

LR
#5**TAX COURT JURISDICTION: Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers with Filing Extensions****TAXPAYER RIGHTS IMPACTED¹**

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PROBLEM

A non-filer who has overpaid his or her taxes by the original filing deadline generally has two years from that date to file a claim for refund.² Under a special rule, however, if the IRS mails the non-filer a notice of deficiency during the first six months of the third year after the original filing deadline and he or she timely petitions the Tax Court, then the Tax Court generally has jurisdiction to refund or credit the overpayment.³ It would have no such jurisdiction though, if the taxpayer had obtained a six-month filing extension.⁴ Congress may have believed it authorized the Tax Court to credit or refund overpayments in this situation in 1997, but a recent decision by the Tax Court in *Borenstein* reveals that the legislative fix was incomplete.⁵

EXAMPLE⁶

Ms. B and Ms. C each overpay their taxes for 2012 on April 15, 2013.⁷ Ms. B timely requests an extension to file, but Ms. C does not. Neither files a return before the IRS sends a notice of deficiency, which it does on June 19, 2015. Each contests the notice and seeks a refund, filing a petition with the Tax Court. The Tax Court has jurisdiction under Internal Revenue Code (IRC) § 6512(b)(3) to determine Ms. C's overpayment because the IRS sent the notice of deficiency during the third year after Ms. C's tax return due date (*i.e.*, June 19, 2015 is between April 15, 2015 and April 15, 2016). But the Tax Court has no similar jurisdiction to determine Ms. B's overpayment because the IRS sent

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 See IRC §§ 6511(a), (b)(2).

3 See IRC §§ 6513(b) (pre-payments deemed paid on due date), 6512(b)(3)(flush) (Tax Court jurisdiction extended for non-filers), 6511(a) (limitations period), (b)(2) (lookback period).

4 *Borenstein v. Comm'r*, 149 T.C. No. 10 (2017), *appeal docketed*, No. 17-390 (2d Cir. Dec. 4, 2017) (hereinafter *Borenstein*) (interpreting IRC § 6512(b)(3)(flush)).

5 Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1282(a) and (b), 111 Stat. 788, 1037-38 (1997) (codified at IRC § 6512(b)(3)(flush)). For a summary of *Borenstein*, see *Significant Cases*, *infra*.

6 This hypothetical example is loosely based on the facts presented in the *Borenstein* case.

7 For purposes of IRC §§ 6511 and 6522, income tax withheld is deemed paid on April 15. See IRC § 6513(b)(1). Similarly, estimated tax is deemed paid on April 15. See IRC § 6513(b)(2).

the notice of deficiency during the *second* year after Ms. B's *extended* due date (*i.e.*, June 19, 2015 is between October 15, 2014 and October 15, 2015). The court lacks jurisdiction to determine Ms. B's overpayment because the IRS mailed the notice of deficiency at just the wrong time—more than two years after she paid the tax but before the third year after her *extended* filing date.

RECOMMENDATION

Amend IRC § 6512(b)(3) to clarify that when the IRS mails a notice of deficiency after the second year following the due date of the return (without regard to extensions) and before the taxpayer files a return, the limitations and lookback periods for filing a claim for refund or credit (under IRC § 6511(a) and (b)(2)) are at least three years from the due date of the return (*without regard to extensions*).

PRESENT LAW

Withholding and other pre-payments are generally deemed paid on the due date of the return without regard to extensions.⁸ In general, a taxpayer must file a claim for refund of an overpayment within two years of paying the tax or within three years of filing the return, whichever is later (*i.e.*, the limitations period).⁹ The amount that can be credited or refunded is limited to amounts paid within the applicable lookback period.¹⁰ If the taxpayer files a return and the claim for refund is filed within the three-year limitations period, then the lookback period is three years, plus any period of any filing extension (*i.e.*, the three-year lookback period).¹¹ Otherwise, the lookback period is the two-year period preceding the claim (*i.e.*, the two-year lookback period).¹²

If a taxpayer who has not filed a claim for refund receives a notice of deficiency and petitions the Tax Court, then the Tax Court generally has jurisdiction to determine whether the taxpayer is due a refund to the same extent the IRS could have considered a claim filed on the date the IRS mailed the notice of deficiency.¹³ However, a special rule applies to extend the limitations and lookback periods (under the final sentence of IRC § 6512(b)(3) when the IRS mails a notice of deficiency *before* the taxpayer files a return. In that case, if the IRS mails the notice of deficiency “during the third year after the due date (with extensions) for filing the return,” then the limitations and lookback periods are three years (not two years), even though the taxpayer has not filed a return.

The special rule in IRC § 6512(b)(3) is supposed to put non-filers who receive notices of deficiency after the two-year lookback period on the same footing as those who file returns on the same day as the IRS mails the notice of deficiency.¹⁴ In *Borenstein*, however, the Tax Court concluded that it has no jurisdiction if the IRS mails the notice of deficiency *after* the second year following the due date (without extensions) and *before* the third year following the due date (with extensions). Thus, the Tax Court determined that there is a donut hole in its jurisdiction.

8 See IRC § 6513(b).

9 See IRC § 6511(a).

10 See IRC § 6511(b)(2).

11 See IRC § 6511(a), (b)(2)(A).

12 See IRC § 6511(a), (b)(2)(B).

13 See IRC § 6512(b)(1), (3)(B).

14 H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.).

REASONS FOR CHANGE

The final sentence of IRC § 6512(b)(3) was enacted in 1997 in response to a decision by the Supreme Court, which held that the two-year lookback period applied to a non-filer because the person had not filed a return before the IRS mailed the notice of deficiency.¹⁵ The Conference Committee report explained that:

[i]f the same taxpayer had filed a return on the date the notice of deficiency was issued, and then claimed a refund, the 3-year ‘look back’ rule would apply, and the taxpayer could have obtained a refund of the overwithheld amounts....¹⁶

The Committee apparently believed it was appropriate to eliminate this disparate treatment. The report also described the law as permitting taxpayers “who initially fail to file a return, but who receive a notice of deficiency and file suit to contest it in Tax Court during the third year after the return due date, to obtain a refund of excessive amounts paid within the three-year period prior to the date of the deficiency notice.”¹⁷ However, this description may not have been accurate. The final sentence of IRC § 6512(b)(3) states:

... where the date of the mailing of the notice of deficiency is during the third year after the **due date (with extensions)** for filing the return of tax and no return was filed before such date, the applicable [lookback] period under subsections (a) and (b)(2) of section 6511 shall be 3 years. [Emphasis added.]

For non-filers who filed timely extensions of the filing deadline, the Tax Court in *Borenstein* interpreted the parenthetical “with extensions” in a way that undercuts Congress’s intention to put a non-filer on the same footing as a taxpayer who filed a return on the day the IRS mailed the notice of deficiency. Although the *Borenstein* case is being appealed to the U.S. Court of Appeals for the Second Circuit, the Tax Court would not have to follow a taxpayer-favorable Second Circuit decision in cases arising in other circuits.¹⁸ Thus, unless the Tax Court revisits its decision, a legislative fix is needed.

EXPLANATION OF RECOMMENDATION

The recommendation would put all non-filers who receive notices of deficiency after the two-year lookback period on the same footing as those who file returns on the same day as the IRS mails the notice of deficiency, as intended by Congress in 1997.¹⁹ Specifically, it would permit those who contest the deficiency in the Tax Court during the third year after the return due date (without extension) to obtain credits and refunds of amounts overwithheld and paid or deemed paid on the due date, even if they timely requested a filing extension.

15 *Comm’r v. Lundy*, 516 U.S. 235 (1996).

16 H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.).

17 *Id.*

18 See *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971). See also *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981), *action on dec.*, 1981-140 (June 2, 1981); Chief Counsel Notice CC-2006-010 (Mar. 2, 2006).

19 H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.).