

## STRENGTHEN TAXPAYER RIGHTS IN JUDICIAL PROCEEDINGS

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### Legislative Recommendation #43

## Expand the Tax Court's Jurisdiction to Hear Refund Cases

### SUMMARY

- *Problem:* For most taxpayers, the U.S. Tax Court is the optimal court in which to challenge an adverse IRS decision, as payment is not a requirement for jurisdiction and the judges possess specialized tax expertise. Under current law, however, taxpayers generally may litigate in Tax Court only if the IRS determines they owe more tax and it issues a notice of deficiency. When taxpayers are solely seeking a refund because they believe they overpaid their tax, they are barred from the Tax Court and must litigate in other, less user-friendly, and more costly federal courts.
- *Solution:* Expand the Tax Court's jurisdiction to determine tax liabilities and refunds in refund cases.

### PRESENT LAW

IRC § 7442 defines the jurisdiction of the U.S. Tax Court. IRC § 6212 requires the IRS to issue a “notice of deficiency” before assessing certain liabilities. When the IRS issues a notice of deficiency, IRC § 6213 authorizes the taxpayer to petition the U.S. Tax Court within 90 days (or 150 days if the notice is addressed to a person outside the U.S.) to review the IRS determination.

If a taxpayer does not receive a notice of deficiency and seeks judicial review of an adverse IRS determination, the taxpayer must pay the tax, penalty, or interest and file suit in a U.S. district court or the U.S. Court of Federal Claims. This situation generally arises when the taxpayer is claiming a refund of tax, penalty or interest that has been paid. Taxpayers solely seeking refunds cannot litigate their cases in the Tax Court.

### REASONS FOR CHANGE

Due to the tax expertise of its judges, the Tax Court is often better equipped to consider tax controversies than other courts. It is also more accessible to less knowledgeable and unrepresented taxpayers than other courts because it uses informal procedures, particularly in disputes that do not exceed \$50,000. Another benefit is that low-income taxpayers representing themselves are generally offered the option of receiving free legal assistance from a Low Income Taxpayer Clinic or *pro bono* representative. In most instances, the Tax Court is the least expensive and best forum for low-income taxpayers to get their day in court.

Under current law, taxpayers who owe tax, receive a notice of deficiency, and wish to litigate a dispute with the IRS can file a petition in the Tax Court, while taxpayers who have paid their tax and are seeking a refund must sue for a refund in a U.S. district court or the U.S. Court of Federal Claims for a judicial determination. The National Taxpayer Advocate recommends that all taxpayers bringing refund suits be given the option to litigate their tax disputes in the Tax Court.

Two examples will illustrate the benefits of this approach:

*Example 1:* A taxpayer files a return that reflects a tax liability of \$15,000. The taxpayer had \$12,000 of withholding and pays an additional \$3,000 with the return. Shortly after filing his original return, his preparer discovers an error, and the taxpayer files an amended return showing a tax liability of \$11,000 and claiming a refund of \$4,000. The IRS denies the claim. Under current law, the taxpayer could not go to Tax Court because there is no deficiency (*i.e.*, no tax is due). To litigate his refund claim, the taxpayer would have

to file a refund suit in a U.S. district court or the U.S. Court of Federal Claims to pursue his \$4,000 refund claim. This taxpayer is harmed because refund suits involve greater cost and additional discovery burdens, and they are likely to require representation by an attorney.

*Example 2:* The IRS imposes an assessable penalty on a taxpayer of \$10,000. If the taxpayer unsuccessfully challenged the penalty administratively, the taxpayer will have to pay the penalty and file a refund suit in a U.S. district court or the U.S. Court of Federal Claims. Because no notice of deficiency has been issued in this case, no action could be brought in the Tax Court. Again, the taxpayer would have to pay the higher court fees and would probably have to retain an attorney to successfully dispute the assessment. If the taxpayer could bring her refund suit in the Tax Court, a judge with tax expertise would hear the case and the Tax Court's simplified procedures might allow the taxpayer to represent herself. This may make the difference between the taxpayer having her day in court or agreeing to an assessment simply because the costs of contesting it are too great.

By expanding the Tax Court's jurisdiction, Congress can give all taxpayers a better opportunity to obtain judicial review of adverse IRS liability determinations.

## RECOMMENDATION

- Amend IRC §§ 7442 and 7422 to give the Tax Court jurisdiction to determine liabilities in refund suits to the same extent as the U.S. district courts and the U.S. Court of Federal Claims.<sup>1</sup>

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<sup>1</sup> For a related recommendation that would allow taxpayers to challenge assessable penalties in the Tax Court, see Legislative Recommendation: *Provide That Assessable Penalties Are Subject to Deficiency Procedures*, *supra*. Based on existing law and procedures, the IRS Office of Chief Counsel represents the government in Tax Court cases, and the Justice Department's Tax Division represents the government in cases before a U.S. district court or the U.S. Court of Federal Claims. If the Tax Court's jurisdiction is expanded and some cases shift toward the Tax Court, the number of attorneys representing the government in each agency may require adjustment.

**Legislative Recommendation #44****Authorize the Tax Court to Order Refunds or Credits in Collection Due Process Proceedings Where Liability Is at Issue****SUMMARY**

- *Problem:* In most Tax Court cases, the court has the authority to determine that a taxpayer made an overpayment of tax and order the IRS to allow a refund or credit. Where a taxpayer cannot challenge the IRS's determination of liability before receiving a "collection due process" hearing, however, the Tax Court does not have the authority to order a refund or credit, thereby imposing financial costs and time burdens on taxpayers who must sue for a refund or credit in other federal courts. This also creates judicial inefficiencies by requiring the filing of multiple causes of action.
- *Solution:* Allow the Tax Court to order a refund or credit in all cases in which it is authorized to determine a taxpayer's tax liability.

**PRESENT LAW**

IRC § 6512(b) grants the Tax Court jurisdiction in deficiency suits to determine that a taxpayer made an overpayment of income tax for the period at issue and that such amount must be refunded or credited to the taxpayer.<sup>1</sup> IRC § 6511(a) generally requires a taxpayer to file a claim for credit or refund by the later of three years from the time a return was filed or, if no return was filed, two years from the time the tax was paid.

IRC § 6330 allows a taxpayer to challenge the underlying liability in a Collection Due Process (CDP) proceeding if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability."<sup>2</sup> However, several courts have concluded that the Tax Court in CDP cases, unlike in deficiency cases, does not have jurisdiction to determine the extent to which a taxpayer has made an overpayment and is entitled to a refund or credit.<sup>3</sup>

The reasoning for this conclusion is that section 6330(d)(1) "gives the Tax Court jurisdiction 'with respect to such matter' as is covered by the final determination in a requested hearing before the Appeals Office."<sup>4</sup> The Appeals determination is required to address (1) "the verification ... that the requirements of any applicable law or administrative procedure have been met,"<sup>5</sup> (2) any relevant issues raised by the taxpayer "related to the unpaid tax or the proposed levy" including "the existence or amount of the underlying tax liability" if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability,"<sup>6</sup> and (3) whether the proposed collection action "balances the need for efficient collection of taxes with the legitimate concerns of [the taxpayer] that any collection action be no more intrusive than necessary."<sup>7</sup> Based on these considerations, the Appeals Officer is supposed to make a determination "regarding the legitimacy of the proposed levy [or filing of notice of federal tax lien] and, if

1 IRC § 6401 provides that the term "overpayment" includes "that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto." The Supreme Court has stated that an overpayment occurs "when a taxpayer pays more than is owed, for whatever reason or no reason at all." *United States v. Dalm*, 494 U.S. 596, 609 n.6 (1990). See also *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947).

2 IRC § 6330(c)(2)(B).

3 See *Greene-Thapedi v. Comm'r*, 126 T.C. 1 (2006); *Willson v. Comm'r*, 805 F.3d 316 (D.C. Cir. 2015); *McLane v. Comm'r*, T.C. Memo. 2018-149.

4 *Greene-Thapedi v. Comm'r*, 126 T.C. 1, at 6 (2006).

5 IRC § 6330(c)(1) & 6330(c)(3)(A).

6 IRC § 6330(c)(2) & 6330(c)(3)(B).

7 IRC § 6330(c)(3)(C).

relevant, the amount and/or existence of the unpaid tax liability.”<sup>8</sup> Because the existence or nonexistence of an overpayment is not pertinent to this determination by the Office of Appeals, the court lacks jurisdiction to review the issue.

## REASONS FOR CHANGE

The limitation on the Tax Court’s jurisdiction to determine an overpayment and order a refund in CDP cases prevents taxpayers from obtaining resolution of their tax disputes in a single forum and imposes unnecessary financial and administrative burdens on taxpayers and the court system.

The Tax Court, unlike other federal courts, is a pre-payment forum that ordinarily allows taxpayers to dispute their liabilities without having to first pay them in full. In a CDP proceeding, only taxpayers who did not otherwise have an opportunity to dispute their underlying liabilities are permitted to contest them.

Taxpayers who are allowed to challenge the existence of a liability in CDP can do so because they did not receive a notice of deficiency or did not otherwise have a previous opportunity to dispute the liability. When taxpayers do not “receive a notice of deficiency,” it generally means that either they were issued a notice of deficiency but did not actually receive it, or a type of tax was assessed against them that is not subject to deficiency procedures. A prior opportunity to dispute the liability means a prior opportunity for a conference with Appeals offered either before or after the assessment of the tax.<sup>9</sup> Therefore, if a taxpayer is allowed to challenge the liability in CDP, it means that the taxpayer has not had a prior opportunity to go to court or to Appeals.

Under these circumstances, the inability of the Tax Court to order a refund or credit seems not only unfair but inefficient. For a taxpayer in a CDP proceeding to receive a refund, the taxpayer must fully pay the assessed tax for the taxable year(s) at issue, file a timely administrative refund claim with the IRS under IRC § 6511 and, if the claim is denied, timely file a refund suit in a U.S. district court or the U.S. Court of Federal Claims. It would be much more efficient to allow the taxpayer to claim the refund in the CDP case and to allow the court that is already familiar with the facts of the case to determine whether an overpayment exists.

CDP taxpayers who may challenge the existence or amount of an underlying tax liability pursuant to IRC § 6330(c)(2)(B) should, similar to taxpayers in deficiency proceedings, have the opportunity to obtain a refund in a pre-payment forum, rather than be required to full-pay the asserted liability and then incur additional time and expense to dispute the liability in another forum. Amending IRC § 6330 to explicitly grant the Tax Court the authority to determine overpayments and order refunds in CDP cases will protect taxpayers’ right to finality, reduce taxpayer burden, and better ensure the IRS collects the correct amount of tax. The Tax Court could apply to CDP proceedings its long-established procedures for determining an overpayment in deficiency cases, so new procedures would not be required.

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<sup>8</sup> *Willson v. Comm’r*, 805 F.3d at 316.

<sup>9</sup> Treas. Reg. § 301.6330-1(e)(3), Q&A E2.

**RECOMMENDATION**

- Amend IRC § 6330(d)(1) to grant the Tax Court jurisdiction to determine overpayments for the tax periods at issue and to order refunds or credits in a CDP case, subject to the limitations of IRC §§ 6511(a) and 6512(b)(3), if the court determines that the taxpayer's underlying tax liability for a taxable year is less than the amounts paid or credited for that year.<sup>10</sup>

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<sup>10</sup> Under this proposal, refund claims in CDP cases would continue to be subject to the limitations of IRC §§ 6511(a) and 6512(b)(3). If the claim was filed by the taxpayer within three years from the time a return was filed, the refund would be limited to the amount paid in the three-year period (plus extensions) before the notice of deficiency was mailed and the amount paid after the notice of deficiency was mailed.

**Legislative Recommendation #45****Promote Consistency With the Supreme Court's *Boechler* Decision by Making the Time Limits for Bringing All Tax Litigation Subject to Equitable Judicial Doctrines****SUMMARY**

- *Problem:* The U.S. Supreme Court has held that the U.S. Tax Court may waive the 30-day deadline for filing a petition in a collection due process (CDP) case when it is equitable to do so (*e.g.*, if a taxpayer misses a filing deadline because he has had a heart attack and is temporarily incapacitated). Other provisions of the IRC also contain filing deadlines, but it is not clear whether courts have the authority to waive those deadlines on equitable grounds.
- *Solution:* Clarify that federal courts may waive filing deadlines when it is equitable to do so.

**PRESENT LAW**

Various provisions in the IRC authorize proceedings or suits against the government, provided such actions are brought timely. If a time limit for bringing suit is deemed a jurisdictional requirement, it cannot be waived or forfeited. It is not subject to equitable exceptions that might excuse an untimely filing. IRC § 7442, which relates to the jurisdiction of the U.S. Tax Court, does not specify that prescribed periods for petitioning the Tax Court are jurisdictional.<sup>1</sup>

Equitable doctrines that, if available, might excuse an untimely filing include equitable tolling (applicable when it is unfair to hold a plaintiff to a statutory deadline because of an extraordinary event that impeded the plaintiff's compliance); equitable estoppel (applicable when it is unfair to allow the defendant to benefit from the statutory deadline because of something the defendant did to prevent a timely suit); forfeiture (applicable when the parties have acted as if the case need not operate under the statutory deadlines); and waiver (applicable when the parties have agreed explicitly that a case need not operate under legal deadlines).

The U.S. Supreme Court held in the *Boechler* case that the 30-day time limit in IRC § 6330(d)(1) to file a petition with the U.S. Tax Court for review of a CDP determination is not a jurisdictional requirement.<sup>2</sup> The Court noted that time limits that are not jurisdictional are presumptively subject to equitable tolling and explained that “we treat a procedural requirement as jurisdictional only if Congress ‘clearly states’ that it is.”<sup>3</sup> After parsing the language of IRC § 6330(d)(1), the Court found no such clear statement.

Taxpayers generally bring their actions in the U.S. Tax Court, a U.S. district court, or the U.S. Court of Federal Claims.<sup>4</sup>

1 IRC § 7442 provides in its entirety:

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

2 *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493 (2022), *rev'g and remanding* 967 F.3d 760 (8th Cir. 2020).

3 *Id.* at 1497.

4 Some tax claims may also be heard by U.S. bankruptcy courts. The Supreme Court has held that the three-year lookback period that may qualify a tax liability for discharge in bankruptcy is subject to equitable tolling. *Young v. United States*, 535 U.S. 43, 47 (2002).

## U.S. Tax Court

CDP cases like the one in the *Boechler* case are not the only type of controversy in which taxpayers, by filing a petition in the U.S. Tax Court within a specified period, may litigate their tax liabilities without first paying the tax. Some other examples include deficiency proceedings and “standalone” innocent spouse cases (*i.e.*, where a taxpayer seeks innocent spouse relief in situations other than in response to a notice of deficiency or as part of a CDP proceeding).

IRC § 6213(a) provides that “[w]ithin 90 days . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.” The Supreme Court in *Boechler* acknowledged that lower courts have interpreted the IRC § 6213(a) deadline as jurisdictional and therefore not subject to equitable tolling but noted that “almost all [such lower court cases] predate this Court’s effort to ‘bring some discipline’ to the use of the term ‘jurisdictional.’”<sup>5</sup>

As for IRC provisions imposing time limits for requesting innocent spouse relief in standalone cases, the Supreme Court in *Boechler* noted that IRC § 6015(e)(1)(A) “much more clearly link[s] [its] jurisdictional grant[s] to a filing deadline,” but the Court did not decide whether the time limit is jurisdictional.<sup>6</sup> Prior to *Boechler*, three appellate courts agreed with the U.S. Tax Court and held that the time limit for requesting standalone innocent spouse relief is jurisdictional.<sup>7</sup>

## Other Federal Courts

Sometimes taxpayers may obtain judicial review in federal courts other than the Tax Court if they sue within a specified period. For example, a refund suit can generally be brought in the U.S. district courts or in the U.S. Court of Federal Claims within two years from the date the IRS denies a claim.<sup>8</sup> There is a split among the circuits regarding whether the statutory period for bringing a suit for refund is subject to equitable doctrines.<sup>9</sup>

Similarly, taxpayers may sue in a U.S. district court to enjoin enforcement of a wrongful levy or sale or to recover property (or proceeds from the sale of property) if they do so within a specified period (generally, within two years of levy).<sup>10</sup> Several federal courts have held that the period is not subject to equitable tolling,<sup>11</sup> but at least one appellate court has held that it is.<sup>12</sup>

5 *Boechler*, 142 S. Ct. 1493 (2022). After the Supreme Court issued its decision in the *Boechler* case, however, the Tax Court held that equitable tolling does not apply to deficiency cases. See *Hallmark v. Comm’r*, 159 T.C. No. 6 (2022). It is likely this decision will be appealed.

6 IRC § 6015(e)(1)(A), in relevant part, provides that “[t]he individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed during the 90-day period.” The Court also noted that IRC § 6404(g)(1), which confers Tax Court “jurisdiction over any action . . . to determine whether the Secretary’s failure to abate interest under this section was an abuse of discretion, . . . if such action is brought within 180 days” more clearly links the jurisdictional grant to a filing deadline. *Id.* at 1498.

7 *Naufflett v. Comm’r*, 892 F.3d 649, 652-654 (4th Cir. 2018); *Matuszak v. Comm’r*, 862 F.3d 192, 196-198 (2d Cir. 2017); *Rubel v. Comm’r*, 856 F.3d 301, 306 (3d Cir. 2017).

8 IRC § 6532(a)(1).

9 *Compare RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1460-1463 (Fed. Cir. 1998) (declining to apply equitable principles to IRC § 6532), with *Wagner v. United States*, 353 F. Supp. 3d 1062 (E.D. Wash. 2018) (concluding the time limits set forth in IRC § 6532 are not jurisdictional and, moreover, that plaintiff’s petition was timely filed), and *Howard Bank v. United States*, 759 F. Supp. 1073, 1080 (D. Vt. 1991), *aff’d*, 948 F.2d 1275 (2d Cir. 1991) (applying equitable principles to IRC § 6532 and estopping the IRS from raising the limitations period as a bar to suit).

10 IRC § 6532(c).

11 See *Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 351-354 (3d Cir. 2000), and cases cited therein from four other circuits (holding that the IRC § 6532(c) period is jurisdictional and not subject to equitable tolling).

12 See, e.g., *Volpicelli v. United States*, 777 F.3d 1042, 1047 (9th Cir. 2015) (holding that the IRC § 6532(c) period is subject to equitable tolling); *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204 (9th Cir. 1995) (same).



Taxpayers may also bring suit, if they do so within the specified periods, to seek civil damages in a U.S. district court or bankruptcy court regarding unauthorized actions by the IRS.<sup>13</sup> Courts have differed on whether equitable doctrines can toll the period for bringing suit.<sup>14</sup>

## REASONS FOR CHANGE

The *Boechler* decision clarified that the filing deadline in CDP cases is not jurisdictional, but it did not address whether filing deadlines in other tax cases are jurisdictional. There is inconsistency in lower courts' interpretations of the various statutes that contain filing deadlines in tax cases.

The consequence for failing to commence suit in the Tax Court or another federal court within the time limits prescribed by the IRC is severe: taxpayers lose their day in that court, which may be the only prepayment forum, or the only forum at all, with jurisdiction to hear their claim.

Treating the IRC time limits for bringing suit as jurisdictional – which means that taxpayers who file suit even seconds late are barred from court regardless of the cause – can lead to harsh and unfair results. For example, the IRS itself occasionally provides inaccurate information to taxpayers regarding the filing deadline, and even in that circumstance, the court has declined to hear the taxpayer's case.<sup>15</sup> Other extenuating circumstances may include a medical emergency (*e.g.*, a heart attack or other medical condition that requires a taxpayer to be hospitalized or causes him or her to be in a coma).<sup>16</sup> Moreover, most U.S. Tax Court petitioners do not have representation, and unrepresented taxpayers are less likely to recognize the severe consequences of filing a late petition.

The *right to a fair and just tax system*<sup>17</sup> requires that equitable doctrines be available to excuse a late filing in extenuating circumstances. Taxpayers would still be required to demonstrate that an equitable doctrine applies, and courts could apply the doctrines narrowly. But the National Taxpayer Advocate believes courts should have the flexibility to make those judgments.

<sup>13</sup> IRC §§ 7431(d); 7432(d)(3); 7433(d)(3).

<sup>14</sup> Compare *Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 871-872 (9th Cir. 2009) (holding that the time for bringing suit under IRC § 7431 is not subject to equitable tolling) and *Hynard v. IRS*, 233 F. Supp. 2d 502, 509 (S.D. N.Y. 2002) (holding that the time for bringing suit under IRC § 7433 is not subject to equitable tolling), with *Ramos v. United States*, 90 A.F.T.R.2d (RIA) 7176 (N.D. Cal. 2002) (denying motion to dismiss because doctrine of equitable tolling might apply to an IRC § 7433 action), and *Bennett v. United States*, 366 F. Supp. 2d 877, 879 (D. Neb. 2005) (holding that the application of equitable tolling to IRC §§ 7432 and 7433 actions has not been definitively determined, but it is an extraordinary remedy and did not apply in this case).

<sup>15</sup> See, *e.g.*, *Naufflett*, 892 F.3d at 652-654 (doctrine of equitable tolling did not apply to innocent spouse case despite reliance on alleged erroneous IRS advice regarding the filing deadline); see also *Rubel v. Comm'r*, 856 F.3d 301, 306 (3d Cir. 2017).

<sup>16</sup> In the context of administrative refund claims, the IRC essentially incorporates the doctrine of equitable tolling. Under IRC § 6511(h), a taxpayer in a coma would likely be able to show that he or she was “financially disabled.” In that case, the IRC § 6511 statute of limitation would be suspended for the period during which the taxpayer was financially disabled, giving the taxpayer more time to request a refund even if the deadline for doing so otherwise would have expired. We see no reason why court filing deadlines should provide less flexibility.

<sup>17</sup> See IRC § 7803(a)(3)(J), <https://www.irs.gov/taxpayer-bill-of-rights> (identifying the “right to a fair and just tax system” as a taxpayer right). The Taxpayer Bill of Rights (TBOR) lists rights that already existed in the tax code, putting them in simple language and grouping them into ten fundamental rights. Employees are responsible for being familiar with and acting in accord with TBOR, including the “right to a fair and just tax system.”



## RECOMMENDATION

- Enact a new section of the IRC to clarify that the periods in the IRC within which taxpayers may petition the Tax Court or file suit in other federal courts are not jurisdictional and are subject to equitable judicial doctrines.<sup>18</sup>

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<sup>18</sup> If this change to the IRC is enacted, a late-filed petition in Tax Court would no longer be dismissed for lack of jurisdiction if the taxpayer is able to establish that equitable tolling should apply. That would mean that a dismissal of a petition from a notice of deficiency by the Tax Court due to untimeliness would be treated as a decision on the merits under IRC § 7459(d), and the doctrine of *res judicata* would prevent the taxpayer from pursuing a refund suit. We therefore recommend that IRC § 7459(d) be correspondingly amended to make clear that a dismissal based on untimeliness is not a decision on the merits.

**Legislative Recommendation #46****Extend the Deadline for Taxpayers to Bring a Refund Suit When They Have Requested Appeals Reconsideration of a Notice of Claim Disallowance But the IRS Has Not Acted Timely to Decide Their Claims****SUMMARY**

- *Problem:* When a taxpayer files a claim for credit or refund and the IRS denies it by sending a notice of claim disallowance, the taxpayer may request reconsideration of that disallowance by the IRS's Independent Office of Appeals (Appeals). If Appeals sustains the denial or does not take action, the taxpayer may bring a refund suit in a U.S. district court or the U.S. Court of Federal Claims but must do so within two years of the date on which the notice of claim disallowance was mailed, unless the taxpayer and the IRS both execute an agreement to extend the time to bring a refund suit. *There is no designated method for taxpayers to get the IRS to execute such an agreement, and consideration of the claim by Appeals does not extend this limitation period.*

If the taxpayer doesn't bring a timely refund suit while waiting for the outcome of Appeals' reconsideration of the claim, any refund issued after the period for bringing suit is an erroneous refund, and any credit is considered void. If there are delays in getting a claim to Appeals or in Appeals' reconsideration of the claim, the unsophisticated taxpayer who chooses to wait for the outcome of Appeals' reconsideration may lose out on the refund because the deadline for the taxpayer to bring suit and the deadline for the IRS to pay the refund (or apply the credit) has passed.

- *Solution:* Extend the two-year period within which the taxpayer must bring suit if the taxpayer has timely requested Appeals' reconsideration of a notice of claim disallowance and Appeals has not rendered a decision within two years of the denial of the refund claim.

**PRESENT LAW**

If the IRS denies a taxpayer's claim for refund by issuing a notice of claim disallowance,<sup>1</sup> the taxpayer may bring a suit for refund in a U.S. district court or the U.S. Court of Federal Claims. IRC § 6532(a)(1) requires that a refund suit must be initiated within two years from the date on which the IRS mailed the notice of claim disallowance. IRC § 6514(a)(2) prohibits the IRS from issuing a refund after the two-year period for filing a refund suit expires, unless the taxpayer has brought a timely suit.

IRC § 6532(a)(2) provides that the period for bringing a refund suit may be extended by written agreement between the taxpayer and the IRS. Any extension must be executed by the taxpayer and the IRS before the 2-year period has expired.<sup>2</sup> While a taxpayer may request Appeals' reconsideration of a claim after the IRS has issued a notice of claim disallowance, IRC § 6532(a)(4) specifically provides that such reconsideration does not extend the period to bring a refund suit.

<sup>1</sup> The letters that the IRS most commonly uses to notify a taxpayer that a claim has been disallowed are Letter 105C, Claim Disallowed, and Letter 106C, Claim Partially Disallowed.

<sup>2</sup> Rev. Rul. 71-57, 1971-1 C.B. 405.

## REASONS FOR CHANGE

The strict two-year limitation on bringing a refund suit and the requirement that any refund must be paid within that period poses hazards for tax professionals and unsophisticated taxpayers alike. They may assume that because they are actively pursuing resolution of their claim by Appeals, their rights to file suit and to receive a refund are protected. Many taxpayers are unaware that, under current law, reconsideration of a disallowed claim does not extend the period to file suit under IRC § 6532 or the period within which the IRS is permitted to issue a refund under IRC § 6514. They do not know that if Appeals doesn't complete consideration of their claim within the two-year period after the mailing of the notice of claim disallowance, the IRS is prohibited by IRC § 6514(a)(2) from issuing a refund. This is true even if the IRS agrees that a refund is owed. IRC § 6514(a)(2) even prohibits the IRS from issuing a refund in cases where Appeals has made a determination within the period to file suit but the IRS did not issue the payment or allow the credit during that period.

The IRS created Form 907, Agreement to Extend the Time to Bring Suit, for use in extending the period to bring a refund suit. However, the Form 907 must be countersigned by the IRS, and there is no designated method for taxpayers to submit the form to the IRS to be countersigned.<sup>3</sup>

Current law may inadvertently discourage taxpayers from seeking administrative resolution of disputed issues because of the risk that their refund claims could become time-barred while an appeal is pending. Conversely, it may encourage unnecessary litigation to protect the refund statute of limitations. It is in the interest of all parties to allow the administrative process to play out without jeopardizing the taxpayer's ability to seek judicial review. By allowing the administrative appeal process to reach a conclusion, the taxpayer may avoid the challenges and costs of bringing a lawsuit; the U.S. Department of Justice (which represents the government in refund litigation) may avoid the challenges and costs of defending against a lawsuit; and the federal courts may avoid hearing a case that the taxpayer and the IRS can resolve without judicial involvement.

The National Taxpayer Advocate appreciates the value of statutes of limitations to prevent open-ended claims. But where a taxpayer is working with the IRS to reach an administrative resolution, the period of limitations should not jeopardize the taxpayer's ability to receive a refund or credit or to obtain judicial review of an adverse Appeals determination when the IRS does not act timely. This is particularly true where a taxpayer is timely in requesting review and responding to all document requests, but where Appeals is simply behind on its case inventories or where a case gets lost in transit between different IRS functions. To prevent these inequities, IRC § 6532 should be amended to remove paragraph (a)(4), which provides that any administrative reconsideration of a disallowed claim does not extend the period to file a refund suit. It should be further amended to ensure that where a taxpayer makes a timely request for Appeals' review of a disallowed claim, the period to file a refund suit will not expire for at least six months after the date when Appeals makes a final determination with respect to the taxpayer's claim. If Appeals ultimately denies the taxpayer's claim, this change will give the taxpayer a full six months to decide whether to pursue judicial review and to prepare and file a complaint. If Appeals ultimately allows the taxpayer's claim, this change will give the IRS a full six months to issue the refund or allow the credit.<sup>4</sup>

3 See Erin M. Collins, Notice of Claim Disallowance: Don't Make This Mistake, NATIONAL TAXPAYER ADVOCATE BLOG (Apr. 6, 2022), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-notice-of-claim-disallowance-dont-make-this-mistake>.

4 IRC § 6514(a)(2) prohibits the issuance of a refund after the expiration of the period for filing a refund suit. By amending IRC § 6532(a) to extend the period to file suit, the period within which the IRS may pay a refund or issue a credit under IRC § 6514(a)(2) would similarly be extended.

## RECOMMENDATION

- Amend IRC § 6532(a) to remove subsection (a)(4) and to provide that, where a taxpayer has submitted a written request for reconsideration of a disallowed claim by the IRS's Independent Office of Appeals within two years of the mailing of a notice of claim disallowance, the time to bring a suit for refund shall not expire before the later of (1) the standard two-year period provided in IRC § 6532(a)(1) or (2) six months after the date of the Appeals closing letter.<sup>5</sup>

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<sup>5</sup> On occasion, taxpayers have sought to refresh time-barred claims by filing later claims that are identical or substantially identical. We do not recommend Congress permit such end-runs around the rule, and the courts generally have not allowed them. See *Peretz v. United States*, 148 Fed. Cl. 586, 607 (2020) (“This court and its predecessor courts, as well as courts in other circuits, have long held that repetitively filed claims do not extend the time for which a plaintiff can file suit under 26 U.S.C. § 6532.”) (and cases cited therein). If Congress is concerned about potential abuse, our recommendation could be modified to provide that an extension beyond two years will only be permitted for the first refund claim filed for a tax period.

**Legislative Recommendation #47****Authorize the Tax Court to Sign Subpoenas for the Production of Records Held by a Third Party Prior to a Scheduled Hearing****SUMMARY**

- *Problem:* The Tax Court’s pre-trial discovery powers are more limited than those of other federal courts. As a result, litigants often must attend pre-trial conferences solely to request or obtain books, records and other key documents, and pre-trial discussions may be delayed or impeded, increasing the likelihood cases that otherwise would be settled must go to trial.
- *Solution:* Authorize the Tax Court to issue third-party subpoenas prior to a scheduled hearing.

**PRESENT LAW**

IRC § 7456(a) authorizes the Tax Court to issue subpoenas for the “production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing...” The Tax Court interprets IRC § 7456(a) as permitting it to issue subpoenas to produce documents by a third party only at trial sessions, at depositions, and at pre-trial conferences.<sup>1</sup> The Tax Court does not believe it has the authority to issue a subpoena directing a third party to produce records in advance of a trial session to facilitate pre-trial discovery.

**REASONS FOR CHANGE**

Efficient pre-trial discovery is an important means of limiting litigation and promoting settlement between the parties. Rule 45 of the Federal Rules of Civil Procedure (FRCP) allows for the use of subpoenas to secure pre-trial discovery of documents, including third-party documents to be produced prior to the scheduling of any hearing or deposition. The Tax Court, however, is governed by Tax Court Rules rather than the FRCP. Unlike FRCP Rule 45, the analogous Tax Court rule (Tax Court Rule 147) does not provide for the use of subpoenas to enforce delivery of documents prior to a hearing, such as a deposition or a trial.

The Tax Court’s authority was addressed in *Johnson v. Commissioner*.<sup>2</sup> In that case, the IRS issued a third-party subpoena to Bank of America for the production of documents. The taxpayer assented to the subpoena. Likewise, Bank of America expressed a willingness to comply, but not before the date specified in a properly authorized subpoena.

The IRS filed a motion asking the Tax Court to permit it to issue a subpoena directing Bank of America to produce the requested documents “prior to” the date of the scheduled trial session. The motion stated that obtaining the documents in advance of the scheduled trial might obviate the need for Bank of America to appear at the trial and facilitate settlement discussions with the taxpayer that might eliminate the need for a trial. The Tax Court stated that the IRS’s position was “not unreasonable” and that production of the documents might benefit all parties. Nevertheless, it concluded that it lacked the authority to issue such a subpoena. Under IRC § 7456(a), the Tax Court concluded it could only authorize a third-party subpoena for the production of documents on the hearing date.

<sup>1</sup> *Johnson v. Comm’r*, Docket No. 17324-18 (T.C. Dec. 26, 2019).

<sup>2</sup> *Id.* During the COVID-19 pandemic, the Tax Court held remote (virtual) sessions, and as part of the rules governing remote proceedings, it allowed parties to subpoena third-party witnesses to produce documents via a remote document subpoena hearing at a date in advance of the remote trial. U.S. Tax Court, *Subpoenas for Remote Proceedings* (Aug. 27, 2020), [https://www.ustaxcourt.gov/resources/zoomgov/subpoenas\\_for\\_remote\\_proceedings.pdf](https://www.ustaxcourt.gov/resources/zoomgov/subpoenas_for_remote_proceedings.pdf). As the pandemic has waned, the court is discontinuing remote sessions. It does not appear the court is applying these procedures to in-person sessions.

Recognizing the potential benefits arising from earlier document delivery, the Tax Court's order discussed several workarounds the litigants could employ to secure the documents before trial. The National Taxpayer Advocate believes this should not be necessary. There is no good reason the authority of the Tax Court should be more limited than the authority of other federal courts to issue subpoenas that would allow the parties to engage in pre-trial discovery to resolve or narrow issues without the need for judicial involvement.

## RECOMMENDATION

- Amend IRC § 7456(a) to expand the authority of the Tax Court to issue subpoenas directing the production of records held by a third party prior to a scheduled hearing.<sup>3</sup>

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<sup>3</sup> A similar recommendation was proposed on the Procedurally Taxing blog in January 2020. See William Schmidt, *Serving Subpoenas: Designated Orders 12/23/19 to 12/27/19*, PROCEDURALLY TAXING, <https://procedurallytaxing.com/serving-subpoenas-designated-orders-12-23-19-to-12-27-19/> (Jan. 29, 2020).

**Legislative Recommendation #48****Provide That the Scope of Judicial Review of “Innocent Spouse” Determinations Under IRC § 6015 Is *De Novo*****SUMMARY**

- *Problem:* If the IRS denies a taxpayer’s request for equitable innocent spouse relief, the taxpayer may request judicial review of the IRS’s denial, but in doing so, the taxpayer is generally prohibited from presenting evidence to a judge that the taxpayer did not previously present to the IRS unless the evidence is “newly discovered.” This is true even if the requesting spouse was subjected to domestic violence or psychological abuse that caused him or her not to present the evidence to the IRS. This limitation on introducing evidence can prevent taxpayers who otherwise qualify for innocent spouse relief from receiving it. It can fall particularly hard on unrepresented taxpayers who did not understand this requirement when they were dealing with the IRS.
- *Solution:* Revise IRC § 6015 to allow courts to consider all relevant evidence in reviewing equitable innocent spouse cases.

**PRESENT LAW**

Taxpayers who file joint federal income tax returns are jointly and severally liable for any deficiency or tax due in connection with their joint returns. IRC § 6015, sometimes referred to as the “innocent spouse” rules, provides relief from joint and several liability under certain circumstances. If “traditional” relief from a deficiency is unavailable under subsection (b) and “separation of liability” from a deficiency is unavailable under subsection (c), a taxpayer may qualify for “equitable” relief from deficiencies and underpayments under subsection (f). Relief under IRC § 6015(f) is appropriate when, considering all the facts and circumstances of a case, it would be inequitable to hold a joint filer liable for the unpaid tax or deficiency. If the IRS denies relief under any subsection of IRC § 6015 or a request for relief has gone unanswered for six months, the taxpayer may file a petition with the U.S. Tax Court.

In recent years, there has been uncertainty regarding both the scope of review and the standard of review that the Tax Court should apply in innocent spouse cases. In 2008, the Tax Court held that the scope of its review in IRC § 6015(f) cases, like its review in IRC § 6015(b) and (c) cases, is *de novo*, meaning it may consider evidence introduced at trial that was not included in the administrative record.<sup>1</sup> In 2009, the Tax Court held that the standard of review in IRC § 6015(f) cases is also *de novo*, meaning that the Tax Court will consider the case anew, without deference to the IRS’s determination.<sup>2</sup>

In 2009, the IRS Office of Chief Counsel (Chief Counsel) issued guidance to its attorneys instructing them to argue, contrary to the Tax Court’s holdings, that review in all IRC § 6015(f) cases is limited to issues and evidence presented before the IRS Appeals or Examination functions and that the proper standard of review is “abuse of discretion.”<sup>3</sup> In 2011, the National Taxpayer Advocate recommended that Congress amend IRC § 6015 to reflect the Tax Court’s holdings and reject the IRS’s position.

In June 2013, following an appellate court decision affirming the Tax Court’s holdings, Chief Counsel issued guidance instructing its attorneys to cease arguing that the scope and standard of review in IRC § 6015(f)

1 *Porter v. Comm’r*, 130 T.C. 115 (2008).

2 *Porter v. Comm’r*, 132 T.C. 203 (2009) (a continuation of the same case that produced the 2008 holding, discussed above, that Tax Court’s review of denials of relief under IRC § 6015(f) is not limited to the administrative record).

3 IRS Chief Counsel Notice CC-2009-021, Litigating Cases Involving Claims for Relief From Joint and Several Liability Under Section 6015(f): Scope and Standard of Review (June 30, 2009).



cases are not *de novo*.<sup>4</sup> In June 2013, Chief Counsel also issued an Action on Decision stating that although the IRS disagrees that IRC § 6015(e)(1) provides for both a *de novo* standard of review and a *de novo* scope of review, the IRS would no longer argue that the Tax Court should limit its review to the administrative record or review IRC § 6015(f) claims solely for an abuse of discretion.<sup>5</sup>

In 2019, Congress added paragraph (7) to IRC § 6015(e). It provides that “any review of a determination made under this section is *de novo* by the Tax Court.”<sup>6</sup> However, this *de novo* review is limited to consideration of “(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence.” The provision does not define the terms “newly discovered” or “previously unavailable.”

## REASONS FOR CHANGE

IRC § 6015(e)(7), which limits the Tax Court’s scope of review, applies to determinations made “under this section” (*i.e.*, IRC § 6015). Thus, the provision supersedes Tax Court jurisprudence regarding the review not only in IRC § 6015(f) cases, but also in cases involving the application of IRC § 6015(b) and (c).

The provision may be intended to encourage the IRS and taxpayers to compile a complete administrative record or resolve cases without litigation. In some cases, however, taxpayers – and particularly taxpayers not represented by counsel – may not appreciate the significance of certain evidence or the consequences of failing to present it to the IRS. In other cases, taxpayers may present relevant evidence during trial to a neutral third party – the judge – that they are reluctant to share with the IRS, such as evidence of the other joint filer’s domestic violence or abuse.<sup>7</sup>

It is difficult to imagine a state law that bars victims of domestic violence from introducing evidence at trial that goes beyond what they initially told police and was included in police records. The requirement that the Tax Court generally limit itself to considering evidence included in the administrative record – even where the requesting spouse suffered from domestic violence and otherwise meets the innocent spouse requirements – is similarly wrong.

Under the current rule, some taxpayers could be deprived of meaningful Tax Court review, particularly taxpayers who filed Tax Court petitions when their requests for relief went unanswered for six months. In these cases, the administrative record may consist of little more than the taxpayer’s skeletal responses to the information solicited by Form 8857, Request for Innocent Spouse Relief, and the IRS may argue that the taxpayer’s evidence is not “newly discovered” or “previously unavailable.”<sup>8</sup> If the IRS argues under IRC § 6015(e)(7) that the taxpayer’s evidence should not be considered because it was available but not presented when the IRS made its determination and the Tax Court accepts this argument, the court may

4 IRS Chief Counsel Notice CC-2013-011, Litigating Cases That Involve Claims for Relief From Joint and Several Liability Under Section 6015 (June 7, 2013).

5 Action on Decision (AOD) 2012-07, I.R.B. 2013-25 (June 17, 2013), issued in response to *Wilson v. Comm’r*, 705 F.3d 980 (9th Cir. 2013), *aff’g* T.C. Memo. 2010-134. An AOD is a formal memorandum prepared by Chief Counsel that announces the litigation position the IRS will take in the future regarding the issue addressed in the AOD.

6 Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981 (2019). In other cases, such as where a taxpayer raises innocent spouse as a defense in a deficiency case, the Tax Court’s scope and standard of review will continue to be *de novo*. See *Eze v. Comm’r*, No. 17486-19S (T.C. Jan. 21, 2022), a non-precedential case in which the court relied on *Porter v. Comm’r*, 132 T.C. 203 (2009).

7 Abuse that prevented a taxpayer from challenging the treatment of an item on a joint return out of fear the other spouse might retaliate would weigh in favor of granting relief. *Stephenson v. Comm’r*, T.C. Memo. 2011-16, is an example of a case in which the Tax Court’s finding that the petitioner was physically and verbally abused by her husband was largely based on evidence produced at trial because the issue of abuse was not fully developed administratively.

8 Chief Counsel has not issued formal guidance to its attorneys about what arguments to make in cases in which IRC § 6015(e)(7) may apply.

decide the case *de novo* based solely on the scant evidence contained in the administrative record.<sup>9</sup> To enable the Tax Court to make the correct decision based on the merits, the National Taxpayer Advocate believes the court should be permitted to consider all evidence, whether or not it could have been provided to the IRS in a prior administrative proceeding.

Finally, some taxpayers who wish to obtain review by a federal court that is *de novo* in scope may pay the asserted tax and bring a refund suit before a U.S. district court or the U.S. Court of Federal Claims. But this approach carries the risk that these courts may conclude they lack jurisdiction to hear innocent spouse claims.<sup>10</sup> To address these cases, and in recognition that innocent spouse claims often follow domestic violence or emotional abuse, the National Taxpayer Advocate recommends the statute be amended to allow all courts with jurisdiction to consider all relevant evidence in IRC § 6015 cases.

## RECOMMENDATION

- Remove IRC § 6015(e)(7)(A) and (B) and revise IRC § 6015(e)(7) to provide: “The standard and scope of any review of a determination made under this section by the Tax Court or other court of competent jurisdiction shall be *de novo*.”<sup>11</sup>

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9 Where the IRS does not answer a taxpayer’s request for relief for more than six months, the court may remand the case and direct the IRS to do so, which may prolong resolution of the case.

10 The National Taxpayer Advocate recommends that Congress address this risk. See *Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection, Bankruptcy and Refund Cases, infra*.

11 This recommendation averts the possibility that the language in IRC § 6015(e)(7) that “[a]ny review of a determination under this section shall be reviewed *de novo* by the Tax Court” could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would preclude innocent spouse relief in collection, bankruptcy, and refund cases litigated in other federal courts and would be inconsistent with IRC § 6015(e)(1)(A) (conferring Tax Court jurisdiction “in addition to any other remedy provided by law”). Such an interpretation would also be inconsistent with the legislative recommendation *Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection, Bankruptcy and Refund Cases, infra*.

**Legislative Recommendation #49****Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection, Bankruptcy, and Refund Cases****SUMMARY**

- *Problem:* Some federal courts have allowed taxpayers to make requests for innocent spouse relief in collection, bankruptcy, and refund cases, while others have not. As a result, similarly situated taxpayers are treated inconsistently, and some taxpayers are left without any forum in which to seek innocent spouse relief before a court enters a financially damaging judgment.
- *Solution:* Clarify that U.S. district courts, bankruptcy courts, and the U.S. Court of Federal Claims have jurisdiction to grant innocent spouse relief in collection, bankruptcy, and refund cases.

**PRESENT LAW**

Married taxpayers who file joint returns are jointly and severally liable for any deficiency or tax due. Spouses who live in community property states and file separate returns are generally required to report half the community income on their separate returns. As an exception, IRC §§ 6015 and 66, sometimes referred to as the “innocent spouse” rules, provide relief from joint and several liability and from the operation of community property rules. Taxpayers seeking innocent spouse relief generally must file Form 8857, Request for Innocent Spouse Relief. After reviewing the request, the IRS issues a final notice of determination granting or denying relief in whole or in part.

If a taxpayer files a petition within 90 days from the date the IRS issues its final notice of determination, the U.S. Tax Court has jurisdiction to determine the appropriate relief. The Tax Court’s jurisdiction to decide innocent spouse claims does not appear to be exclusive; IRC § 6015(e)(1)(A) provides that an individual may petition the Tax Court for review of an innocent spouse determination “in addition to any other remedy provided by law.”

The Tax Court is the only prepayment judicial forum in which a taxpayer may obtain review of an adverse IRS determination. However, there is no right to a jury trial in Tax Court. Moreover, while the standard of review of a denial of a claim for innocent spouse relief under IRC § 6015 is *de novo*, the scope of the Tax Court’s review is limited to “(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence.”<sup>1</sup>

The Tax Court does not have jurisdiction over collection suits arising under IRC §§ 7402 or 7403, over bankruptcy proceedings arising under Title 11 of the United States Code, or over refund suits arising under IRC § 7422. Some federal courts with jurisdiction in these cases have considered taxpayers’ innocent spouse claims, which is consistent with IRC § 6015(e)(1)(A).<sup>2</sup>

<sup>1</sup> IRC § 6015(e)(7). This provision was enacted as part of the Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981, 988 (2019). The National Taxpayer Advocate recommends revising IRC § 6015(e)(7) to remove this limitation on the Tax Court’s scope of review. See *Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is De Novo*, *supra*.

<sup>2</sup> See, e.g., *United States v. Diehl*, 460 F. Supp. 1282 (S.D. Tex. 1976), *aff’d per curiam*, 586 F.2d 1080 (5th Cir. 1978) (IRC § 7402 suit to reduce an assessment to judgment); *In re Pendergraft*, 119 A.F.T.R.2d (RIA) 1229 (Bankr. S.D. Tex. 2017) (bankruptcy proceeding); *In re Bowman*, 129 A.F.T.R.2d (RIA) 909 (Bankr. E.D. La. 2022) (bankruptcy proceeding); and *Hockin v. United States*, 400 F. Supp. 3d 1085, 1092 n.2 (D. Or. 2019) (refund suit).

However, other federal courts have held that the Tax Court’s jurisdiction to decide innocent spouse claims is exclusive and have declined to consider such claims in collection, bankruptcy, and refund cases.<sup>3</sup>

## REASONS FOR CHANGE

Inconsistent decisions about whether taxpayers may seek innocent spouse relief in collection, bankruptcy, and refund cases have created confusion and resulted in different treatment of similarly situated taxpayers. In addition, treating the Tax Court as having exclusive jurisdiction over innocent spouse claims may create economic hardships. If the federal courts that decide collection, bankruptcy, and refund cases cannot consider innocent spouse claims, taxpayers in those cases may be left without any forum in which to seek innocent spouse relief before a court enters a financially damaging judgment or, in rare cases, a taxpayer loses his or her home to foreclosure. At the same time, taxpayers forced to raise their innocent spouse claims in Tax Court will be deprived of a *de novo* scope of review that would be available in other federal courts.

Legislation is needed to clarify that the statutory language of IRC § 6015, which confers Tax Court jurisdiction “in addition to any other remedy provided by law,” does not give the Tax Court exclusive jurisdiction to determine innocent spouse claims and that U.S. district courts, bankruptcy courts, and the U.S. Court of Federal Claims may also consider whether innocent spouse relief should be granted.<sup>4</sup>

## RECOMMENDATION

- Amend IRC §§ 6015 and 66 to clarify that taxpayers are entitled to raise innocent spouse relief as a defense in proceedings brought under any provision of Title 26 (including §§ 6213, 6320, 6330, 7402, 7403, and 7422) and in cases arising under Title 11 of the United States Code.

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3 *United States v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (S.D. Cal. 2007) (IRC § 7402 suit to reduce an assessment to judgment); *United States v. Cawog*, 97 A.F.T.R.2d (RIA) 3069 (W.D. Pa. 2006) (IRC § 7403 suit to foreclose on federal tax liens); *In re Mikels*, 524 B.R. 805 (Bankr. S.D. Ind. 2015) (bankruptcy proceeding); and *Chandler v. United States*, 338 F. Supp. 3d 592 (N.D. Tex. 2018) (refund suit).

4 As noted above, IRC § 6015(e)(7) provides that “[a]ny review of a determination under this section shall be reviewed *de novo* by the Tax Court.” The National Taxpayer Advocate agrees that the standard and scope of Tax Court review of innocent spouse cases should be *de novo*. However, the new provision could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would be inconsistent with IRC § 6015(e)(1)(A). For this reason, the National Taxpayer Advocate recommends clarifying that the scope and standard of review are *de novo* in innocent spouse cases adjudicated by the Tax Court “or other court of competent jurisdiction,” thereby avoiding the inference that the Tax Court has exclusive jurisdiction over and innocent spouse claims. See *Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is De Novo*, *supra*.

**Legislative Recommendation #50****Fix the Donut Hole in the Tax Court’s Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions****SUMMARY**

- *Problem:* A “donut hole” in the Tax Court’s jurisdiction may prevent it from reviewing some refund claims. This unusual situation arises when taxpayers overpay their tax obligations, request a six-month filing extension, do not file a return, and later receive a notice of deficiency. The Tax Court’s unclear authority to review these refund claims harms taxpayers, whose recourse to judicial oversight should not be limited because of ambiguity in the statutory framework governing Tax Court jurisdiction.
- *Solution:* Amend IRC § 6512(b)(3) so the Tax Court has clear jurisdiction to review refund claims by taxpayers affected by the current donut hole.

**PRESENT LAW**

IRC § 6511(a) provides that the limitations period for filing a claim for refund generally expires two years after paying the tax or three years after filing the return, whichever is later. The amount a taxpayer can recover is limited to amounts paid within the applicable lookback period provided by IRC § 6511(b)(2). If the claim was filed within three years of the return, then the lookback period is three years, plus any filing extension. If the claim wasn’t filed within three years of the return or the taxpayer never filed a return, the lookback period is two years.

When a taxpayer does not file a return, the IRS sometimes sends a notice of deficiency to assess additional tax. A notice of deficiency gives the taxpayer the right to petition the United States Tax Court, and if the taxpayer timely does so, then the Tax Court generally has jurisdiction under IRC § 6512(b) to determine whether the taxpayer is due a refund for the tax year at issue, provided the tax was paid within the applicable lookback period under IRC § 6511(b). Under IRC § 6512(b), if the taxpayer did not file a return before receiving the notice of deficiency, the date on the notice of deficiency becomes the hypothetical date of the taxpayer’s refund claim, and the two- or three-year lookback period in IRC § 6511(b)(2) runs from the date the IRS mailed the notice of deficiency. Absent a special rule, the Tax Court would have no jurisdiction to award refunds to non-filers who are issued a notice of deficiency more than two years after paying the tax.

However, the flush language of IRC § 6512(b)(3) provides just such a rule. It says that certain taxpayers who do not file a tax return are entitled to a three-year look-back period. Before Congress amended IRC § 6512 to add this special rule, a taxpayer who had not filed a return before the IRS mailed a notice of deficiency was entitled only to a two-year lookback period. But Congress, seeking to extend the lookback period available to such non-filing taxpayers, provided that if a notice of deficiency is mailed “during the third year after the due date (with extensions) for filing the return,” and if no return was filed before the notice of deficiency was mailed, the lookback period is three years.

This special rule contains an unintended glitch. In the case of a non-filer who had requested an extension of time to file and then received a notice of deficiency, the words “with extensions” could delay by six months the beginning of the “third year after the due date.” As a result, if the IRS mailed a notice of deficiency before the beginning of the third year, the Tax Court would not have jurisdiction to look back more than two years from the mailing of the notice of deficiency, and thus would not be able to consider any overpayment that had been paid on the original due date of the return, usually April 15. Thus, there is a six-month “donut hole” during which the IRS can send a notice of deficiency without triggering the Tax Court’s jurisdiction to consider the taxpayer’s claim for refund.

*Example:* John Doe had made estimated tax payments in excess of his tax liability by April 15, 2016,<sup>1</sup> the original filing deadline for a 2015 tax return. He had requested a six-month extension of time to file but did not file a return. On July 2, 2018, the IRS mailed him a notice of deficiency for the 2015 tax year. He responded to the notice by petitioning the Tax Court and explaining the notice was incorrect because he had paid the asserted deficiency. He then filed a tax return showing he had overpaid his tax and was due a refund. Because Mr. Doe did not file a return, IRC § 6512 only permits the Tax Court to refund payments made within two years of the date on the notice of deficiency, without regard to extensions (*i.e.*, for taxes paid on or after July 2, 2016). This rule would not help Mr. Doe because he paid his taxes on April 15, 2016, which is more than two years before the date the notice of deficiency was mailed on July 2, 2018.

The special rule provided by the flush language of IRC § 6512 would also not help Mr. Doe, because it would only apply if the IRS had mailed the notice of deficiency during the third year after the due date of his return (with extensions) (*i.e.*, the year beginning after October 15, 2018). Because the IRS mailed his notice of deficiency before the third year had begun, the special rule did not apply, and John Doe could not get his refund.

## REASONS FOR CHANGE

According to the legislative history, Congress enacted the special rule of IRC § 6512(b)(3) to put non-filers who receive notices of deficiency after the two-year lookback period on the same footing as taxpayers who file returns before the IRS mails the notice of deficiency. The special rule was supposed to allow non-filers “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 3-year period prior to the date of the deficiency notice.”<sup>2</sup>

However, the statute as written may not fix the problem it was enacted to solve. In *Borenstein*, the Tax Court concluded that it had no jurisdiction to determine a non-filer’s overpayment because the non-filer had requested a six-month extension to file and the IRS mailed the notice of deficiency during the first six months of the third year following the original due date — after the second year following the due date (without extensions) and before the third year following the due date (with extensions).<sup>3</sup> Thus, the court found that the special rule of IRC § 6512(b)(3) leaves a donut hole in its jurisdiction. Although the U.S. Court of Appeals for the Second Circuit reversed the Tax Court’s decision, the Tax Court is not required to follow the Second Circuit’s decision in cases arising in other circuits.<sup>4</sup> Thus, unless the Tax Court revisits its decision, a legislative fix is still needed.

Although this problem only affects the relatively limited number of taxpayers who request a six-month filing extension and then, for whatever reason, do not file a return before receiving a notice of deficiency, Congress felt it was important to provide non-filers with this special rule. We believe it is important to highlight this unintended result and recommend a solution.

1 Under IRC § 6513(b)(2), for a calendar-year taxpayer, estimated taxes are deemed paid on April 15 in the year following the close of the tax year to which the tax is allowable as a credit.

2 H.R. REP. No. 105-220, at 701 (1997) (CONF. REP.).

3 *Borenstein v. Comm’r*, 149 T.C. 263 (2017), *rev’d*, 919 F.3d 746 (2d Cir. 2019). See also *O’Connell v. Comm’r*, No. 6587-20 (T.C. May 20, 2021) (settled in accordance with the *Borenstein* precedent).

4 *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971).

**RECOMMENDATION<sup>5</sup>**

- Amend IRC § 6512(b)(3) to clarify that when the IRS mails a notice of deficiency to a non-filer after the second year following the due date of the return (without regard to extensions), the lookback period for filing a claim for refund or credit is three years (plus the period of any extension of time for filing a return) from the date of the notice of deficiency.

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5 For more detail, see National Taxpayer Advocate 2018 Annual Report to Congress (Legislative Recommendation: *Tax Court Jurisdiction: Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18\\_Volume1\\_LR\\_05\\_TaxCourt.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_LR_05_TaxCourt.pdf); Nina E. Olson, *The Second Circuit in Borenstein Helped to Close the Gap in the Tax Court's Refund Jurisdiction, but Only for Taxpayers in that Circuit*, NATIONAL TAXPAYER ADVOCATE BLOG, <https://www.taxpayeradvocate.irs.gov/news/ntablog-the-second-circuit-in-borenstein-helped-to-close-the-gap-in-the-tax-courts-refund-jurisdiction-but-only-for-taxpayers-in-that-circuit/> (Apr. 24, 2019). This recommendation could be implemented by revising the flush language in IRC § 6512(b)(3) to insert the word “original” before “due date” and striking the parenthetical phrase “(with extensions).”