



Federal Tax ADVISORY ■

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When Is a Deadline Not a Deadline? The Supreme Court Intends to Decide

Are taxpayers and other petitioners in Tax Court absolutely required to follow statutory deadlines to file suit? Or does the Tax Court have jurisdiction to hear an untimely filed case anyway, under a theory that the equities of the situation permit tolling of the relevant deadlines? On September 30, 2021, the U.S. Supreme Court granted certiorari in *Boechler P.C. v. Commissioner*, No. 20-1472, and is expected to provide answers to these questions.

In *Boechler*, the Eighth Circuit held that the statutory deadline of Section 6330(d)(1), regarding filing suit in Tax Court to challenge an adverse collection due process determination by the Internal Revenue Service, was jurisdictional. In so doing, the Eighth Circuit rejected the application of the doctrine of “equitable tolling,” which may have permitted the untimely suit to proceed. Under the doctrine of equitable tolling, statutory deadlines may be suspended if a litigant can show that it diligently pursued available remedies but were unable to meet statutory deadlines due to circumstances beyond their control. As the Supreme Court has observed,

Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990).

Equitable tolling is much more common in litigation between private litigants. In suits against the government, however, federal courts have generally held that sovereign immunity limits the application

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of the equitable tolling doctrine. Accordingly, federal courts that have held statutory deadlines to be jurisdictional have also generally held that those deadlines cannot be equitably tolled due to the limited waiver of sovereign immunity involved in the jurisdictional grant. On the other hand, if a statute merely sets out a claim-processing rule that is not jurisdictional, federal courts have presumed that those deadlines may be suspended in appropriate cases through equitable tolling.

In the case to be reviewed by the Court, *Boechler*, a small law firm in Fargo, North Dakota, had allegedly failed to file copies of the Forms W-2 it issued to its employees with the Social Security Administration. Taxpayers can incur penalties for this failure, and in June 2015 the IRS sent a notice to the law firm assessing a 10% intentional disregard penalty. The notice went unanswered, and the IRS followed up in July 2016 with a notice of intent to levy. The *Boechler* firm timely filed a request for an administrative collection due process hearing under Section 6330(b)(1), arguing that it had provided the forms at issue and that the penalty was excessive and a financial hardship.

Following an administrative hearing, the IRS denied *Boechler's* request for relief. On July 28, 2017, the IRS mailed a notice of determination sustaining the levy to *Boechler*. Under Section 6330(d)(1), the deadline to file suit for review by the Tax Court was August 28, 2017—30 days from the mailing of the notice, plus an additional day because the deadline fell on a Sunday. *Boechler* mailed its petition to the Tax Court one day late, on August 29, 2017. The IRS successfully moved to dismiss the suit in Tax Court based upon *Boechler's* untimely filing. In dismissing the case, the Tax Court noted that “we have repeatedly held that the 30-day period provided in section 6330(d)(1) for the filing of a petition for review is jurisdictional.” Because, in the Tax Court’s view, the statutory language is jurisdictional rather than a mere claim-processing rule, equitable tolling was unavailable to *Boechler*.

While the Tax Court has held that the deadlines to file suit in collection due process cases under Section 6330(d)(1) are jurisdictional, there is a split in the circuits on this issue—leading to the Supreme Court’s grant of certiorari in *Boechler*. Agreeing with the Tax Court, the Eighth Circuit in *Boechler* and the Ninth Circuit in *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), have both held that the relevant language is jurisdictional. On the other side, the D.C. Circuit held in *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019), that the “nearly identical” statutory language found in Section 7623(b)(4), regarding Tax Court review of denials of IRS whistleblower claim awards, was not jurisdictional and was potentially subject to equitable tolling. Similar language is also found in Section 6015(e)(1)(A), regarding challenges to IRS innocent spouse determinations, and the Second, Third, and Fourth Circuits have held that language to be jurisdictional.

Ultimately, what is at stake in resolving this split is taxpayer access to the Tax Court. The Tax Court is the only forum in which a taxpayer may challenge a proposed deficiency without paying the deficiency in advance. The Tax Court is also the only forum available for certain types of claims. As the National Taxpayer Advocate Service [recently noted](#):

Treating the IRC time limits for commencing a judicial proceeding as jurisdictional leads to unfair outcomes.... Unrepresented taxpayers in particular may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late, and most Tax Court petitioners do not have representation.... [T]he *right to a fair and just tax system* requires that these doctrines be available to taxpayers in the rare cases they would apply.

For these reasons, the Taxpayer Advocate Service recommended that Congress amend Section 7442 to clarify that the statutory deadlines to file suit in Tax Court, federal district courts, and the U.S. Court of Federal Claims are *not* jurisdictional and are subject to equitable tolling, among other equitable doctrines.

Would a holding from the Supreme Court allowing for equitable tolling in Tax Court open the floodgates to taxpayer litigation by encouraging untimely suits? The Tax Court is already severely overloaded, as [Bloomberg](#) and other outlets have recently noted. In the 2017 recommendation, the Taxpayer Advocate Service opined that “[t]here is no reason to suppose that taxpayers would succeed, or expect to succeed, more often if they were allowed to raise equitable doctrines to excuse a late filing to commence tax litigation.” While the Taxpayer Advocate Service may be correct about the potential rate of success of claims involving equitable tolling—a doctrine that is intended to be applied only in extraordinary circumstances—this position downplays the administrative challenges raised by processing, responding to, evaluating, and ultimately dismissing unmeritorious or even frivolous arguments for equitable tolling.

While most taxpayers hopefully will never have to avail themselves of the equitable tolling doctrine, the Supreme Court’s review of *Boechler* has important ramifications for taxpayer rights. Particularly over the last two years in the COVID-19 era, taxpayer errors regarding deadlines have occurred for any number of reasons and at all income levels. For example, severe delays in mail delivery of key IRS notices, problems with online filing systems, and staffing reductions at IRS service centers and taxpayer hotlines have all contributed to potential mistakes in meeting deadlines. While intended to be used sparingly, doctrines like equitable tolling may provide a crucial remedy in these extraordinary times. Nonetheless, cases like *Boechler* are stark reminders to exercise extreme caution and conservatism in calculating and meeting key deadlines—an adverse taxpayer decision in *Boechler* will indicate that very little relief is available to taxpayers who miss them.

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