RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

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State Bar of Texas Tax Section
First Wednesday Tax Update
February 14, 2024

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I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

A. Income

B. Deductible Expenses versus Capitalization

C. Reasonable Compensation

D. Miscellaneous Deductions

1. Standard mileage rates for 2024. Notice 2024-8, 2024-2 I.R.B. 356 (12/14/23). The standard mileage rate for business miles in 2024 goes up to 67 cents (from 65.5 cents in 2023) and the medical/moving rate goes *down* to 21 cents per mile (from 22 cents in 2023). The charitable mileage rate remains fixed by § 170(i) at 14 cents. The portion of the business standard mileage rate treated as depreciation goes up to 30 cents per mile (from 28 cents in 2023). The maximum standard automobile cost may not exceed $62,000 (up from $60,800 in 2023) for passenger automobiles (including trucks and vans) for purposes of computing the allowance under a fixed and variable rate (FAVR) plan.

- The notice reminds taxpayers that (1) the business standard mileage rate cannot be used to claim an itemized deduction for unreimbursed employee travel expenses because, in the 2017 Tax Cuts and Jobs Act, Congress disallowed miscellaneous itemized deductions for 2024, and (2) the standard mileage rate for moving has limited applicability for the use of an automobile as part of a move during 2024 because, in the 2017 Tax Cuts and Jobs Act, Congress disallowed the deduction of moving expenses for 2024 (except for members of the military on active duty who move pursuant to military orders incident to a permanent change of station, who can still use the standard mileage rate for moving).

The following table summarizes the optional standard mileage rates:

Category	**2022**		**2023**	**2024**
	Jan.-Jun.	Jul.-Dec.		
Business miles	58.5 cents	62.5 cents	65.5 cents	67 cents
Medical/moving	18 cents	22 cents	22 cents	21 cents
Charitable mileage	14 cents	14cents	14 cents	14 cents

E. Depreciation & Amortization

1. Section 280F 2023 depreciation tables for business autos, light trucks, and vans. Rev. Proc. 2024-13, 2024-9 I.R.B. ___ (2/6/24). Section 280F(a) limits the depreciation deduction for passenger automobiles. For this purpose, the term "passenger automobiles" includes trucks and vans with a gross vehicle weight of 6,000 pounds or less. The IRS has published depreciation tables with the 2024 depreciation limits for business use of passenger automobiles acquired after September 27, 2017, and placed in service during 2024:

2024 Passenger Automobiles with § 168(k) first year recovery:

1st Tax Year	$20,400
2nd Tax Year	$19,800
3rd Tax Year	$11,900
Each Succeeding Year	$ 7,160

2024 Passenger Automobiles (no § 168(k) first year recovery):

1st Tax Year	$12,400
2nd Tax Year	$19,800
3rd Tax Year	$11,900
Each Succeeding Year	$ 7,160

For leased vehicles used for business purposes, § 280F(c)(2) requires a reduction in the amount allowable as a deduction to the lessee of the vehicle. Under Reg. § 1.280F-7(a), this reduction in the lessee's deduction is expressed as an income inclusion amount. The revenue procedure provides a table with the income inclusion amounts for lessees of vehicles with a lease term beginning in 2024. For 2024, this income inclusion applies when the fair market value of the vehicle exceeds $62,000.

F. Credits

G. Natural Resources Deductions & Credits

H. Loss Transactions, Bad Debts, and NOLs

I. At-Risk and Passive Activity Losses

III. INVESTMENT GAIN AND INCOME

IV. PERSONAL INCOME AND DEDUCTIONS

V. CORPORATIONS

VI. PARTNERSHIPS

VII. TAX SHELTERS

VIII. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

IX. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

1. Is the IRS ever going to learn that the § 6751(b) supervisory approval requirement is not met unless the required supervisory approval of a penalty occurs *before* the initial determination that formally communicates the penalty to the taxpayer? Laidlaw's Harley Davidson Sales, Inc. v. Commissioner, 154 T.C. 68 (1/16/20). The taxpayer, a C corporation, failed to disclose its participation in a listed transaction as required by § 6011 and Reg. § 1.6011-4(a). The IRS revenue agent examining the taxpayer's return issued a 30-day letter to the taxpayer offering the opportunity for the taxpayer to appeal the proposal to the IRS Office of Appeals (IRS Appeals). The 30-day letter proposed to assess a penalty under § 6707A for failing to disclose a reportable transaction. Approximately three months after the 30-day letter was issued, the revenue agent's supervisor approved the penalty by signing a Civil Penalty Approval Form. Following unsuccessful discussions with IRS Appeals, the IRS assessed the penalty and issued a notice of levy. The taxpayer requested a collection due process (CDP) hearing with Appeals, following which Appeals issued a notice of determination sustaining the proposed levy. In response to the notice of determination, the taxpayer filed a petition in the Tax Court. In the Tax Court, the taxpayer filed a motion for summary judgment on the basis that the IRS had failed to comply with the supervisory approval requirement of § 6751(b). Section 6751(b)(1) requires that the "initial determination" of the assessment of a penalty be "personally approved (in writing) by the immediate supervisor of the individual making such determination." The Tax Court (Judge Gustafson) granted the taxpayer's motion. The court first concluded that the supervisory approval requirement of § 6751(b) applies to the penalty imposed by § 6707A. Next, the court concluded that the supervisory approval of the §6707A penalty in this case was not timely because it had not occurred before the IRS's initial determination of the penalty. The parties stipulated that the 30-day letter issued to the taxpayer reflected the IRS's initial determination of the penalty. The supervisory approval of the penalty occurred three months later and therefore, according to the court, was untimely. The IRS argued that the supervisory approval was timely because it occurred before the IRS's *assessment* of the penalty. In rejecting this argument, the court relied on its prior decisions interpreting § 6751(b), especially *Clay v. Commissioner*, 152 T.C. 23 (2019), in which the court held in a deficiency case "that when it is 'communicated to the taxpayer formally … that penalties will be proposed', section 6751(b)(1) is implicated." In *Clay*, the IRS had issued a 30-day letter when it did not have in hand the required supervisory approval of the relevant penalty. The IRS can assess the penalty imposed by § 6707A without issuing a notice of deficiency. Nevertheless, the court observed "[t]hough Clay was a deficiency case, we did not intimate that our holding was limited to the deficiency context." The court summarized its holding in the present case as follows:

> Accordingly, we now hold that in the case of the assessable penalty of section 6707A here at issue, section 6751(b)(1) requires the IRS to obtain written supervisory approval before it formally communicates to the taxpayer its determination that the taxpayer is liable for the penalty.

The court therefore concluded that it had been an abuse of discretion for the IRS Office of Appeals to determine that the IRS had complied with applicable laws and procedures in issuing the notice of levy. The court accordingly granted the taxpayer's motion for summary judgment.

a. "We are all textualists now," says the Ninth Circuit. When the IRS need not issue a notice of deficiency before assessing a penalty, the language of § 6751(b) contains no requirement that supervisory approval be obtained before the IRS formally communicates the penalty to the taxpayer. Laidlaw's Harley Davidson Sales, Inc. v. Commissioner, 29 F.4th 1066 (9th Cir. 3/25/22), *rev'g* 154 T.C. 68 (1/16/20). In an opinion by Judge Bea, the U.S. Court of Appeals for the Ninth Circuit has reversed the decision of the Tax Court and held that, when the IRS need not issue a notice of deficiency before assessing a penalty, the IRS can comply with the supervisory approval requirement of § 6751(b) by obtaining supervisory approval of the penalty before assessment of the penalty provided that approval occurs when the supervisor still has discretion whether to approve the penalty. As previously discussed, the taxpayer, a C corporation, failed to disclose its participation in a listed transaction as required by § 6011 and Reg. § 1.6011-4(a). The IRS revenue agent examining the taxpayer's return issued a 30-day letter to the taxpayer offering the opportunity for the taxpayer to appeal the proposal to the IRS Office of Appeals (IRS Appeals). The 30-day letter proposed to assess a penalty under § 6707A for failing to disclose a reportable transaction. After the taxpayer had submitted a letter protesting the proposed penalty and requesting a conference with IRS Appeals, and approximately three months after the revenue agent issued the 30-day letter, the revenue agent's supervisor approved the proposed penalty by signing Form 300, Civil Penalty Approval Form. The Tax Court held that § 6751(b)(1) required the IRS to obtain written supervisory approval before it formally communicated to the taxpayer its determination that the taxpayer was liable for the penalty, i.e., before the revenue agent issued the 30-day letter. On appeal, the government argued that § 6751(b) required only that the necessary supervisory approval be secured before the IRS's *assessment* of the penalty as long as the supervisory approval occurs at a time when the supervisor still has discretion whether to approve the penalty. The Ninth Circuit agreed. In agreeing with the government, the court rejected the Tax Court's holding that § 6751(b) requires supervisory approval of the *initial determination* of the assessment of the penalty and therefore requires supervisory approval before the IRS formally communicates the penalty to the taxpayer. According to the Ninth Circuit, "[t]he problem with Taxpayer's and the Tax Court's interpretation is that it has no basis in the text of the statute." The court acknowledged the legislative history of § 6751(b), which indicates that Congress enacted the provision to prevent IRS revenue agents from threatening penalties as a means of encouraging taxpayers to settle. But the text of the statute as written, concluded the Ninth Circuit, does not support the interpretation of the statute advanced by the Tax Court and the taxpayer. The court summarized its holding as follows:

> Accordingly, we hold that § 6751(b)(1) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment. Since, here, Supervisor Korzec gave written approval of the initial penalty determination before the penalty was assessed and while she had discretion to withhold approval, the IRS satisfied § 6751(b)(1).

The court was careful to acknowledge that supervisory approval might be required at an earlier time when the IRS must issue a notice of deficiency before assessing a penalty because, "once the notice is sent, the Commissioner begins to lose discretion over whether the penalty is assessed." The IRS can assess the penalty in this case, imposed by § 6707A, without issuing a notice of deficiency.

Dissenting opinion by Judge Berzon. In a dissenting opinion, Judge Berzon emphasized that the 30-day letter the revenue agent sent to the taxpayer was an operative determination. The letter indicated that, if the taxpayer took no action in response, the penalty would be assessed. Judge Berzon analyzed the text of the statute and its legislative history and concluded as follows:

> In my view, then, the statute means what it says: a supervisor must personally approve the "initial determination" of a penalty by a subordinate, or else no penalty can be assessed based on that determination, whether the proposed penalty is objected to or not. 26 U.S.C. §§ 6751(b)(1). That meaning is consistent with

> Congress's purpose of preventing threatened penalties never approved by supervisory personnel from being used as a "bargaining chip" by lower-level staff, S. Rep. No. 105-174, at 65 (1998); see *Chai v. Commissioner*, 851 F.3d 190, 219 (2d Cir. 2017), which is exactly what happened here.

Because the 30-day letter was an operative determination, according to the dissent, "supervisory approval was required at a time when it would be meaningful-before the letter was sent."

b. Is the tide turning in favor of the government? The Eleventh Circuit has held that, when the IRS must issue a notice of deficiency before assessing tax, the government can comply with the requirement of § 6751(b) that there be written supervisory approval of penalties by securing the approval at any time before assessment of the penalty. Kroner v. Commissioner, 48 F. 4th 1272 (11th Cir. 9/13/22), *rev'g* T.C. Memo. 2020-73. In an opinion by Judge Marvel, the U.S. Court of Appeals for the Eleventh Circuit has held that, when the IRS must issue a notice of deficiency before assessing a penalty, the IRS can comply with the supervisory approval requirement of § 6751(b) by obtaining supervisory approval at any time before assessment of the penalty. The court's holding is contrary to a series of decisions of the Tax Court and contrary to a decision of the U.S. Court of Appeals for the Second Circuit. Section 6751(b)(1) provides:

> No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.

Second Circuit's reasoning in Chai v. Commissioner. In *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), the Second Circuit focused on the language of § 6751(b)(1) and concluded that it is ambiguous regarding the timing of the required supervisory approval of a penalty. Because of this ambiguity, the court examined the statute's legislative history and concluded that Congress's purpose in enacting the provision was "to prevent IRS agents from threatening unjustified penalties to encourage taxpayers to settle." That purpose, the court reasoned, undercuts the conclusion that approval of the penalty can take place at any time, even just prior to assessment. The court held "that § 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty." Further, the court held "that compliance with § 6751(b) is part of the Commissioner's burden of production and proof in a deficiency case in which a penalty is asserted. … Read in conjunction with § 7491(c), the written approval requirement of § 6751(b)(1) is appropriately viewed as an element of a penalty claim, and therefore part of the IRS's prima facie case."

Tax Court's prior decisions in other cases. In *Graev v. Commissioner*, 149 T.C. 485 (2017), a reviewed opinion by Judge Thornton, the Tax Court (9-1-6) reversed its earlier position and accepted the interpretation of § 6751(b)(1) set forth by the Second Circuit in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017). Since *Graev*, the Tax Court's decisions have focused on what constitutes the *initial determination* of the penalty in question. These decisions have concluded that the initial determination of a penalty occurs in the document through which the IRS Examination Division notifies the taxpayer in writing that the examination is complete and it has made a decision to assert penalties. *See, e.g., Belair Woods, LLC v. Commissioner*, 154 T.C. 1 (2020); *Beland v. Commissioner*, 156 T.C. 80 (2021). Accordingly, if the IRS notifies the taxpayer that it intends to assert penalties in a document such as a revenue agent's report, and if the IRS fails to secure the required supervisory approval before that notification occurs, then § 6751(b)(1) precludes the IRS from asserting the penalty.

Facts of this case. In the current case, *Kroner v. Commissioner*, the taxpayer failed to report as income just under $25 million in cash transfers from a former business partner. The IRS audited and, at a meeting with the taxpayer's representatives on August 6, 2012, provided the taxpayer with a letter (Letter 915) and revenue agent's report proposing to increase his income by the cash he had received and to impose just under $2 million in accuracy-related penalties under § 6662. The letter asked the taxpayer to indicate whether he agreed or disagreed with the proposed changes and provided him with certain options if he disagreed, such as providing additional information, discussing the report with the examining agent or the agent's supervisor, or requesting a conference with the IRS Appeals Office. The letter also stated that, if the taxpayer took none of these steps, the IRS would issue a notice of deficiency. The IRS later issued a formal 30-day letter (Letter 950) dated October 31, 2012, and an updated examination report. The 30-day letter provided the taxpayer with the same options as the previous letter if he disagreed with the proposed adjustments and stated that, if the taxpayer took no action, the IRS would issue a notice of deficiency. The 30-day letter was signed by the examining agent's supervisor. On that same day, the supervisor also signed a Civil Penalty Approval Form approving the accuracy-related penalties. The IRS subsequently issued a notice of deficiency and, in response, the taxpayer filed a timely petition in the U.S. Tax Court.

Tax Court's reasoning in this case. The Tax Court (Judge Marvel) upheld the IRS's position that the cash payments the taxpayer received were includible in his gross income but held that the IRS was precluded from imposing the accuracy-related penalties. The Tax Court reasoned that the August 6 letter (Letter 915) was the IRS's initial determination of the penalty and that the required supervisory approval of the penalty did not occur until October 31, and therefore the IRS had not complied with § 6751(b).

Eleventh Circuit's reasoning in this case. The Eleventh Circuit rejected the reasoning of the Tax Court as well as the reasoning of the Second Circuit in *Chai v. Commissioner*:

> We disagree with Kroner and the Tax Court. We conclude that the IRS satisfies Section 6751(b) so long as a supervisor approves an initial determination of a penalty assessment before it assesses those penalties. *See Laidlaw's Harley Davidson Sales, Inc. v. Comm'r*, 29 F.4th 1066, 1071 (9th Cir. 2022). Here, a supervisor approved Kroner's penalties, and they have not yet been assessed. Accordingly, the IRS has not violated Section 6751(b).

The Eleventh Circuit first reasoned that the phrase "determination of such assessment" in § 6751(b) is best interpreted not as a reference to communications to the taxpayer, but rather as a reference to the IRS's conclusion that it has the authority and duty to assess penalties and its resolution to do so. The court explained:

> The "initial" determination may differ depending on the process the IRS uses to assess a penalty. … But we are confident that the term "initial determination of such assessment" has nothing to do with communication and everything to do with the formal process of calculating and recording an obligation on the IRS's books.

The court then turned to the question of *when* a supervisor must approve a penalty in order to comply with § 6751(b). The court analyzed the language of § 6751(b) and concluded: "We likewise see nothing in the text that requires a supervisor to approve penalties at any particular time before assessment." Thus, according to the Eleventh Circuit, the IRS can comply with § 6751(b) by obtaining supervisory approval of a penalty at any time, even just before assessment.

Finally, the court reviewed the Second Circuit's decision in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), in which the court had interpreted § 6751(b) in light of Congress's purpose in enacting the provision, which, according to the Second Circuit, was to prevent IRS agents from threatening unjustified penalties to encourage taxpayers to settle. According to the Eleventh Circuit, the *Chai* decision did not take into account the full purpose of § 6751(b). The purpose of the statute, the court reasoned, was not only to prevent unjustified threats of penalties, but also to ensure that only accurate and appropriate penalties are imposed. There is no need for supervisory approval to occur at any specific time before the assessment of penalties, the court explained, to ensure that penalties are accurate and appropriate and therefore carry out this aspect of Congress's purpose in enacting the statute. Further, the Eleventh Circuit concluded, there is no need for a pre-assessment deadline for supervisory approval to reduce the use of penalties as a bargaining chip by IRS agents. This is so, according to the court, because negotiations over penalties occur even after a penalty is assessed, such as in administrative proceedings after the IRS issues a notice of federal tax lien or a notice of levy. (This latter point by the court seems to us to be a stretch. Although it is possible to have penalties reduced or eliminated post-assessment, such post-assessment review does not meaningfully reduce the threat of penalties by IRS agents to encourage settlement at the examination stage.)

Concurring opinion by Judge Newsom. In a concurring opinion, Judge Newsom cautioned against interpreting statutes by reference to their legislative histories: “Without much effort, one can mine from § 6751(b)’s legislative history other—and sometimes conflicting—congressional ‘purposes.’” The legislative history, according to Judge Newsom, is “utterly unenlightening.” Statutes, in his view, should be interpreted by reference to their text.

c. Yes, the tide seems to be turning. The Tenth Circuit has held that, when the IRS must issue a notice of deficiency before assessing tax, the government can comply with the requirement of § 6751(b) that there be written supervisory approval of penalties by securing the approval no later than the date the IRS issues the notice of deficiency formally asserting a penalty. Minemyer v. Commissioner, 131 A.F.T.R.2d 2023-364 (10th Cir. 1/19/23), aff’g in part and rev’g in part T.C. Memo. 2020-99 (7/1/20). In an unpublished order and judgment by Judge Tymkovich, the U.S. Court of Appeals for the Tenth Circuit has held that, when the IRS must issue a notice of deficiency before assessing a penalty, the IRS can comply with the supervisory approval requirement of § 6751(b) by obtaining supervisory approval on or before the date on which the IRS issues a notice of deficiency.

The taxpayer in this case was indicted on two counts of tax evasion for the years 2000 and 2001. The taxpayer pleaded guilty with respect to the year 2000 and, in exchange, the government dismissed the count for 2001. Subsequently, the IRS asserted deficiencies for 2000 and 2001 and § 6663 civil fraud penalties for both years. In 2010, an IRS revenue agent visited the taxpayer in prison and obtained his signature on Form 4549, Income Tax Examination Changes, in which the IRS proposed the deficiencies and penalties for 2000 and 2001. At that time, the agent’s supervisor had not approved the penalties. The taxpayer later requested that his agreement to the deficiencies and penalties be withdrawn. The IRS agreed to the withdrawal and later issued a 30-day letter (Letter 950) asserting the same deficiencies and penalties. The 30-day letter was signed by the revenue agent’s supervisor. The IRS later issued a notice of deficiency asserting the deficiencies and penalties for both years.

Tax Court’s Analysis. The taxpayer challenged the notice of deficiency by filing a petition in the U.S. Tax Court. The Tax Court (Judge Kerrigan) granted summary judgment in favor of the IRS as to the deficiencies for both years and as to the fraud penalty for 2000. Following a trial, the Tax Court held that the IRS was precluded from asserting the fraud penalty for 2001 by § 6751(b)(1). (The court also held that conviction for tax evasion on the 2000 count collaterally estopped the taxpayer from challenging the civil fraud penalty for 2000.) Section 6751(b)(1) provides:

> No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.

The Tax Court’s prior decisions have focused on what constitutes the *initial determination* of the penalty in question. These decisions have concluded that the initial determination of a penalty occurs in the document through which the IRS Examination Division notifies the taxpayer in writing that the examination is complete and it has made a decision to assert penalties. *See, e.g., Belair Woods, LLC v. Commissioner*, 154 T.C. 1 (2020); *Beland v. Commissioner*, 156 T.C. 80 (2021). Accordingly, if the IRS notifies the taxpayer that it intends to assert penalties in a document such as a revenue agent's report, and if the IRS fails to secure the required supervisory approval before that notification occurs, then § 6751(b)(1) precludes the IRS from asserting the penalty. In this case, the Tax Court held, the IRS had failed to comply with § 6751(b)(1) because the Form 4549 the revenue agent presented to the taxpayer in prison was the initial determination of the penalties, and the IRS had not secured the required supervisory approval before the agent presented the form to the taxpayer.

Tenth Circuit's Analysis. On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed the Tax Court's grant of summary judgment to the government as to the deficiencies for both years and as to the fraud penalty for 2000 but reversed the Tax Court's decision as to the penalty for 2001. The court observed that the U.S. Courts of Appeal for the Ninth and Eleventh Circuits have disagreed with the Tax Court's position that the supervisory approval before the IRS first communicates to the taxpayer that it intends to assert penalties. See *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th 1066 (9th Cir. 3/25/22); *Kroner v. Commissioner*, 48 F. 4th 1272 (11th Cir. 9/13/22). The court agreed with the Ninth and Eleventh Circuits:

> We agree with these assessments of § 6751(b)(1) and hold that its plain language does not require approval before proposed penalties are communicated to a taxpayer.

The Tenth Circuit then addressed the question of what timing requirement, if any, § 6751(b)(1) imposes on the government to obtain the necessary supervisory approval. The court analyzed the Second Circuit's decision in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), and agreed with the Second Circuit's analysis:

> We are persuaded by the Second Circuit's reasoning and hold that with respect to civil penalties, the requirements of § 6751(b)(1) are met so long as written supervisory approval of an initial determination of an assessment is obtained on or before the date the IRS issues a notice of deficiency.

Because the revenue agent's supervisor had approved the 2001 civil fraud penalty before the IRS issued the notice of deficiency, the Tenth Circuit reversed the Tax Court's decision as to the 2001 penalty and remanded a determination of whether the taxpayer was liable for the penalty.

d. The turning tide now seems to have washed over the Tax Court--at least in this case appealable to the Ninth Circuit. Kraske v. Commissioner, 161 T.C. No. 7 (10/26/23). This Tax Court decision presents an opportunity to synthesize for our readers the case law developments over the last few years (as detailed above) concerning the supervisory approval requirement of § 6751(b)(1). Readers will recall that § 6751(b)(1) requires the "initial determination" of the assessment of certain (but not all) federal income tax penalties be "personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate." The bare language of the poorly drafted statute is ambiguous, leaving room for various interpretations as evidenced by numerous recent court decisions. For a thorough discussion and analysis of the "hundreds of cases" that have been decided under § 6751(b)(1), see Gianni, *Supervisory Approval of Penalties: The Opening of a Graev Pandora's Box*, 76 Tax Lawyer 41 (2022). Professor Gianni ultimately concludes that § 6751(b)(1) should be retroactively repealed and replaced as proposed (but never passed) in H.R. 5376, 117th Cong. §§ 138404(a), 138404(c)(1). Professor Gianna also details in her article the many penalties that are and are not subject to the supervisory approval requirement of § 6751(b)(1).

The Tax Court. The Tax Court has taken an expansive view of § 6751(b)(1) regarding what constitutes the *initial determination* of the penalty in question. In a series of cases beginning with *Graev v. Commissioner*, 149 T.C. 485 (2017), the Tax Court reversed its earlier position that supervisory approval need only occur before assessment of the penalties subject to § 6751(b)(1). Instead, the Tax Court in *Graev* accepted the Second Circuit's interpretation of § 6751(b)(1) as set forth in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017): "that § 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty." Then, in subsequent cases, the Tax Court has gone further, generally holding that:

- The supervisory approval requirement of § 6751(b)(1) applies to both "assessable penalties" (i.e., penalties not subject to deficiency procedures, like § 6707A concerning failure to disclose a reportable transaction) and to penalties that are subject to deficiency procedures (like the § 6662(a) and (b)(2) accuracy-related penalties); and
- Supervisory approval must be obtained under § 6751(b)(1) on or before the date of the *initial determination* of the penalty in question, which is the earlier of (1) the date on which the IRS issues the notice of deficiency or (2) the date on which the IRS "formally communicates" (such as in a Revenue Agent's Report) to the taxpayer the assertion of a penalty or penalties subject to § 6751(b)(1).

See, *e.g.*, *Clay v. Commissioner*, 152 T.C. 23 (2019), *aff'd on other grounds*, 990 F.3d 1296 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 342 (2021); *Belair Woods, LLC v. Commissioner*, 154 T.C. 1 (2020); *Beland v. Commissioner*, 156 T.C. 80 (2021).

The Circuit Courts. The Circuit Court interpretations of § 6751(b)(1) have not been as expansive as the Tax Court's, but they have not been consistent either.

- As mentioned above, the Second Circuit in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), *aff'g in part and rev'g in part*, T.C. Memo 2015-42, held that, for penalties subject to deficiency procedures (like the § 6662 accuracy-related penalties) "§ 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty."
- The Ninth Circuit in *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th 1066 (9th Cir. 2022), *rev'g*, 154 T.C. 68 (2020), held that for an "assessable penalty" not requiring a deficiency procedure (like the penalty imposed by § 6707A for failure to disclose a reportable transaction) the § 6751(b)(1) supervisory approval requirement applies "before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment."
- The Eleventh Circuit in *Kroner v. Commissioner*, 48 F. 4th 1272 (11th Cir. 2022), *rev'g*, T.C. Memo. 2020-73, held that, for penalties subject to deficiency procedures, the IRS may comply with § 6751(b)(1) by obtaining supervisory approval at any time, even just before assessment. Writing in reversal of the Tax Court, the Eleventh Circuit stated: "The 'initial' determination may differ depending on the process the IRS uses to assess a penalty…But we are confident that the term 'initial determination of such assessment' has nothing to do with communication and everything to do with the formal process of calculating and recording an obligation on the IRS's books."
- The Tenth Circuit, in an unpublished opinion, *Minemyer v. Commissioner*, 131 A.F.T.R.2d 2023-364 (10th Cir. 2023), *aff'g in part and rev'g in part*, T.C. Memo. 2020-99 (2020), aligned itself with the Second Circuit by holding in a case concerning penalties subject to deficiency procedures that "the requirements of § 6751(b)(1) are met so long as written supervisory of an initial determination of an assessment is obtained on or before the date the IRS issues a notice of deficiency.

The Facts in Kraske. The Tax Court in *Kraske v. Commissioner*, 161 T.C. No. 7 (10/26/23), a case appealable to the Ninth Circuit, signaled that it may be reconsidering its expansive interpretation of § 6751(b)(1) and backing off its view that supervisory approval must come on or before the IRS "formally communicates" proposed penalties to a taxpayer. On June 2, 2014, the examining agent within the IRS's Small Business and Self-Employed Division sent the taxpayer in *Kraske* a Letter 692 (15-day letter) proposing in part the imposition of accuracy-related penalties under § 6662. The 15-day letter further advised that if the taxpayer did not respond within 15 days, a notice of deficiency would be issued. Almost a month after the deadline passed for responding to the 15-day letter, the taxpayer on July 16, 2014, mailed the IRS examining agent a letter disagreeing with the examining agent's proposed tax adjustments and penalties. Coincidentally, on that same day, July 16, 2024, the examining agent, not having received a response to the 15-day letter from the taxpayer after having been promised it several times, closed the case as unagreed and forwarded it to the agent's group manager, who was the agent's immediate supervisor. On July 21, 2014, the group manager reviewed the case, signed approval forms regarding the agent's assertion of accuracy-related penalties under § 6662, and approved the case for closure. The case was then forwarded to Appeals on July 24, 2014, immediately after the IRS received on that date the taxpayer's July 16, 2014, letter objecting to the proposed tax adjustments and penalties. IRS Appeals received the case on August 12, 2014, and after the taxpayer and Appeals were unable to settle matters, a notice of deficiency was issued to the taxpayer on July 28, 2015. Before the Tax Court, the taxpayer argued that imposition of any accuracy-related penalty under § 6662 was improper because the IRS had not timely obtained supervisory approval under § 6751(b)(1).

The Tax Court's Opinion in Kraske. In an opinion written by Judge Gale, the Tax Court acknowledged that under the court's holding in *Clay v. Commissioner*, 152 T.C. 23 (2019), *aff'd on other grounds*, 990 F.3d 1296 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 342 (2021), the supervisory approval obtained in *Kraske* would be considered untimely under § 6751(b)(1) because it came after a "formal communication" (i.e., the 15-day letter) of the proposed penalties was sent to the taxpayer. Judge Gale noted, however, that because the case was appealable to the Ninth Circuit, the Ninth Circuit's decision in *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th 1066 (9th Cir. 2022), *rev'g*, 154 T.C. 68 (2020), must be considered. As noted above, *Laidlaw's Harely Davidson Sales, Inc.* concerned an "assessable penalty," not a penalty subject to deficiency procedures as in *Kraske*. Arguably, then, *Laidlaw's Harley Davidson Sales, Inc.* was distinguishable, and the Tax Court was not necessarily bound to follow it under a strict application of *Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971) (holding that "better judicial administration...requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone)." Judge Gale also noted, though, that the so-called *Golson* doctrine allows the Tax Court to examine not just the narrow holding of a binding Circuit Court decision, but also the underlying rationale of the decision. On this basis, Judge Gale determined that the *Golson* doctrine should apply in *Kraske*, resulting in the Tax Court ruling in favor of the government and against the taxpayer. Judge Gale wrote:

> The rationale of the Ninth Circuit's holding in *Laidlaw's Harley Davidson* is clear regarding the timing of supervisory approval. The Ninth Circuit rejected outright our position in *Clay* that the supervisory approval required by section 6751(b)(1) is timely only if it is obtained before a formal communication to the taxpayer that penalties would be proposed, finding that our interpretation "has no basis in the text of the statute." [Citation omitted.] Instead, the Ninth Circuit opined that approval is timely at any time before assessment, provided the supervisor retains discretion to give or withhold approval.

Judge Gale then ruled that the timeline for supervisory approval under § 6751(b)(1) in *Kraske* was "well within the parameters . . . found timely by the Ninth Circuit in *Laidlaw's Harley Davidson*," explaining further:

> When the supervisor approved the penalties on July 21, 2014, it was more than a month past the deadline for [the taxpayer] to respond to the 15-day letter, and the [examining agent] had not received a written request for Appeals' consideration from him. Although [the taxpayer] had mailed such a request on July 16, 2014, it

was not received by the [examining agent] until July 24, 2014--three days after written supervisory approval had been given. The case was not received by Appeals until August 12, 2014--over three weeks after supervisory approval had been given. Thus, the [examining agent's] immediate supervisor retained discretion to approve or to withhold approval of the penalties when she did so on July 21 because the case had not yet been transferred to Appeals (at which time the Small Business and Self-Employed Division's jurisdiction over the case, and the supervisor's discretion, may have terminated).

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

1. Ever heard of a 424-day letter? Well, now you have in this case of first impression from the Tax Court. Dodson v. Commissioner, 162 T.C. No. 1 (1/3/24). The taxpayers in this case received a notice of deficiency dated October 7, *2021* ("first 90-day letter"). The first 90-day letter specified December 5, *2022*, as the last day for filing a petition in the Tax Court. (FYI, December 5, 2022, is 424 days after October 7, 2021.) Promptly realizing its mistake, on October 8, 2021, the IRS sent the taxpayers a "corrected" notice of deficiency ("second 90-day letter") substantially the same as the first 90-day letter but specifying January 6, *2022*, as the last day for filing a petition in the Tax Court. A cover sheet to the second 90-day letter stated: "PREVIOUS NOTICE SENT WITH INCORRECT DATE. CORRECTED NOTICE WITH CORRECT DATES." The taxpayers stated that they did not receive the second 90-day letter. The taxpayers also produced tracking information from the USPS indicating that the second 90-day letter left a distribution center near the taxpayers' address but did not show delivery. On March 3, 2022, 147 days after October 7, 2021, the taxpayers filed a petition in the Tax Court disputing the adjustments proposed by the IRS in the first 90-day letter. The IRS moved to dismiss the taxpayers' petition on the grounds that it was untimely because it was filed beyond the 90-day period specified in § 6213(a) (which was the date reflected in the IRS's corrected, second 90-day letter). The taxpayers, however, argued that their petition in response to the IRS's first 90-day letter was timely because, as the last sentence of § 6213(a) states: "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." In a case of first impression, the Tax Court (Judge Marvel) agreed with the taxpayers. Judge Marvel reasoned that the above-quoted last sentence of § 6213(a) controlled in this case, especially because the IRS did not rescind the first 90-day letter as permitted by § 6212(d). Section 6212(d) permits the IRS to rescind a notice of deficiency mailed to a taxpayer if the taxpayer consents on a properly executed Form 8626 (Agreement to Rescind Notice of Deficiency) or other acceptable document reflecting an agreement to rescind between the IRS and the taxpayer. *See also* Rev. Proc. 98-54, 1998-2 C.B. 529 at 530 (§ 5.07). Judge Marvel further determined that the second 90-day letter sent by the IRS was insufficient to unilaterally rescind the first 90-day letter. Moreover, the Tenth Circuit, to which an appeal from the Tax Court would lie in this case, has stated: "[I]f a notice indicates a petition date that is more than 90 days after the date of mailing, that date controls." *Smith v. Commissioner*, 275 F.3rd 912 at 916 (10th Cir. 2001). Judge Marvel rejected the IRS's argument that the 90-day period set forth in § 6213(a) nevertheless should apply because the date in the first 90-day letter was an "obvious mistake." The IRS's argument relied in part upon two prior decisions in which the 90-day period in § 6213(a) was enforced even though the notice of deficiency completely omitted a date by which a petition in the Tax Court was required to be filed. *See Smith v. Commissioner*, 114 T.C. 489 (2000), *aff'd* 275 F.3rd 912 (10th Cir. 2001) (notice of deficiency was valid despite failure to specify last date to file a petition in Tax Court); *Rochelle v. Commissioner*, 116 T.C. 356 (2001) (petition filed 143 days after mailing of notice of deficiency was untimely despite failure of notice to specify last date to file a petition in Tax Court). Judge Marvel distinguished *Smith* and *Rochelle* because those cases dealt with circumstances where no filing date for a Tax Court petition was specified, not a situation like the present case in which the specified filing date incorrectly extended beyond the 90-day period of § 6213(a). Judge Marvel reasoned that the IRS's argument "attempts to create uncertainty about the meaning of the last sentence of section 6213(a) where there is none." Anticipating a future case, perhaps, Judge Marvel also wrote: "This is not a case where a taxpayer petitions us for redetermination of a deficiency in a notice that purports to correct a prior notice of deficiency, a circumstance for which we express no view on the application of the last sentence of section 6213(a)."

E. Statute of Limitations

1. Do you know the difference between a "postponement" and an "extension"? The IRS explains and announces slightly longer look-back periods under § 6511 for filing claims for credit or refund relating to COVID-year postponed returns and payments of taxes. Notice 2023-21, 2023-11 I.R.B. 563 (2/27/23). Appreciating this IRS Notice requires some knowledge of recent history as well as an understanding of § 6511 relating to claims for credit or refund of federal taxes paid. The bottom line, though, is good news for taxpayers. *Note to self*: You may want to mark May 17, 2024, on your calendar for individual clients who filed their 2020 federal income tax returns by the COVID-year postponed due date of May 17, 2021.

Background. As a result of the COVID pandemic, the IRS exercised its authority under § 7508A to postpone the filing and payment deadlines for numerous types of federal tax returns and taxes due in 2020 and 2021. *See* Notice 2020-23, 2020-18 I.R.B. 742 (4/9/20) (normal April 15, 2020, filing and payment obligations postponed to July 15, 2020, for Form 1040 series returns (individuals), Form 1120 series returns (corporations), Form 1065 (partnerships), Form 1041 (income tax return of trusts and estates), Form 706 (estate and generation-skipping transfer tax return), Form 709 (gift and generation-skipping transfer tax return), and Form 990-T (unrelated business income of tax-exempt organizations); Notice 2021-21, 2021-15 I.R.B. 986 (4/12/21) (normal April 15, 2021, filing and payment obligations postponed to May 17, 2021, for Form 1040 series returns (individuals)). Although Notice 2020-23 and Notice 2021-21 *postponed* certain return filing and payment due dates, those notices did not *extend* the time for filing the returns because a postponement is not an extension. *See* Reg. § 301.7508A-1(b)(4). As a result, the postponements did not lengthen the so-called "lookback period" of § 6511(b), which limits a taxpayer to recovering only taxes paid within a specified look-back period.

Limitations periods of § 6511. Section 6511(a) generally requires claims for credit or refund of federal taxes paid to be filed by the *later of* (i) three years from the time the taxpayer's return was filed or (ii) two years from the time the tax was paid. If the taxpayer fails to file the claim within one of these periods, then § 651l(b)(l) prohibits the Service from making the refund. Even if a taxpayer files a claim for refund within one of the periods prescribed by § 6511(a), the amount of tax that the taxpayer can recover may be limited by § 6511(b)(2). If the taxpayer files the claim within the three-year period of § 6511(a), then under § 651l(b)(2)(A) the taxpayer can recover only the portion of the tax paid during the period preceding the filing of the refund claim equal to three years *plus any extension of time the taxpayer may have obtained for filing the return*. If the taxpayer files the refund claim more than three years after the taxpayer filed the return, but within two years after the taxpayer paid the tax (so that the two-year period of § 6511(a) is satisfied), then under § 6511(b)(2)(B) the taxpayer can recover only the portion of the tax paid during the two years preceding the filing of the refund claim. Furthermore, for a calendar-year taxpayer, withheld and estimated income taxes are deemed paid on the due date of the tax return, generally April 15 of each year. *See* § 6513(b)(1)-(2). The three-year lookback period of § 6511(b)(2)(A), particularly the deemed April 15 payment date for withheld and estimated taxes, is the subject of Notice 2023-21.

Notice 2023-21. Under the general rule of § 6511(b)(2)(A) described above, taxpayers who did not extend the time for filing their 2019 or 2020 federal returns must file a claim for credit or refund within three years of the normal due date for their returns (generally April 15, 2020, or April 15, 2021, respectively). Yet, Notice 2020-23 *postponed* until July 15, 2020, the due date for most 2019 federal tax returns, and Notice 2021-21 *postponed* until May 17, 2021, the due date for 2020 individual federal income tax returns. Technically, these "postponements" are not "extensions." Therefore, absent relief, the three-year lookback period for filing claims for credit or refund of 2019 or 2020 taxes paid (or deemed paid) with returns timely-filed according to the postponed 2020 or 2021 filing dates would expire earlier than the full three years otherwise allowed by § 6511(b)(2)(A). Consequently, pursuant to § 7508A the IRS has announced relief for any person (i) with a federal tax return filing or payment obligation that was postponed by Notice 2020-23 to July 15, 2020, or (ii) with a federal income tax return in the Form 1040 series that was postponed by Notice 2021-21 to May 17, 2021. Notice 2023-21 provides that, for taxpayers affected by Notice 2020-23, the period beginning on April 15, 2020, and ending on July 15, 2020, will be disregarded in determining the beginning of the lookback period for the purpose of determining the amount of a credit or refund under § 6511(b)(2)(A). Similarly, for taxpayers affected by Notice 2021-21 the period beginning on April 15, 2021, and ending on May 17, 2021, will be disregarded in determining the beginning of the lookback period for the purpose of determining the amount of a credit or refund under § 6511(b)(2)(A). The relief provided under § 7508A and announced in Notice 2023-21 is automatic. Affected taxpayers do not have to call the IRS, file any form, or send letters or other documents to receive this relief.

Example. Taxpayer is a calendar-year filer with a 2019 federal income tax return due date of April 15, 2020. Taxpayer's employer withheld income taxes from Taxpayer's wages throughout 2019 and remitted the withheld income taxes to the IRS. Pursuant to § 6513(b), these withheld income taxes are deemed paid on April 15, 2020. The due date for Taxpayer's 2019 federal income tax return was postponed by Notice 2020-23 to July 15, 2020. Pursuant to the postponed due date, Taxpayer timely filed their return on June 22, 2020. Under § 6511(a), Taxpayer may timely file a claim for credit or refund until three years from the return filing date, or June 22, 2023. But if Taxpayer files a claim for credit or refund on June 22, 2023, absent the relief granted in Notice 2023-21, the amount of Taxpayer's credit or refund would be limited to tax paid during the period beginning three years before the filing of the claim, or June 22, 2020. As a result, a credit or refund of Taxpayer's withheld income taxes would be barred because they were deemed paid on April 15, 2020, outside of the lookback period in § 6511(b)(2)(A). This notice provides relief by disregarding the period beginning on April 15, 2020, and ending on July 15, 2020, in determining the beginning of the lookback period. Accordingly, under the relief provided by this notice, if Taxpayer files a claim for credit or refund on or before June 22, 2023, the lookback period extends three years back from the date of the claim, disregarding the period beginning on April 15, 2020, and ending on July 15, 2020. As a result, the limit to the amount of the credit or refund would include Taxpayer's withheld income taxes deemed paid on April 15, 2020.

2. The 90-day period specified in § 6213(a) for filing a petition in the U.S. Tax Court is jurisdictional and is not subject to equitable tolling, according to the Tax Court. Hallmark Research Collective v. Commissioner, 159 T.C. No. 6 (11/29/22). In a unanimous, reviewed opinion by Judge Gustafson, the Tax Court has held that the 90-day period specified by § 6213(a) within which taxpayers can challenge a notice of deficiency by filing a petition in the Tax Court is jurisdictional and is not subject to equitable tolling. In this case, the IRS sent a notice of deficiency to the taxpayer. Pursuant to § 6213(a), the taxpayer then had 90 days within which to challenge the notice of deficiency by filing a petition in the U.S. Tax Court. The last day of this 90-day period was September 1, 2021. The taxpayer electronically filed its petition on September 2, 2021, which was one day late. In the petition, the taxpayer stated: "My CPA . . . contracted COVID/DELTA over the last 40 days and kindly requests additional time to respond." In other words, it appears that the taxpayer was requesting an extension of the § 6213(a) 90-day period.

Procedural history. The Tax Court issued an order to show cause in which it ordered the parties to respond as to why the court should not, on its own motion, dismiss the action for lack of jurisdiction. The taxpayer requested that the court defer ruling on the matter until the U.S. Supreme Court issued its opinion in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (4/21/22), which was pending in the Supreme Court. The Tax Court declined to defer ruling and dismissed the taxpayer's action. After the U.S. Supreme Court issued its opinion in *Boechler*, the taxpayer moved to vacate the court's order of dismissal. After receiving briefing, the court issued a unanimous, reviewed opinion denying the motion to vacate its prior order of dismissal.

Tax Court's holding. In a lengthy (57 pages) and extraordinarily thorough opinion, the Tax Court examined the text and history of § 6213(a) and concluded that Congress had clearly indicated that the 90-day period specified in the statute is jurisdictional. The court observed that the Tax Court is a court of limited jurisdiction and has only whatever jurisdiction it has been granted by Congress. Accordingly, because the 90-day period is jurisdictional, in the court's view, the court must dismiss cases, such as this one, in which the taxpayer's petition is filed late. And because the statute is jurisdictional, the court concluded, it is not subject to equitable tolling, i.e., taxpayers cannot argue for exceptions on the basis that they had good cause for failing to meet the deadline. The court also concluded rather briefly that its view on the jurisdictional nature of § 6213(a) was not affected by the U.S. Supreme Court's decision in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (4/21/22). In *Boechler*, the Court held that the 30-day period specified in § 6330(d)(1) for requesting review in the Tax Court of a notice of determination following a collection due process hearing is *not* jurisdictional and *is* subject to equitable tolling. According to the Tax Court, *Boechler* "emphatically teaches that" § 6213(a) and § 6330(d)(1) "are different sections" that "[e]ach must be analyzed in light of its own text, context, and history." The fact that, in *Boechler*, the Supreme Court concluded that the 30-day period specified in § 6330(d)(1) is *not* jurisdictional did not change the Tax Court's view that the 90-day period specified in § 6213(a) *is* jurisdictional. Accordingly, the Tax Court dismissed the taxpayer's action.

a. The Third Circuit disagrees. The 90-day period specified in § 6213(a) for filing a petition in the U.S. Tax Court is *not* jurisdictional and *is* subject to equitable tolling. Culp v. Commissioner, 75 F.4th 196 (3d Cir. 7/19/23). In an opinion by Judge Ambro, the U.S. Court of Appeals for the Third Circuit has held that the 90-day period specified by § 6213(a) within which taxpayers can challenge a notice of deficiency by filing a petition in the Tax Court is *not* jurisdictional and *is* subject to equitable tolling. Although the Third Circuit's opinion does not provide specific dates, it states that the IRS mailed a notice of deficiency to the taxpayers, a married couple, as well as a second notice of deficiency, both with respect to the taxable year 2015. The taxpayers filed a petition in the Tax Court seeking redetermination of the deficiency well outside the 90-day period specified in § 6213(a) for doing so. In an unpublished order, the Tax Court dismissed the taxpayers' petition for lack of jurisdiction. On appeal, the taxpayers, backed by amicus curiae represented by the Legal Services Center of Harvard Law School, argued that the 90-day period provided by § 6213(a) is not jurisdictional and is subject to equitable tolling in appropriate circumstances. The court framed the issue in this way:

> The central question in this appeal is whether the Culps' late filing deprives the Tax Court of jurisdiction to consider their petition. Put another way, is § 6213(a)'s 90-day requirement jurisdictional or is it a claims-processing rule?

The court first analyzed the text of § 6213(a), which provides in part:

> Within 90 days … after the notice of deficiency authorized in section 6212 is mailed …, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. … 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.

The court concluded that the provision's text did not indicate that the 90-day period specified in § 6213(a) is jurisdictional. The language Congress used, the court reasoned, does not link the 90-day deadline to the Tax Court's jurisdiction. The statute provides that the Tax Court has no jurisdiction to enjoin actions or order a refund if the taxpayer's petition is not timely filed, which indicates that "Congress knew how to limit the scope of the Tax Court's jurisdiction." But the provision does not similarly limit the Tax Court's jurisdiction to review petitions that are not timely filed. Further, according to the court, neither the context of the statute nor the court's own precedent interpreting § 6213(a) indicates that the 90-day period is jurisdictional.

After holding that the 90-day period specified in § 6213(a) is not jurisdictional, the court considered whether the period is subject to equitable tolling. According to the court, neither the text nor the context of the statute suggests that Congress intended the period not to be subject to equitable tolling. Accordingly, the court remanded the case to the Tax Court with instructions for the Tax Court to consider whether the taxpayers could demonstrate sufficient grounds for the 90-day period to be equitably tolled.

b. The Tax Court apparently will not follow the Third Circuit's decision in *Culp* in cases appealable to other circuits. Nguyen v. Commissioner, T.C. Memo 2023-151 (12/20/23). In a case decided after the Third Circuit issued its decision in *Culp v. Commissioner*, 75 F.4th 196 (3d Cir. 7/19/23), the Tax Court refused to apply equitable tolling in a case appealable to the Tenth Circuit. Briefly, the taxpayer's Tax Court petition arrived one day after the 90-day period of § 6213(a) had expired. Moreover, the "timely-mailed, timely-filed" rule of § 7502 did not apply because the taxpayer used FedEx Ground instead of one of the other FedEx delivery services permitted under § 7502 pursuant to Notice 2016-30, 2016-18 I.R.B. 676. The Tax Court (Judge Lauber) refused to apply equitable tolling principles and dismissed the taxpayer's petition for lack of jurisdiction, stating in footnote 2 of the opinion:

> Absent stipulation to the contrary this case is appealable to the Tenth Circuit, and we thus follow its precedent, which is squarely on point. See *Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), aff'd, 445 F.2d 985 [27 AFTR 2d 71-1583] (10th Cir. 1971). The Tenth Circuit has long agreed with this Court's holdings that the statutory period prescribed by section 6213(a) is a jurisdictional requirement. See *Armstrong v. Commissioner*, 15 F.3d at 973 n.2; *Foster v. Commissioner*, 445 F.2d 799, 800 [28 AFTR 2d 71-5210] (10th Cir. 1971). Thus, we need not address a recent ruling by the U.S. Court of Appeals for the Third Circuit that the statutory filing deadline in deficiency cases is a non-jurisdictional "claims-processing" rule. *See Culp v. Commissioner*, 75 F.4th 196, 205 [132 AFTR 2d 2023-5198] (3d Cir. 2023).

3. If I'm high on cannabis and forget the 30-day deadline, will "equitable tolling" get me a few extra days to file my collection due process hearing request with IRS Appeals? Maybe. Organic Cannabis Foundation, LLC v. Commissioner, 161 T.C. No. 4 (9/27/23). Ala *Boechler*, the Tax Court, in a reviewed opinion (14-0-3), introduces "equitable tolling" to the 30-day deadline under § 6320(a)(3)(B) for requesting a collection due process ("CDP") hearing with IRS Appeals, overruling *Kennedy v. Commissioner*, 116 T.C. 255 (2001). Recall that in *Boechler, P.C. v. Commissioner*, 596 U.S. 199, (2022), the Supreme Court of the United States held that the 30-day period specified in § 6330(d)(1) for requesting *judicial* review in the Tax Court of a notice of determination following a CDP hearing with IRS Appeals is *not* jurisdictional and *is* subject to equitable tolling. In this case, the taxpayer missed the 30-day deadline in another provision, § 6320(a)(3)(B), which permits a taxpayer to request an *administrative* hearing with IRS Appeals after receiving a notice of the filing of federal tax lien ("NFTL") under § 6323(a). More specifically, the taxpayer, a single-member LLC subsidiary that had elected subchapter C status, had unpaid tax for three years: 2010, 2011, and 2018. The IRS issued notices of federal tax lien filings to the taxpayer for all three years. For tax years 2010 and 2011, the taxpayer timely requested a CDP hearing with IRS Appeals within the 30-day period under § 6320(a)(3)(B). For some reason, however, the taxpayer's § 6320(a)(3)(B) request for a CDP hearing with IRS Appeals for 2018 was filed one day late. IRS Appeals determined that the taxpayer's hearing request for 2018 was untimely and provided an equivalent hearing under Treas. Reg. § 301.6320-1(i)(1). Ultimately, IRS Appeals issued an adverse notice of determination to the taxpayer for 2010 and 2011 and an adverse decision letter for 2018. The taxpayer then filed a petition in Tax Court seeking review for all three years. In response, the IRS moved to dismiss the taxpayer's Tax Court petition with respect to 2018 for lack of jurisdiction, arguing that IRS Appeals did not make a "determination" for the Tax Court to review under § 6330(d)(1). See *Kennedy v. Commissioner,* 116 T.C. 255 (2001). The taxpayer argued that the 30-day period for requesting a CDP *administrative* hearing with IRS Appeals under § 6320(a)(3)(B) should be equitably tolled, similar to SCOTUS's ruling in *Boechler* under § 6330(d)(1) for a *judicial* hearing in Tax Court. The Tax Court, in a thirty-one-page opinion written by Judge Goeke reached the following holdings:

- IRS Appeals has authority under § 6320 to hold CDP hearings and issue a notice of determination even when a taxpayer files a request after the 30-day period of § 6320(a)(3)(B).
- The Regulations under § 6320 do not preclude the application of the doctrine of equitable tolling with respect to the 30-day period.
- The 30-day period is subject to equitable tolling where the circumstances so warrant.
- *Kennedy v. Commissioner*, 116 T.C. 255 (2001), is overruled to the extent that it holds that IRS Appeals is not authorized under § 6320(a)(3)(B) to waive the 30-day period and issue a notice of determination (instead of a decision letter after a CDP equivalent hearing) where circumstances warrant application of the doctrine of equitable tolling.

The Tax Court then remanded the case to IRS Appeals to determine if the taxpayer's circumstances warranted equitable tolling.

Concurring and dissenting opinion of Judge Jones. In a concurring and dissenting opinion by Judge Jones (joined by Judges Buch and Foley), Judge Jones dissented from the majority's holding that the Regulations under § 6320 do not preclude equitable tolling and would have held for the IRS and against the taxpayer on that basis.

F. <u>Liens and Collections</u>

G. <u>Innocent Spouse</u>

H. <u>Miscellaneous</u>

X. WITHHOLDING AND EXCISE TAXES

XI. TAX LEGISLATION

XII. TRUSTS, ESTATES & GIFTS