

## #51 FIX THE DONUT HOLE IN THE TAX COURT'S JURISDICTION TO DETERMINE OVERPAYMENTS BY NON-FILERS WITH FILING EXTENSIONS

### Present Law

Internal Revenue Code (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 return is filed, then the lookback period is three years, plus any filing extension. Otherwise, the lookback period is two years. IRC § 6513(b) provides that withholding and other pre-payments are deemed paid on the due date of the return without regard to extensions. Thus, taxpayers who have overpaid on or before the original return filing deadline generally cannot claim a credit or refund more than two years later unless they file a return.

When a taxpayer does not file a return, the IRS sometimes sends a notice of deficiency to assess additional tax. A notice of deficiency gives the taxpayer the right to petition the Tax Court, and if the taxpayer timely does so, then the Tax Court generally has jurisdiction under IRC § 6512(b) to determine whether the taxpayer is due a refund for the taxable year at issue to the same extent the IRS could have considered a claim for refund filed on the date the IRS mailed the notice of deficiency. In the absence of a special rule, the Tax Court would have no jurisdiction to award refunds to non-filers who are issued a notice of deficiency after the two-year lookback period.

IRC § 6512(b)(3)(flush) provides such a special rule. It extends the limitations and lookback periods if the IRS mails a notice of deficiency *before* the taxpayer files a return. Specifically, it provides that if the IRS mails the notice of deficiency “during the third year after the due date (*with extensions*) for filing the return,” then the limitations and lookback periods are three years (not two), even though the taxpayer has not filed a return. Because the Tax Court’s general refund jurisdiction lapses after the second year following the original due date (*without regard to extensions*) and the special rule does not apply unless the IRS mails the notice after the second year (*with regard to extensions*), there is a six-month “donut hole” during which the IRS can send a notice of deficiency without triggering the Tax Court’s jurisdiction to consider the taxpayer’s claim for refund.

An example may help to illustrate these rules. Assume John Doe was over-withheld on April 15, 2016, the original filing deadline for a 2015 tax return. He requested a six-month extension of time to file, but did not get around to filing before July 1, 2018, when the IRS mailed him a notice of deficiency. He responded to the notice by petitioning the Tax Court to claim his refund. Under the general rule, Mr. Doe’s overpayment could only be refunded within two years of the due date of the return, *without regard to extensions* (*i.e.*, April 15, 2018). Thus, he can only recover his overpayment if the special rule extends this period.

The special rule only applies if the IRS mails the deficiency notice during the third year after the due date of his return (*with extensions*) (*i.e.*, the year beginning after October 15, 2018). Because the IRS mailed his deficiency notice before the beginning of the third year, the special rule does not apply, and Mr. Doe cannot get his refund.

### Reasons for Change

According to H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.), Congress enacted the special rule of IRC § 6512(b)(3)(flush) to put non-filers who receive notices of deficiency after the two-year lookback period on the same footing as taxpayers who file returns on the same day the IRS mailed the notice of deficiency. The special rule was supposed to allow non-filers “who receive a notice of deficiency and file suit to contest it in

Tax Court during the third year after the return due date, to obtain a refund of excessive amounts paid within the 3-year period prior to the date of the deficiency notice.”

However, the statute as written may not fully fix the problem it was enacted to solve. In *Borenstein*, the Tax Court concluded that it had no jurisdiction to determine a non-filer’s overpayment because the non-filer had requested a six-month extension to file and the IRS mailed the notice of deficiency during the first six months of the third year following the original due date — *after* the second year following the due date (*without extensions*) and *before* the third year following the due date (*with extensions*).<sup>207</sup> Thus, the court found that the special rule of IRC § 6512(b)(3)(flush) leaves a donut hole in its jurisdiction. Although the U.S. Court of Appeals for the Second Circuit reversed the Tax Court’s decision in this case, the Tax Court is not required to follow the Second Circuit’s decision in cases arising in other circuits.<sup>208</sup> Thus, unless the Tax Court revisits its decision, a legislative fix is still needed.

Although this problem only affects the relatively limited number of taxpayers who request a six-month filing extension and then, for whatever reason, do not file a return, Congress felt it was important to provide them with this special rule. For that reason, we believe it is important to highlight this unintended result and recommend a solution.

### Recommendation<sup>209</sup>

- Amend IRC § 6512(b)(3) to clarify that when the IRS mails a notice of deficiency to a non-filer after the second year following the due date of the return (*without regard to extensions*), the limitations and lookback periods for filing a claim for refund or credit are at least three years from the due date of the return (*without regard to extensions*).

<sup>207</sup> *Borenstein v. Comm’r*, 149 T.C. 263 (2017), *rev’d*, 919 F.3d 746 (2d Cir. 2019).

<sup>208</sup> *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971).

<sup>209</sup> For more detail, see National Taxpayer Advocate 2018 Annual Report to Congress (Legislative Recommendation: *Tax Court Jurisdiction: Fix the Donut Hole in the Tax Court’s Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions*); National Taxpayer Advocate, *The Second Circuit in Borenstein Helped to Close the Gap in the Tax Court’s Refund Jurisdiction, but Only for Taxpayers in that Circuit*, NTA Blog (Apr. 27, 2019), <https://taxpayeradvocate.irs.gov/news/nta-blog-the-second-circuit-in-borenstein-helped-to-close-the-gap-in-the-tax-court-s-refund-jurisdiction-but-only-for-taxpayers-in-that-circuit>.