ninth Circuit remand on a third-party wrongful levy suit. That court disregarded contrary precedent in other circuits. It relied on the Court's presumption that time limits are subject to equitable tolling (*Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015)).

And the D.C. Circuit split on equitable tolling in a sympathetic whistleblower case, even though the whistleblower statute is not remedial. The majority strained to hold that the one-sentence whistleblower filing deadline is non-jurisdictional because the jurisdictional grant was not expressly conditioned on timely filing (section 7623(b)(4)). The dissent argued that the necessary connection was provided in the parenthetical in the same sentence (*Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019)).

The Tax Court is remedial. Historically, it was formed as the administrative Board of Tax Appeals to allow taxpayers to contest their deficiencies without prepayment. The court itself has loosened the criteria for satisfying filing deadlines over the years, establishing that timely mailing equals timely filing, regardless of when the petition arrives in the mail. There are opportunities to contest dismissal for late filing, namely the court's order to show cause, which is mostly about the court wanting to know if it has the relevant dates straight. When the IRS was knocked out by the pandemic, the court extended its filing deadlines by four months (Notice 2020-23, 2020-18 IRB 742).

A decision that the *Boechler* Court distinguished may stand in the way of equitable tolling in *Hallmark Research*, even if the statute is deemed non-jurisdictional, according to Steve R. Johnson of Florida State University College of Law. The Court held that equitable tolling does not apply to the three-year deadline for taxpayers to file administrative refund claims (section 6511). The Court held that the presumption in favor of

equitable tolling was rebutted, because the deadline was emphatically stated and the six exceptions were specific (*United States v. Brockamp*, 519 U.S. 347 (1997)).

How would *Brockamp* apply to *Hallmark Research*? The deficiency filing deadline has likewise accumulated seven detailed exceptions over the years. For example, the running of the filing period is suspended during the bankruptcy automatic stay (section 6213(f)(1)). And Congress and the Tax Court itself have loosened the mailbox rule over the years so that more petitions are treated as timely. The Tax Court (and later the Supreme Court) may conclude that efforts have been made to ameliorate late filers' concerns, so that judicial interference would not be necessary.

If equitable tolling were allowed in late-filed cases when tax had already been assessed, the IRS would face a real mess. "Would the IRS have to erase the assessment and halt collection? If the IRS had already effected partial collection, would the IRS have to give the money back?" Johnson asked rhetorically. "Could the taxpayer seek refund of the partial amount collected without paying the balance of the assessment?"

Partial refunds are not possible in district court. "A taxpayer couldn't do that in district court or the Court of Federal Claims because of the *Flora* full payment rule. Could a taxpayer circumvent the Supreme Court's *Flora* decision in the Tax Court in the situation just described?" Johnson asked (*Flora v. United States*, 357 U.S. 63 (1958)).

What Numbers?

What are the ramifications of treating the deficiency filing deadline as non-jurisdictional?

"The Tax Court will undoubtedly give the IRS the opportunity to agree with *Hallmark* before rendering a decision," T. Keith Fogg, director of the Harvard Law School Federal Tax Clinic, wrote in a blog post. "I anticipate that the Tax Court will endeavor to act swiftly because of the volume of dismissals each year and the impact of the jurisdictional decision on practice at the Court."

"Of course, the Tax Court's decision in *Hallmark*, whatever it turns out to be, will not resolve the issue. There'll be circuit court decisions. If they conflict, the Supreme Court may grant certiorari, resulting in a decision who

knows how many years from now,” Johnson commented. “Congress could prevent the years of confusion, uncertainty, and expense by amending the relevant statutes, but Congress likely won’t.”

The IRS stands to lose this case unless it can demonstrate how disruptive to court and assessment processes a holding that the deficiency filing deadline is non-jurisdictional would be. The taxpayer boldly insists that there are no adverse consequences. Turns out there aren’t developed public numbers on how many Tax Court cases are dismissed for untimely filing each year. The taxpayer estimates 600 of them.

The taxpayer’s memorandum ventures that two kinds of taxpayers would be harmed by keeping section 6213(a) jurisdictional: those who would be eligible for equitable tolling, and those whose filing the court itself noticed was late after the IRS missed the issue. That means the IRS would have to police the filing deadline, not the court.

The IRS stands to lose this case unless it can demonstrate how disruptive a holding that the deficiency filing deadline is non-jurisdictional would be.

The taxpayer estimates there would be about 100 late-filed cases potentially eligible for equitable tolling in Tax Court each year. “Not even in every case where there are plausible equitable tolling facts will the Tax Court agree that the facts are good enough to qualify for equitable tolling,” the taxpayer admitted. Here we are, upending the law again for what advocates say would be a handful of cases.

A Tax Court order to show cause is not, but potentially could be, an avenue for an occasional argument for equitable tolling, if the court could work around the statute. A pro se taxpayer argued to the court that the petition was late because of coronavirus complications, which have caused enormous problems with IRS communication. The court empathized and responded that the deadline is jurisdictional. It recommended that the taxpayer negotiate with the IRS (*Barnabas v. Commissioner*, Dkt. No. 20219-21S (T.C. Mar. 28, 2022)).

For fiscal 2020, the IRS said that individuals filed 240 million returns and were issued 303 million refunds. They filed 16,000 Tax Court petitions contesting deficiencies, which is lower than usual because of lockdowns, according to the IRS. The number of dismissals is known; most are for late filing or failure to pay the filing fee. No one has reliably estimated how many petitions dismissed for late filing would be eligible for equitable tolling.

The irony of this case and similar cases is that only the Tax Court has easy access to the numbers necessary to gauge the administrative burden of equitable tolling, and there is no legal avenue for the litigants to compel the court to reveal them. The Tax Court resists FOIA requests on the view that it is not an executive agency. Outsiders can reproduce the data by reading all the court filings, a laborious task that litigants have attempted only in small batches.

“In the scheme of things, the Tax Court’s deficiency deadline is not central to the tax law, especially when taxpayers have the alternative route of paying the tax and suing for a refund,” the taxpayer argued. Maybe the Tax Court should take it upon itself to waive or extend filing deadlines until the IRS gets back on its feet. ■