

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, receive a six-month filing extension but do not file a return, and later receive a notice of deficiency from the IRS. The Tax Court’s jurisdiction to review refund claims in these circumstances is uncertain, which harms taxpayers.
- *Solution:* Amend IRC § 6512(b)(3) to clarify that the Tax Court has jurisdiction to review refund claims by taxpayers affected by the existing “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 is filed within three years of the return, the lookback period is three years, plus any filing extension. If the claim is not 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 U.S. Tax Court. If the taxpayer files a timely petition, 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 in IRC § 6511(b). Pursuant to 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 not have jurisdiction to award refunds to non-filers who are issued a notice of deficiency more than two years after paying the tax.

In 1997, Congress sought to provide such a rule. It added flush language to IRC § 6512(b)(3) to extend the lookback period from two years to three years for non-filing taxpayers, provided the IRS mailed the notice of deficiency “during the third year after the due date (with extensions) for filing the return” and the taxpayer did not file a return before the notice of deficiency was mailed.¹

However, this special rule created an unintended glitch that has created a jurisdictional “donut hole.” The words “with extensions” can delay by six months the beginning of the “third year after the due date” for non-filers who received filing extensions but do not file and who then receive a notice of deficiency from the IRS. As a result, when the IRS mails a notice of deficiency before the third year begins, the Tax Court would not have jurisdiction to look back more than two years from the mailing date of the notice, 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). This unintended glitch opens a six-month “donut hole” during which the IRS can send deficiency notices to taxpayers without triggering the Tax Court’s jurisdiction to consider taxpayer refund claims.

¹ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1282(a), 111 Stat. 788, 1037 (1997).

REASONS FOR CHANGE

The Tax Court’s jurisdiction is limited to the authority Congress specifically confers. 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.”²

However, the statute as written may not fix the problem it was enacted to solve. In *Borenstein*, the Tax Court concluded that it lacked jurisdiction to determine a non-filer’s overpayment because the non-filer had requested a six-month extension to file and the IRS had mailed the notice of deficiency during the first six months of the third year following the original due date – *i.e.*, after the second year following the due date (without extensions) and before the third year following the due date (with extensions).³ Consequently, the Tax Court found a “donut hole” in its jurisdiction despite the special rule Congress included in IRC § 6512(b)(3). 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.⁴ Thus, unless the Tax Court revisits its precedent, a legislative fix is still needed.

Although this problem affects a relatively limited number of taxpayers, Congress felt it was important to solve the problem by enacting this special rule for certain non-filing taxpayers. The National Taxpayer Advocate believes it is important to highlight the unintended glitch created by the special rule and recommend a solution.⁵

RECOMMENDATION

- 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.⁶

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).

⁵ For more detail, see 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 (Apr. 24, 2019), <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>.

⁶ 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).”