STRENGTHEN TAXPAYER RIGHTS IN JUDICIAL PROCEEDINGS

Legislative Recommendation #43

Expand the U.S. 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 because payment is not a requirement for jurisdiction, the judges possess specialized tax expertise, and taxpayers can represent themselves more easily than in other federal courts. However, taxpayers generally may litigate their tax liabilities in Tax Court only when the IRS determines a taxpayer owes more tax and issues a notice of deficiency. Taxpayers who are solely seeking refunds because they believe they overpaid their tax are barred from the Tax Court and must litigate their claims 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(a) 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 United States) 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 of monies already paid 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 offers simplified and less formal procedures, particularly for 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 have their day in court.

Under current law, taxpayers who receive a notice of deficiency and wish to challenge the IRS's proposed adjustment 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 to obtain a judicial determination.

Example: 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 the original return, the taxpayer's 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 cannot go to Tax Court because there is no deficiency (*i.e.*, the IRS has not determined that any additional tax is due). To pursue the $4,000 refund claim, the taxpayer will have to file a refund suit in a U.S. district court or the U.S. Court of Federal Claims. This law harms taxpayers because a refund suit is a more formal court proceeding that involves greater cost and generally requires representation by an attorney.

The National Taxpayer Advocate recommends that all taxpayers bringing refund suits be given the option to litigate their tax disputes in the Tax Court. 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.[1]

1 For a related recommendation that would allow taxpayers to challenge assessable penalties in the Tax Court, see *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 U.S. district court and the U.S. Court of Federal Claims cases. 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 U.S. 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 provide a refund or credit. Where the Tax Court considers the IRS's determination of liability in a Collection Due Process (CDP) hearing, however, the Tax Court does not have the authority to order a refund or credit – even where the taxpayer did not have a prior opportunity to challenge the liability. This restriction on the Tax Court's authority imposes financial costs and time burdens on taxpayers who must sue for a refund or credit in other federal courts. It 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

In deficiency cases, IRC § 6512(b) grants the Tax Court jurisdiction 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.[1] 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.

In CDP proceedings, IRC § 6330 allows a taxpayer to challenge their underlying 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."[2] 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.[3]

The reasoning for this conclusion is that IRC § 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."[4] The Appeals determination is required to address (1) "the verification … that the requirements of any applicable law or administrative procedure have been met,"[5] (2) any relevant issues raised by the taxpayer "relating 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,"[6] 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."[7] 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

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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, *aff'd*, 24 F.4th 316 (4th Cir. 2022); *Brown v. Comm'r*, 58 F.4th 1064 (9th Cir. 2023), *aff'g* T.C. Memo. 2021-112.

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

5 IRC § 6330(c)(1), (c)(3)(A).

6 IRC § 6330(c)(2), (c)(3)(B).

7 IRC § 6330(c)(3)(C).

relevant, the amount and/or existence of the unpaid tax liability."[8] Because the existence or nonexistence of an overpayment is not pertinent to this determination by the Office of Appeals, the courts have reasoned the Tax 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 prepayment forum that ordinarily allows taxpayers to dispute their liabilities without first having to pay them in full. In CDP proceedings, 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 proceedings can do so because they did not receive a notice of deficiency or 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.[9] 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 prepayment 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.[10] 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.

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.[11]

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8 *Willson v. Comm'r*, 805 F.3d at 316.

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

10 *See also* Carlton M. Smith, *Give the Tax Court Full Refund Jurisdiction*, Procedurally Taxing (June 7, 2024), https://www.taxnotes.com/procedurally-taxing/give-tax-court-full-refund-jurisdiction/2024/06/07/7k9bg.

11 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 Tax Court may toll the 30-day deadline for filing a petition in a Collection Due Process (CDP) case when it is equitable to do so (*e.g.*, when a taxpayer misses a filing deadline because he has had a heart attack and is temporarily incapacitated). However, the tax code contains other filing deadlines, including deadlines in deficiency cases and deadlines in refund cases, and it is not clear whether courts have the authority to toll those deadlines on equitable grounds.

- *Solution:* Clarify that federal courts may toll filing deadlines in tax cases when it is equitable to do so.

PRESENT LAW

Various provisions of the tax code 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. IRC § 7442, which relates to the jurisdiction of the Tax Court, does not specify that prescribed periods for petitioning the Tax Court are jurisdictional.[1] IRC § 7451(b) provides a *statutory* tolling rule for the filing of petitions in any case in which a filing location is inaccessible or otherwise unavailable to the general public on the date a petition is due, but it does not address whether the period for filing a petition is subject to *equitable* tolling by the courts.

Equitable doctrines that, if available, might excuse an untimely filing include (1) equitable tolling (applicable when it is unfair to hold a plaintiff/petitioner to a statutory deadline because of facts and circumstances that unduly impeded the plaintiff's/petitioner's compliance); (2) forfeiture (applicable when the parties have acted as if the case need not operate under the statutory deadlines); and (3) waiver (applicable when the parties have agreed explicitly that a case need not operate under legal deadlines).

In the *Boechler* case, the Supreme Court held that the 30-day time limit in IRC § 6330(d)(1) to file a petition with the Tax Court for review of a CDP determination is not a jurisdictional requirement.[2] 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."[3] After parsing the language of IRC § 6330(d)(1), the Court found no such clear statement. The Court further held that the 30-day period in IRC § 6330(d)(1) is subject to equitable tolling.[4]

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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*, 596 U.S. 199 (2022), *rev'g and remanding* 967 F.3d 760 (8th Cir. 2020).

3 *Id.* at 203.

4 *Id.* at 208-211.

Taxpayers generally bring their actions in the U.S. Tax Court, a U.S. district court, or the U.S. Court of Federal Claims.[5]

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 Tax Court within a specified period, may litigate their tax liabilities without first paying the tax. Other examples include deficiency proceedings and "stand-alone" 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.'"[6] After the Supreme Court decided the *Boechler* case, the Tax Court held that equitable tolling does not apply to deficiency cases.[7] In a separate case, however, the Third Circuit disagreed and held that the IRC § 6213(a) deadline is not jurisdictional and is subject to equitable tolling.[8]

As for tax code provisions imposing time limits for petitioning the Tax Court to determine the appropriate innocent spouse relief in stand-alone 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.[9] Prior to *Boechler*, three appellate courts agreed with the Tax Court and held that the time limit for requesting stand-alone innocent spouse relief is jurisdictional.[10]

Other Federal Courts

Taxpayers seeking refunds may obtain judicial review in federal courts other than the Tax Court if they sue within a specified period. A refund suit can generally be brought in a U.S. district court or in the U.S. Court of Federal Claims within two years from the date the IRS denies a claim.[11] There is a split among the circuits regarding whether the statutory period for bringing a suit for refund is subject to equitable doctrines.[12]

Similarly, parties other than the taxpayers with an interest in or lien on levied property 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

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5 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).

6 *Boechler*, 596 U.S. at 208.

7 *Hallmark Res. Collective v. Comm'r*, 159 T.C. 126 (2022).

8 *Culp v. Comm'r*, 75 F.4th 196 (3d Cir. 2023).

9 IRC § 6015(e)(1)(A) provides, in relevant part, 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. *Boechler*, 596 U.S. at 206.

10 *Nauflett 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).

11 IRC § 6532(a)(1).

12 *Compare RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1460-1463 (Fed. Cir. 1998) (declining to apply equitable principles to IRC § 6532), *and Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340 (3d Cir. 2000) (finding time limits set forth in IRC § 6532 are jurisdictional and not subject to equitable tolling), *with Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015) (concluding the time limits set forth in IRC § 6532 are not jurisdictional and are subject to equitable tolling), *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).

of property) if they do so within a specified period (generally, within two years of levy).[13] Several federal courts have held that this period is not subject to equitable tolling,[14] but other appellate courts have held it is.[15]

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.[16] Courts have differed on whether equitable doctrines can toll the period for bringing suit.[17]

REASONS FOR CHANGE

The *Boechler* decision clarified that the filing deadline in CDP cases is not jurisdictional, and that the deadline is subject to equitable tolling. However, it did not address whether filing deadlines in other tax cases are jurisdictional or subject to equitable tolling. 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 tax code is severe – taxpayers forfeit their day in Tax Court or other federal courts with jurisdiction to hear their claims.

Treating the tax code 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.[18] Other extenuating circumstances may include a medical emergency (*e.g.*, a heart attack or other medical condition that requires a taxpayer to be hospitalized). Moreover, most U.S. Tax Court petitioners do not have representation,[19] and unrepresented taxpayers are less likely to recognize the severe consequences of filing a late petition.

Consistent with taxpayers' *right to a fair and just tax system,*[20] equitable doctrines should 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. However, the National Taxpayer Advocate believes courts should have the flexibility to make those determinations.

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13 IRC § 6532(c).

14 *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).

15 *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).

16 IRC §§ 7431(d), 7432(d)(3), 7433(d)(3).

17 *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).

18 *See, e.g., Nauflett*, 892 F.3d at 652-54 (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).

19 In fiscal year 2023, 91 percent of taxpayers were unrepresented before the Tax Court. National Taxpayer Advocate 2023 Annual Report to Congress 158 (Most Litigated Issues), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23_MostLitigatedIssues.pdf.

20 *See* IRC § 7803(a)(3)(J) (identifying the "right to a fair and just tax system" as a taxpayer right); *see also* Taxpayer Bill of Rights (TBOR), https://www.taxpayeradvocate.irs.gov/taxpayer-rights (last visited Oct. 18, 2024). The rights contained in TBOR are also codified in IRC § 7803(a)(3). The 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*.

RECOMMENDATIONS

- Enact a new section of the tax code to clarify that the time periods in the code 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.[21]
- Specify that equitable tolling periods are included in timeliness determinations for purposes of enjoining any actions or proceedings or ordering any refunds or relief.[22]

21 If this change to the tax code is enacted, a late-filed petition in the 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.

22 For example, the last two sentences of IRC § 6213(a) provide that:

> 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.

To ensure consistency, equitable tolling must be applied to the underlying cause of action. Otherwise, a change in law consistent with our first recommendation could lead to the absurd result in which equitable tolling is interpreted as applying to the filing of a suit for refund, thus making the suit timely, but not applying to the underlying statutory period in which the IRS is authorized to issue a refund under IRC § 6514, thus barring the taxpayer from receiving a refund if the suit is successful. For discussion of a related issue, see *Extend the Deadline for Taxpayers to File a Refund Suit When They Request Appeals Reconsideration of a Notice of Claim Disallowance But the IRS Has Not Acted Timely Decided Their Claim, infra*.

Legislative Recommendation #46

Extend the Deadline for Taxpayers to File a Refund Suit When They Request Appeals Reconsideration of a Notice of Claim Disallowance But the IRS Has Not Timely Decided Their Claim

SUMMARY

- *Problem:* Taxpayers have two years to file a refund suit after the IRS mails a notice of claim disallowance denying a claim for credit or refund. Taxpayers may request reconsideration of a disallowance by the IRS's Independent Office of Appeals (Appeals), but the two-year period is not suspended during Appeals' consideration of the case unless both parties agree to an extension. If Appeals does not resolve the claim timely, the taxpayer may miss the deadline for filing a refund suit and thereby forfeit their refund while waiting for Appeals to act.

- *Solution:* Extend the two-year period for taxpayers to file a refund suit if they have timely requested Appeals' reconsideration of a notice of claim disallowance and Appeals has not made its 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, the taxpayer may bring a suit for refund in a U.S. district court or the U.S. Court of Federal Claims.[1] IRC § 6532(a)(1) requires that a refund suit be initiated within two years from the date 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.

The taxpayer and the IRS may extend the period for bringing a refund suit if an extension is executed by both parties before the two-year period has expired.[2] 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.

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 taxpayers alike. They may assume that because they are actively pursuing resolution of their claim with Appeals, their rights to file suit and receive a refund are protected. However, reconsideration of a disallowed claim does not extend the period to file suit under IRC § 6532 or the period in which the IRS is permitted to issue a refund under IRC § 6514. Therefore, if Appeals fails to complete consideration of a claim within two years after the IRS mails a notice of claim disallowance,

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1 A taxpayer may not bring a suit for refund in the U.S. Tax Court. The Tax Court is a prepayment forum for challenging federal tax disputes. Its judges possess specialized tax expertise, and it is often a less formal, less expensive, and more accessible forum for *pro se* and low-income taxpayers. For a related recommendation to allow taxpayers to bring refund suits in the U.S. Tax Court, see Legislative Recommendation: *Expand the U.S. Tax Court's Jurisdiction to Hear Refund Cases*, *supra*.

2 IRC § 6532(a)(2); Rev. Rul. 71-57, 1971-1 C.B. 405. *But see Kaffenberger v. United States*, 314 F.3d 944, 953 (8th Cir. 2003) (holding that the two-year period under IRC § 6532(a)(1) can be extended after the two-year period has expired); *nonacq. on this issue*, IRS Notice 2004-57, 2004-35 I.R.B. 350. IRS, Form 907, Agreement to Extend the Time to Bring Suit, is used to extend the period for bringing a refund suit. However, 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. *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.

the IRS is prohibited by IRC § 6514(a)(2) from issuing a refund, even if the IRS agrees that a refund is owed. IRC § 6514(a)(2) even prohibits the IRS from issuing a refund where Appeals has made a determination within the two-year period but the IRS did not issue the payment or allow the credit during that period.

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 taxpayers' ability to seek judicial review. By allowing the administrative appeal process to conclude, all parties may avoid the challenges and costs of a lawsuit, and the federal courts may avoid hearing a case the parties can resolve without judicial involvement.

Statutes of limitation are important to prevent open-ended claims. But where taxpayers are working with the IRS to reach an administrative resolution, the period of limitations should not jeopardize the taxpayers' ability to receive a refund or credit or to obtain judicial review of an adverse Appeals determination if the IRS does not act timely. This is particularly true where taxpayers timely pursue their appeal rights, but Appeals is simply behind on its case inventories or a case gets lost in transit between different IRS functions.

To prevent these inequities, we recommend IRC § 6532 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. We further recommend that IRC § 6532 be amended to ensure that where taxpayers timely request Appeals' review of a disallowed claim, the period to file a refund suit will not expire for at least six months after the date Appeals makes a final determination with respect to the claim. This will allow sufficient time for taxpayers to decide whether to pursue judicial review if Appeals denies their claim and for the IRS to issue the refund or allow the credit if Appeals allows their claim.[3]

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.[4]

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3 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.

4 Under current law, the IRS is not required to process a taxpayer's claim for credit or refund or even respond to the claim. Theoretically, the IRS can simply ignore a refund claim. For a legislative recommendation that would require the IRS to timely process claims for credit or refund, see Legislative Recommendation: *Require the IRS to Timely Process Claims for Credit or Refund, supra*.

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 directing the production of documents prior to a scheduled hearing.

PRESENT LAW

IRC § 7456(a)(1) 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)(1) as permitting it to issue a subpoena to produce documents by a third party only at designated places of hearing, including trial sessions, pre-trial hearings, depositions, and pre-trial conferences.[1] 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 hearing 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. The Federal Rules of Civil Procedure (FRCP) prescribe the procedural rules that apply in most federal courts. FRCP Rule 45 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.[2] 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 trial, apart from the scheduling of a deposition or hearing.[3]

The Tax Court's authority to go beyond Tax Court Rule 147 was addressed in *Johnson v. Commissioner*.[4] In that case, the IRS issued a third-party subpoena to Bank of America to produce 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.

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1 Order, *Johnson v. Comm'r*, No. 17324-18 (T.C. Dec. 26, 2019); Order, *N. Donald LA Prop., LLC. v. Comm'r*, No. 24703-21 (T.C. Oct. 14, 2022).

2 Fed. R. Civ. P. 45(a)(1)(A), (c)(2)(A).

3 Tax Ct. R. 147(a)(1)(B); *see, e.g.*, Kaelyn J. Romey, *No More Document Dumps or Secret Subpoenas: Amending the U.S. Tax Court Rules to Conform to the Federal Rules of Civil Procedure, Streamlining Pretrial Discovery*, 4 Bus. Entrepreneurship & Tax L. Rev. 107 (2020), http://scholarship.law.missouri.edu/betr/vol4/iss1/45. Effective March 20, 2023, the Tax Court added Rule 147(a)(3) to conform closely to Rule 45(a)(4) of the FRCP by requiring that before a subpoena is served on a third party, a notice and copy of the subpoena must be served on each party to the case. The amendment to Rule 147(d) also provides protections for the person subject to the subpoena. *See* Press Release, U.S. Tax Ct. 92-93 (Mar. 20, 2023), https://www.ustaxcourt.gov/resources/press/03202023.pdf.

4 Order, *Johnson v. Comm'r*, No. 17324-18 (T.C. Dec. 26, 2019).

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 to produce documents on the hearing date.

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. Subsequent guidance from the Tax Court and other Tax Court cases authorize document subpoena hearings prior to a case's trial session.[5] Despite the use of the document subpoena hearings, the National Taxpayer Advocate believes 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.

5 Order, *N. Donald LA Prop., LLC. v. Comm'r,* No. 24703-21 (T.C. Oct. 14, 2022); U.S. Tax Ct., Subpoenas For Remote Proceedings (Dec. 10, 2020), https://www.ustaxcourt.gov/resources/zoomgov/subpoenas_for_remote_proceedings.pdf.

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 relief in an innocent spouse case, 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 or was previously unavailable. This is true even if the requesting spouse was subjected to domestic violence or psychological abuse that caused that spouse 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 requests for equitable relief in 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) of IRC § 6015 and separation of liability relief 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 under IRC § 6015(e).

In recent years, there has been uncertainty regarding both the scope of review and the standard of review 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.[1] In 2009, the Tax Court held that the standard of review in IRC § 6015(f) cases, like its review in IRC § 6015(b) and (c) cases, is also *de novo*, meaning the Tax Court will consider the case anew, without deference to the IRS's determination.[2]

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 judicial 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."[3] 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.

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

2 *Porter v. Comm'r*, 132 T.C. 203 (2009) (a continuation of the case that produced the 2008 holding).

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).

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) cases are not *de novo*.[4] 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 scope of review in IRC § 6015(f) cases to the administrative record or its standard of review in IRC § 6015(f) claims solely for an abuse of discretion.[5]

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."[6] 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"[7] or "previously unavailable."[8]

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.[9] In some cases, however, taxpayers – particularly taxpayers not represented by counsel – may not understand 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.[10]

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 misguided. To enable the Tax Court to make the correct decision based on the merits of an innocent spouse claim, 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.

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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, 988 (2019).

7 The Tax Court has defined "newly discovered" as "recently obtained sight or knowledge of for the first time." *See Thomas v. Comm'r*, 160 T.C. 371 (2023).

8 In other cases, such as where a taxpayer raises innocent spouse as a defense in a deficiency case or the IRS does not issue a notice of determination, 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) and *Schnackel v. Comm'r,* T.C. Memo. 2024-76 (both cases following *Porter v. Comm'r*, 132 T.C. 203 (2009)).

9 *See* Treasury Inspector General for Tax Administration, Ref. No. 2024-300-001, *The Innocent Spouse Program Needs Improved Guidance for Employees and Increased Communication With Taxpayers* 5-6 (2023), https://www.tigta.gov/reports/audit/innocent-spouse-program-needs-improved-guidance-employees-and-increased-communication (the IRS did not fully develop facts and circumstances in 22 percent of examined cases; underdeveloped factors included domestic abuse, knowledge test, compliance, economic hardship, and mental/physical health).

10 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.

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.[11] 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 over IRC § 6015 cases to consider all relevant evidence. The Treasury Department has made a similar proposal.[12]

RECOMMENDATION

- Remove IRC § 6015(e)(7)(A) and (B) and revise IRC § 6015(e)(7) to provide: "The standard and scope of review of any petition or request for relief filed under this section in the Tax Court or other court of competent jurisdiction shall be *de novo*."[13]

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11 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*.

12 *See* Dep't of the Treasury, General Explanations of the Administration's Fiscal Year 2025 Revenue Proposals 190 *(Allow the Tax Court to Review All Evidence in Innocent Spouse Relief Cases)*.

13 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 IRS 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.

The U.S. Tax Court has jurisdiction to determine the appropriate relief if a taxpayer files a petition: (1) within 90 days from the date the IRS mails its final notice of determination, or (2) if the IRS fails to issue a notice of determination, no earlier than six months after the request for innocent spouse relief is made.[1] Under IRC § 6015(e)(1)(A), the Tax Court's jurisdiction to decide innocent spouse claims does not appear to be exclusive.[2] IRC § 6015(e)(1)(A) provides that an individual may petition the Tax Court for review of an innocent spouse determination "[i]n 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 the 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."[3]

The Tax Court does not have jurisdiction over collection suits arising under IRC §§ 7402 and 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

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1 IRC § 6015(e)(1)(A). The Tax Court may also have jurisdiction where the taxpayer requests innocent spouse relief as an affirmative defense. *See, e.g.*, *Van Arsdalen v. Comm'r*, 123 T.C. 135 (2004) (deficiency proceeding); *Estate of Wenner v. Comm'r*, 116 T.C. 284 (2001) (interest abatement proceeding).

2 Under IRC § 6015(e)(3), the Tax Court loses jurisdiction in refund cases. *See Coggin v. Comm'r*, 157 T.C. 144 (2021).

3 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 Innocent Spouse Determinations Under IRC § 6015 Is* De Novo, *supra*. The Treasury Department has made a similar proposal. *See* Department of the Treasury, General Explanations of the Administration's Fiscal Year 2025 Revenue Proposals 190-191 (*Allow the Tax Court to Review All Evidence in Innocent Spouse Relief Cases*), https://home.treasury.gov/system/files/131/General-Explanations-FY2025.pdf.

claims, which is consistent with IRC § 6015(e)(1)(A).[4] 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.[5]

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 inconsistent treatment of similarly situated taxpayers. In addition, treating the Tax Court as having exclusive jurisdiction over innocent spouse claims may deprive some taxpayers of their day in court. If other federal courts decide they cannot consider innocent spouse claims in collection, bankruptcy, and refund cases, 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.[6]

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.

4 *See*, *e.g.*, *United States v. Diehl*, 460 F. Supp. 1282 (S.D. Tex. 1978), *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).

5 *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); *Chandler v. United States*, 338 F. Supp. 3d 592 (N.D. Tex. 2018) (refund suit); and *Geary v. United States*, 650 B.R. 486 (Bankr. W.D. Pa. 2023) (bankruptcy proceeding).

6 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 and shall be based upon – (A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence." 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 innocent spouse claims. *See Provide That the Scope of Judicial Review of Innocent Spouse 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 prevents it from reviewing some taxpayer 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 a taxpayer files a claim within three years of the original return, the lookback period is three years, plus any filing extension. If a taxpayer does not file a claim within three years of the return or the taxpayer never filed a return, the lookback period is two years. IRC § 6513(b) provides that withholding and amounts paid as estimated tax are deemed paid on the original due date of the return, which means taxpayers who have overpaid generally cannot claim a refund more than two years later unless they file a return.

When the IRS proposes to assess additional tax, it ordinarily must issue a notice of deficiency to the taxpayer, who can then seek review in the U.S. Tax Court if they disagree with the IRS's position.[1] 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. The refund is limited to the tax paid within a specified period. The relevant period here is described in IRC § 6512(b)(3)(B), which limits the refund to tax paid during the applicable two- or three-year lookback period in IRC § 6511(b)(2), running from the date the IRS mailed the notice of deficiency.

In 1996, the Supreme Court held in *Commissioner v. Lundy* that the language in IRC § 6512(b)(3)(B) meant that the two-year lookback period applied to a taxpayer who had not filed a return before the IRS mailed a notice of deficiency.[2] The IRS had mailed the notice in the third year after the return's filing deadline, and the Court determined that the taxpayer was unable to recover overpayments from withholding since they were deemed paid on the original due date of the return, which was more than two years from the date of the notice of deficiency.

The Supreme Court's interpretation created a disparity between non-filers who received notices of deficiency during the third year after the return was due and taxpayers who similarly received such a notice but had filed returns on or before the notice's date. Non-filers were subject to the two-year lookback period and thus unable to recover overpayments attributable to withholding and estimated taxes because those amounts were deemed paid on the due date of the return, which was outside the two-year window. By contrast, filers were subject

1 IRC §§ 6212, 6213.
2 516 U.S. 235 (1996).

to the three-year lookback period and could be refunded those overpayments. In 1997, Congress added flush language to IRC § 6512(b)(3) to eliminate the disparity by extending the lookback period for non-filing taxpayers from two years to three years when the IRS mailed the notice of deficiency "during the third year after the due date (with extensions) for filing the return."[3]

REASONS FOR CHANGE

The 1997 law may not entirely fix the problem it was enacted to solve. According to the legislative history, Congress enacted the special rule of IRC § 6512(b)(3) to put non-filers who receive notices of deficiency within three years after the date the return was due on the same footing as taxpayers who file returns on or 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 three-year period prior to the date of the deficiency notice."[4]

In 2017, the Tax Court interpreted the law in a way that has created a jurisdictional "donut hole" for taxpayers who filed for an extension but did not subsequently file their return. In *Borenstein v. Commissioner*, 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).[5] Under the Tax Court's reading of the statute, 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.

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 the refund claims of those taxpayers. 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.[6] Thus, unless the Tax Court revisits its own precedent, a legislative fix is still needed.

> *Example:* For tax year 2018, John Doe made timely estimated tax payments in excess of his tax liability, so the tax was deemed paid on April 15, 2019. He requested a six-month extension of time to file his return, but he ultimately did not file. On July 2, 2021, the IRS mailed him a notice of deficiency for the 2018 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 previously, the general rule of IRC § 6512 limits the Tax Court to refunding 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, 2019). This rule would not help Mr. Doe because he paid his taxes on April 15, 2019, which is more than two years before the date of the notice of deficiency.

3 Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1282(a), 111 Stat. 788, 1037 (1997); H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.).

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

5 *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).

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

Under the Tax Court's interpretation of the statute, the flush language in IRC § 6512 also would 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, 2021). 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.

This glitch arises when the IRS issues a notice deficiency after the regular filing deadline (generally, April 15) and not later than the extended filing deadline (generally, October 15) if the taxpayer requested an extension but did not file a return.

The Tax Court's interpretation appears inconsistent with the legislative fix that Congress enacted to assist certain non-filers in response to *Lundy*. Although this problem affects a relatively limited number of taxpayers, the National Taxpayer Advocate believes it is important to highlight the unintended glitch and recommend a solution.[7]

RECOMMENDATION

- Amend the flush language in IRC § 6512(b)(3) by inserting the word "original" before "due date" and striking the parenthetical clause "(with extensions)."

7 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/nta-blog/ntablog-the-second-circuit-in-borenstein-helped-to-close-the-gap-in-the-tax-courts-refund-jurisdiction-but-only-for-taxpayers-in-that-circuit/2019/04.