#47 PROVIDE THAT THE TIME LIMITS FOR BRINGING TAX LITIGATION ARE SUBJECT TO THE JUDICIAL DOCTRINES OF FORFEITURE, WAIVER, ESTOPPEL, AND EQUITABLE TOLLING

Present Law

Various provisions in the Internal Revenue Code (IRC) authorize proceedings or suits against the government, provided such actions are brought timely. These actions are generally brought in the U.S. Tax Court, a U.S. District Court, or the U.S. Court of Federal Claims.[176]

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

U.S. Tax Court

For some types of tax controversies, the U.S. Tax Court is the only judicial forum in which taxpayers, by filing a petition within a specified period, may litigate their tax liability without first paying the tax asserted. Examples of these types of controversies include deficiency proceedings, collection due process (CDP) proceedings, and "standalone" innocent spouse cases (*i.e.*, where innocent spouse relief is sought other than in response to a statutory notice of deficiency or as part of a CDP proceeding).

Other types of cases brought in the Tax Court include interest abatement cases, worker classification cases, and whistleblower claims.

IRC § 7442, which describes the jurisdiction of the Tax Court, does not specify that prescribed periods for petitioning the Tax Court are not subject to equitable doctrines.

In the absence of a timely filed petition, however, the Tax Court has held it does not have jurisdiction to redetermine deficiencies, hear appeals from IRS CDP proceedings, consider standalone innocent spouse claims, or decide whistleblower claims.

With respect to deficiency cases and standalone innocent spouse cases, several U.S. Courts of Appeal have agreed with the Tax Court that the time limits for filing a Tax Court petition are jurisdictional requirements that cannot be modified by applying equitable doctrines. In addition, one appellate court agreed with the Tax Court that the deadline for filing a petition in a CDP case is not subject to equitable tolling.[177] However, a different appellate court, interpreting language in IRC § 7432 (the whistleblower statute) that is "nearly

176 Some tax claims may also be heard by U.S. bankruptcy courts. For a fuller discussion of this recommendation, see National Taxpayer Advocate 2017 Annual Report to Congress 283 (Legislative Recommendation: *Equitable Doctrines: Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling, and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case*).

177 *Duggan v. Comm'r*, 879 F.3d 1029, 1034 (9th Cir. 2018).

identical in structure" to the language in IRC § 6330 (the CDP statute), reversed a Tax Court dismissal and held that the filing deadline for whistleblower cases is not jurisdictional and is subject to equitable tolling.[178]

Other Federal Courts

In some cases, taxpayers have the right to obtain judicial review in federal courts other than the Tax Court if they sue within a specified period. For example, a refund suit can generally be brought in the U.S. District Courts or in the U.S. Court of Federal Claims within two years after the IRS denies the claim. There is a split between circuits regarding whether the statutory period for seeking refunds is subject to equitable doctrines.[179]

Similarly, taxpayers may sue in a U.S. District Court to enjoin enforcement of a wrongful levy or sale or to recover property (or proceeds from the sale of the property) if they do so within a specified period (generally, within two years of levy). Several federal courts have held that the applicable period is not subject to equitable tolling,[180] but at least one appellate court has held that it is.[181]

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 with respect to unauthorized actions by the IRS. Courts have differed on whether equitable doctrines can toll the applicable period for bringing suit.[182]

Reasons for Change

The sanction for failing to commence suit in the Tax Court or another federal court within the time limits prescribed by the IRC is severe: taxpayers lose their day in that court, which may be the only prepayment forum, or the only forum at all, with jurisdiction to hear their claim. Treating the IRC time limits for bringing suit as jurisdictional, and not subject to equitable doctrines, 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. The IRS itself occasionally provides inaccurate information regarding the filing deadline to a taxpayer, and taxpayers have been harmed by relying on that erroneous information.[183]

178 *Myers v. Comm'r*, 928 F.3d 1025, 1036 (D.C. Cir. 2019), *reh'g en banc denied*, No. 18-1003 (D.C. Cir. Oct. 4, 2019). At least one other taxpayer, relying on the *Myers* decision, has argued that the CDP deadlines are not jurisdictional (see Opening Brief of Petitioner-Appellant, *Boechler v. Comm'r*, Docket No. 19-2003, 2019 WL 3384248 (8th Cir. 2019)).

179 *Compare RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1460-1463 (Fed. Cir. 1998) (declining to apply equitable principles to IRC § 6352) with *Wagner v. United States*, 2018-2 U.S.T.C. (CCH) ¶50,496 (E.D. Wash. 2018) (the time limits set forth in IRC § 6532 are not jurisdictional; furthermore, plaintiff's petition was timely filed) and *Howard Bank v. United States*, 759 F. Supp. 1073, 1080 (D. Vt. 1991), *aff'd*, 948 F.2d 1275 (2d Cir. 1991) (applying equitable principles to IRC § 6352 and estopping the IRS from raising the limitations period as a bar to suit).

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

181 *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).

182 *Compare Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 871-872 (9th Cir. 2009) (time for bringing suit under IRC § 7431 is not subject to equitable tolling) *with United States v. Marsh*, 89 F. Supp. 2d 1171, 1177 (D. Haw. 2000) (doctrine of equitable tolling is an extraordinary remedy that did not apply in an IRC § 7433 action), *Ramos v. United States*, 2002-2 U.S.T.C. (CCH) ¶50,767 (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) (whether equitable tolling applies to IRC §§ 7432 and 7433 actions has not been definitively determined, but it is an extraordinary remedy and did not apply in this case).

183 *See, e.g., Nauflett v. Comm'r*, 892 F.3d 649, 652-654 (4th Cir. 2018) (doctrine of equitable tolling did not apply to innocent spouse case despite reliance on erroneous IRS advice regarding the filing deadline); *Rubel v. Comm'r.*, 856 F.3d 301, 306 (3d Cir. 2017) (same).

The right to a fair and just tax system requires that equitable doctrines be available to taxpayers in the rare cases they would apply. Taxpayers would still be required to demonstrate that an equitable doctrine applies in their cases, and courts could still dismiss petitions or complaints as untimely.

Recommendation

- Enact a new section of the IRC, or amend IRC § 7442, to provide that the periods set forth in the IRC within which taxpayers may petition the Tax Court or file suit in other federal courts are not jurisdictional and are subject to the judicial doctrines of forfeiture, waiver, estoppel, and equitable tolling.[184]

184 If this change to the IRC were enacted, late-filed claims would no longer be dismissed for lack of jurisdiction, which would mean that the taxpayer would have no right to pursue a refund suit. As a result, we are also recommending that IRC § 7459(d) be amended to make clear that a dismissal based on timeliness is not a decision on the merits.