159 T.C. 80–183

UNITED STATES TAX COURT

REPORTS

Vol. 159 Nos. 5 and 6

November 1, 2022, to

December 31, 2022

UNITED STATES TAX COURT

WASHINGTON, D.C.

JUDGES OF THE UNITED STATES TAX COURT

Chief Judge

KATHLEEN KERRIGAN

Judges

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JOSEPH H. GALE
DAVID GUSTAFSON[1]
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JOHN O. COLVIN
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JUAN F. VASQUEZ
MICHAEL B. THORNTON
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Special Trial Judges

LEWIS R. CARLUZZO, *Chief Special Trial Judge*

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ADAM B. LANDY
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STEPHANIE A. SERVOSS, *Clerk*

SHEILA A. MURPHY, *Reporter of Decisions*

[1] Judge Gustafson retired on October 31, 2022, and was recalled on November 1, 2022.
[2] Termination of recall December 31, 2022.

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REPORTS

OF THE

UNITED STATES TAX COURT

GREEN VALLEY INVESTORS, LLC, ET AL.,[1] BOBBY A. BRANCH, TAX MATTERS PARTNER, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 17379-19, 17380-19, 17381-19, 17382-19. Filed November 9, 2022.

P timely petitioned this Court challenging the IRS's adjustments in notices of final partnership administrative adjustment regarding charitable deductions related to syndicated conservation easement transactions listed under I.R.S. Notice 2017-10, 2017-4 I.R.B. 544. The parties filed Cross-Motions for Partial Summary Judgment seeking summary adjudication as to the imposition of penalties in these consolidated cases. P principally contends that I.R.C. § 6662A penalties cannot be imposed for two reasons: (1) the IRS seeks to improperly impose such penalties retroactively and (2) the IRS failed to comply with the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA) when issuing Notice 2017-10. R contends that Notice 2017-10 was properly issued without notice-and-comment rulemaking and that he is entitled to partial

[1] The following cases are consolidated herewith: Vista Hill Investments, LLC, Bobby A. Branch, Tax Matters Partner, Docket No. 17380-19; Big Hill Partners, LLC, Bobby A. Branch, Tax Matters Partner, Docket No. 17381-19; and Tick Creek Holdings, LLC, Bobby A. Branch, Tax Matters Partner, Docket No. 17382-19.

summary judgment. *Held*: Notice 2017-10 is a legislative rule, improperly issued by the IRS without notice and comment as required under the APA. *Held, further*, Notice 2017-10 will be set aside by the Court, and P's Cross-Motions for Summary Judgment will be granted in part prohibiting the imposition of I.R.C. § 6662A penalties in these consolidated cases.

Vivian D. Hoard, *Kip D. Nelson*, *Richard A. Coughlin*, *Brian C. Bernhardt*, and *Elizabeth K. Blickley*, for petitioner.

Emily J. Giometti, *Kirsten E. Brimer*, *Clint J. Locke*, *Kimberly B. Tyson*, *Mary Helen Weber*, *Travis Vance*, and *Angela B. Reynolds*, for respondent.

OPINION

WEILER, *Judge*: On December 3, 2021, the Commissioner of Internal Revenue (respondent) filed a third Motion for Partial Summary Judgment,[2] seeking summary adjudication in each of these consolidated cases (third Motions for Partial Summary Judgment) on the issue of whether the Internal Revenue Service (IRS) complied with the requirements of section 6751(b)(1) as applied to the gross valuation misstatement penalty under section 6662(h), the substantial valuation misstatement penalty under section 6662(e), the negligence penalty under section 6662(b)(1) and (c), and the reportable transaction penalty under section 6662A.[3] Then on December 14, 2021, petitioner[4] in these consolidated cases filed Motions

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[2] In each of these consolidated cases respondent has twice before moved for partial summary judgment. By separate order, the court will rule on respondent's Motions for Partial Summary Judgment regarding the issue of whether the IRS complied with the requirements of section 6751(b)(1). Unless otherwise indicated, all statutory references are to the Internal Revenue Code (Code), Title 26 U.S.C., in effect at all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. All dollar amounts are rounded to the nearest dollar.

[3] The tax year at issue for Green Valley Investors, LLC (Green Valley), Big Hill Partners, LLC (Big Hill), and Tick Creek Holdings, LLC (Tick Creek), is 2014, while the tax year at issue for Vista Hill Investments, LLC (Vista Hill), is 2015.

[4] In these consolidated cases Bobby A. Branch is the petitioner and tax matters partner for four entities: Green Valley, Vista Hill, Big Hill, and Tick Creek. We refer to these entities individually as "LLC" and collectively as "the LLCs." Since Mr. Branch is the tax matters partner in each of these

for Summary Judgment (Cross-Motions for Summary Judgment) regarding respondent's assertion of two penalties—sections 6662(h) and 6662A.[5]

In the Cross-Motions for Summary Judgment petitioner makes two arguments against the penalties asserted under section 6662A. First, petitioner contends that penalties under section 6662A may not be asserted in these cases since any assessment of them would be made retroactively after the issuance of I.R.S. Notice 2017-10, 2017-4 I.R.B. 544; and second, the issuance of Notice 2017-10 failed to comply with the notice-and-comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706.

On January 7, 2022, petitioner filed a written Objection to respondent's third Motions for Partial Summary Judgment. Petitioner's principal argument is that respondent cannot assess penalties under section 6662A as a matter of law.

On February 11, 2022, respondent filed a written Objection to petitioner's Cross-Motions for Summary Judgment. In the Objection, and among other arguments not relevant to this report, respondent contends petitioner has failed to show and establish that section 6662A penalties are not applicable to the transactions at issue in these consolidated cases pursuant to Notice 2017-10. Respondent further contends that Notice 2017-10 was properly issued without notice-and-comment rulemaking and that he is entitled to partial summary judgment as prayed for in his third Motions for Partial Summary Judgment.

Background

The following facts are drawn from respondent's third Motions for Partial Summary Judgment, petitioner's Cross-Motions for Summary Judgment, Declarations and Exhibits thereto, and the parties' respective written Objections. These facts are stated solely for purposes of ruling on the parties' Motions herein.

consolidated cases, we will collectively refer to the tax matters partner for the LLCs in the singular and as "petitioner" throughout this report.

[5] This report will address only petitioner's Motions regarding respondent's determination of section 6662A penalties. The Court will, by separate order, address petitioner's Cross-Motions for Partial Summary Judgment with respect to section 6662(h) penalties.

By deed recorded on December 31, 2014, Green Valley, Big Hill, and Tick Creek each granted a conservation easement to Triangle Land Conservancy (TLC). On December 3, 2015, Vista Hill did the same. Green Valley, Big Hill, and Tick Creek each timely filed Forms 1065, U.S. Return of Partnership Income, for tax year 2014, and Vista Hill timely filed Form 1065 for tax year 2015. On its Form 1065 Green Valley deducted $22,559,000 for its charitable easement contribution to TLC for the tax year 2014. Similarly, Big Hill and Tick Creek deducted contributions of charitable easements of $22,626,000 and $22,605,000, respectively. Vista Hill deducted $22,498,000 on its Form 1065 for its charitable easement contribution for tax year 2015.

On December 23, 2016, the IRS issued Notice 2017-10. Notice 2017-10 identified all syndicated conservation easement transactions beginning January 1, 2010, including all substantially similar transactions, as “listed transactions” for purposes of Treasury Regulation § 1.6011-4(b)(2).

The IRS conducted examinations of Green Valley’s, Vista Hill’s, Big Hill’s, and Tick Creek’s respective Forms 1065. By notices of final partnership administrative adjustment (FPAA) issued to the LLCs on June 24, 2019, the IRS disallowed the claimed deductions for noncash charitable contributions because the LLCs (1) did not establish that the deductions met all requirements pursuant to section 170 and (2) failed to establish that the values of the property interests contributed exceeded zero. In addition each FPAA asserted a gross valuation misstatement penalty under section 6662(h), a substantial valuation misstatement penalty under section 6662(e), a negligence penalty under section 6662(b)(1) and (c), and a substantial understatement penalty under section 6662(b)(2) and (d). Respondent’s Answers asserted the additional reportable transaction penalty under section 6662A.

On September 20, 2019, petitioner timely petitioned this Court challenging the FPAA determinations. When the Petitions were filed, the LLCs’ principal places of business were in North Carolina.

Discussion

I. *Summary Judgment*

A party may move for summary judgment regarding all or any part of the legal issues in controversy. *See* Rule 121(a); *Wachter v. Commissioner*, 142 T.C. 140, 145 (2014). We may grant summary judgment if the pleadings, stipulations and exhibits, and any other acceptable materials show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law. *See* Rule 121(a) and (b); *see also CGG Ams., Inc. v. Commissioner*, 147 T.C. 78, 82 (2016); *Elec. Arts, Inc. & Subs. v. Commissioner*, 118 T.C. 226, 238 (2002). We construe the facts and draw all inferences in the light most favorable to the nonmoving party to decide whether summary judgment is appropriate. *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). The moving party has the burden of proving that there is no genuine issue of material fact. *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). However, the nonmoving party may not rest upon the mere allegations or denials in its pleadings but instead must "set forth specific facts showing that there is a genuine dispute for trial." Rule 121(d); *see Sundstrand Corp.*, 98 T.C. at 520.

II. *Application of Section 6662A Penalties*

Section 6662A was enacted as part of the American Jobs Creation Act of 2004 (AJCA), Pub. L. No. 108-357, § 812(a), 118 Stat. 1418, 1577. It is effective for tax years ending after October 22, 2004. *Id.* § 812(f), 118 Stat. at 1580. Section 6662A(a) provides: "If a taxpayer has a reportable transaction understatement for any taxable year, there shall be added to the tax an amount equal to 20 percent of the amount of such understatement." The penalty is increased from 20% to 30% of the amount of the understatement if the disclosure requirements of section 6664(d)(3)(A), requiring disclosure in accordance with the regulations prescribed under section 6011, are not met. I.R.C. § 6662A(c). Section 6662A penalties apply to any item which is attributable to any "listed transaction." I.R.C. § 6662A(b)(2)(A).

After the enactment of the AJCA, temporary regulations were issued, including Temporary Treasury Regulation

§ 1.6011-4T(b)(2) defining the term "listed transaction" to include those types of transactions which the IRS has determined to be tax avoidance transactions and identified by notice, regulation, or other form of published guidance. *See* T.D. 9350, 2007-38 I.R.B. 607. This temporary regulation was published, and the IRS requested comments. Additional notice and request for comments was published by the IRS in Notice 2005-11, 2005-1 C.B. 493, and Notice 2005-12, 2005-1 C.B. 494, as amended.[6] Final regulations were published, the IRS requested comments as to Treasury Regulation § 1.6011-4, and the term "listed transaction" continued to be defined as a transaction that is the same or substantially similar to one of the types of transactions that the IRS has determined to be tax avoidance transactions and identified by notice, regulation, or other form of published guidance. Treas. Reg. § 1.6011-4(b)(2).

It is undisputed that Notice 2017-10 was issued after the LLCs filed the returns at issue. It is also undisputed that Notice 2017-10 identified certain syndicated conservation easement transactions as tax avoidance transactions classified as "listed transactions" for purposes of Treasury Regulation § 1.6011-4 and sections 6111 and 6112. *See* Notice 2017-10, § 3, 2017-4 I.R.B. at 545. Petitioner does not dispute that the transactions at issue are the same as or substantially similar to the certain syndicated conservation easement transactions described in Notice 2017-10.

Effective December 23, 2016, Notice 2017-10 identifies certain transactions for purposes of Treasury Regulation § 1.6011-4(b)(2) and sections 6111 and 6112. The notice includes transactions entered into on or after January 1, 2010, that are the same as or substantially similar to certain syndicated conservation easement transactions described in the notice. Notice 2017-10 states that taxpayers who have entered into a listed transaction or transactions of interest "must disclose the transactions as described in [Treasury Regulation §] 1.6011-4 for each taxable year in which the taxpayer participated in the transactions, provided that the period of limitations for assessment of tax has not ended on or before December 23, 2016." On the basis of this text, the Court finds

[6] These notices alerted taxpayers to the recent enactments and invited comments from the public regarding rules and standards relating to section 6707A and sections 6662A, 6662, and 6664, as amended.

that Notice 2017-10 is applicable to the 2014 and the 2015 transactions at issue.

Petitioner cites the definition section found in section 6707A(c)(2) as an indication that the terms Congress uses are in the past tense. Similarly, petitioner cites Treasury Regulation § 1.6011-4 for the proposition that the IRS must identify a transaction as being a reportable transaction prospectively. However, respondent notes that Treasury Regulation § 1.6011-4(e)(2) addresses the issue at hand—namely, the duty on taxpayers to disclose a previous transaction within 90 calendar days from the date in which the prior transaction became a listed transaction or transaction of interest, so long as the period of limitations for assessment remains open.

We have previously upheld the retroactive application of penalties, even though the taxpayers became subject to the penalties after they had entered into the transactions or after their tax returns had been filed. *See Soni v. Commissioner*, T.C. Memo. 2013-30, at *8–9; *see also Kenna Trading, LLC v. Commissioner*, 143 T.C. 322, 371–72 (2014), *aff'd sub nom. Sugarloaf Fund, LLC v. Commissioner*, 911 F.3d 854 (7th Cir. 2008); *Patin v. Commissioner*, 88 T.C. 1086, 1127 n.34 (1987), *aff'd without published opinion*, 865 F.2d 1264 (5th Cir. 1989), *and aff'd sub nom. Gomberg v. Commissioner*, 868 F.2d 865 (6th Cir. 1989), *Skeen v. Commissioner*, 864 F.2d 93 (9th Cir. 1989), *and Hatheway v. Commissioner*, 856 F.2d 186 (4th Cir. 1988) (per curiam) (unpublished table decision); *McGehee Family Clinic, P.A. v. Commissioner*, T.C. Memo. 2010-202.

Petitioner also cites *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), in which the Supreme Court struck down the retroactive application of a newly promulgated regulation by the Department of Health and Human Services.

On the basis of our findings *infra* Part III, we conclude that these cases do not require us to decide whether section 6662A penalties can be applied retroactively. Accordingly, we refrain from doing so.

III. *Notice-and-Comment Rulemaking Requirements*

The APA provides a three-step procedure for "notice-and-comment rulemaking" whereby agencies are required to (1) issue a general notice of proposed rulemaking, (2) allow inter-

ested persons an opportunity to participate, and (3) include in the final rule a "concise general statement of [its] basis and purpose." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting 5 U.S.C. § 553(c)). However, "[n]ot all 'rules' must be issued through the notice-and-comment process. . . . [T]he notice-and-comment requirement 'does not apply' to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'" *Id.* (quoting 5 U.S.C. § 553(b)(A)). "The APA also recognizes that Congress may modify these requirements, but provides that a '[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly.'" *Asiana Airlines v. FAA*, 134 F.3d 393, 396 (D.C. Cir. 1998) (quoting 5 U.S.C. § 559).

Notably, the Supreme Court has affirmed a material advisor's right to challenge an IRS notice as violative of the APA. *See CIC Servs., LLC v. IRS*, 141 S. Ct. 1582 (2021). Other federal courts have recently wrestled with the issue before this Court. In *Mann Construction, Inc. v. United States*, 539 F. Supp. 3d 745 (E.D. Mich. 2021), the district court held that Congress authorized the IRS to promulgate Notice 2007-83, 2007-2 C.B. 960, without the requirement of having to first provide notice and comment under the APA; however, this decision was later reversed by the U.S. Court of Appeals for the Sixth Circuit in *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022). While in *CIC Services, LLC v. IRS*, No. 3:17-CV-110, 2021 WL 4481008 (E.D. Tenn. Sept. 21, 2021), the district court granted a preliminary injunction in favor of the taxpayer, finding the taxpayer was likely to prevail on its challenge of Notice 2016-66, 2016-47 I.R.B. 745, on the basis of the IRS's failure to first comply with the APA's notice-and-comment requirements.[7]

Respondent makes two arguments identical to those made by the United States in *Mann Construction*; namely, that (1) Notice 2017-10 was an interpretative rather than a legislative rule and (2) even if Notice 2017-10 were a legislative

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[7] *See also Liberty Glob., Inc. v. United States*, No. 1:20-CV-03501, 2022 WL 1001568 (D. Col. Apr. 4, 2022) (granting partial summary judgment after finding temporary treasury regulations related to section 245A were invalid since they were not promulgated in compliance with the APA's notice-and-comment requirements).

rule, Congress has authorized its issuance by procedure other than the notice-and-comment requirements under the APA.

A. *Is Notice 2017-10 an Interpretative or a Legislative Rule?*

Legislative rules impose new rights or duties and change the legal status of regulated parties. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1995); *see Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (explaining that legislative rules impose new rights or duties and change the legal status of the parties, whereas interpretative rules articulate what an agency thinks a statute means or remind parties of pre-existing duties). Interpretative rules merely advise the public of an agency's construction of the statutes it administers. *Mortg. Bankers Ass'n*, 575 U.S. at 97. Unlike interpretative rules, legislative rules have the force and effect of law. *Id*. at 96.

The Sixth Circuit recently addressed respondent's first argument, finding Notice 2007-83, entitled "Abusive Trust Arrangements Utilizing Cash Value Life Insurance Policies Purportedly to Provide Welfare Benefits," to be a legislative rule requiring the IRS to comply with notice-and-comment requirements under the APA. *Mann Constr., Inc.*, 27 F.4th at 1143–44. Like the Sixth Circuit, we find Notice 2017-10 to be a legislative rule.

Congress tasked the IRS with determining "by regulations" how taxpayers are to "make a return or statement" and the information they must provide therein to the IRS. *See* I.R.C. § 6011(a). Under section 6707A, Congress likewise delegates authority to determine which transactions are reportable transactions as having "a potential for tax avoidance" or that are "the same as, or substantially similar to, a transaction" deemed "a tax avoidance transaction." I.R.C. § 6707A(c)(1). Notice 2017-10, 2017-4 I.R.B. at 544–45, purports to carry out this delegation of authority, and states in part:

> This notice alerts taxpayers and their representatives that the transaction described in section 2 of this notice is a tax avoidance transaction and identifies this transaction, and substantially similar transactions, as listed transactions for purposes of § 1.6011-4(b)(2) of the Income Tax Regulations (Regulations) and §§ 6111 and 6112 of the Internal Revenue Code (Code).

The act of identifying a transaction as a listed transaction by the IRS, by its very nature, is the creation of a substantive (i.e., legislative) rule and not merely an interpretative rule.[8] *See* 5 U.S.C. § 553. Identifying a transaction as a listed transaction does not merely provide the IRS's interpretation of the law or remind taxpayers of preexisting duties. Rather, and as we will detail below, identifying a transaction as a listed transaction imposes new duties in the form of reporting obligations and recordkeeping requirements on both taxpayers and their advisors. Notice 2017-10 exposes these individuals to additional reporting obligations and penalties to which they would not otherwise be exposed but for the notice. Creating new substantive duties and exposing taxpayers to penalties for noncompliance "are hallmarks of a legislative, not an interpretive, rule." *Mann Constr., Inc.*, 27 F.4th at 1144.

1. *Reporting Obligations on Taxpayers*

The IRS's act of identifying a transaction as a listed transaction imposes a reporting obligation on any taxpayer who participated in such a transaction. *See* Treas. Reg. § 1.6011-4. As part of their obligation to file a tax return, taxpayers must disclose their participation in any reportable transaction. *Id.* para. (a). A listed transaction is a type of reportable transaction. *Id.* para. (b)(2). A taxpayer is considered to have participated in a listed transaction if the taxpayer's return reflects tax consequences or a tax strategy described in published guidance that lists the transaction as a listed transaction. *Id.* para. (c)(3)(i)(A). Without the IRS identifying the transaction as a listed transaction, no such reporting obligation exists.

Once a transaction is identified by the IRS as a listed transaction, a taxpayer's reporting obligation is significant. Listed transactions are reported on Form 8886, Reportable Transaction Disclosure Statement. Unlike most tax forms, which

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[8] Many of the provisions discussed *infra* were enacted or substantially modified in 2004 as part of AJCA §§ 811–822, 118 Stat. at 1575–87. These provisions substantially changed the reporting and recordkeeping requirements for listed and other reportable transactions. This report offers no opinion on whether identifying a transaction as a listed transaction was substantive rulemaking before the enactment of the AJCA or whether Congress expressed its intent to exempt from the standard notice-and-comment procedures transactions that were already listed as of the enactment of the AJCA.

generally require information relating to calculation of a tax liability, Form 8886 requires narrative information unrelated to the computation of tax. For example, for the years in issue, Form 8886 asks the taxpayer to

> describe the amount and nature of the expected tax treatment and expected tax benefits generated by the transaction for all affected years. Include facts of each step of the transaction that relate to the expected tax benefits including the amount and nature of your investment. Include in your description your participation in the transaction and all related transactions regardless of the year in which they were entered into. Also, include a description of any tax result protection with respect to the transaction.

Form 8886 further requires the taxpayer to

> [i]dentify all individuals and entities involved in the transaction that are tax-exempt, foreign, or related. Check the appropriate box(es) (see instructions). Include their name(s), identifying number(s), address(es), and a brief description of their involvement. For each foreign entity, identify its country of incorporation or existence. For each individual or related entity, explain how the individual or entity is related.[9]

Taxpayers are not merely required to include Form 8886 with their tax returns. Form 8886 must be attached to each amended return and a copy sent to the Office of Tax Shelter Analysis at the same time Form 8886 is first filed by the taxpayer. Treas. Reg. § 1.6011-4(e)(1). If a transaction becomes a listed transaction after the filing of a taxpayer's return that reflects the taxpayer's participation in the listed transaction, then the taxpayer is required to file Form 8886 with the Office of Tax Shelter Analysis within 90 days after the date on which the transaction became a listed transaction. *Id.* subpara. (2)(i). This obligation continues until the period of limitations for that filed return has lapsed. *Id.*[10]

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[9] This information may not be readily known to the taxpayer; however, the IRS expects the taxpayer to gather this information from third parties who, themselves, are under no obligation to provide it.

[10] That period of limitations may be affected by the IRS's act of identifying a transaction as a listed transaction. If a taxpayer does not disclose a listed transaction, the period of limitations for assessment of tax attributable to that transaction does not expire until one year after the transaction is disclosed. I.R.C. § 6501(c)(10). And we have already discussed that the obligation to disclose a listed transaction applies to previously filed returns. Treas. Reg. § 1.6011-4(e)(2). We are unaware of any cases deciding whether the IRS's action of identifying a transaction as a listed transaction has the

Failure to report a listed transaction to the IRS can have significant financial consequences for a taxpayer.[11] Section 6707A imposes a maximum penalty of 75% of the decrease in tax resulting from a transaction, not to exceed $200,000. I.R.C. § 6707A(b)(1) and (2). This penalty, however, still applies even if the taxpayer's tax treatment of the transaction ultimately proves to be correct. In other words, this penalty does not require a tax deficiency or that the IRS's adjustment to the treatment of the transaction be sustained by the Court. The minimum penalty for failing to report a listed transaction is $10,000. I.R.C. § 6707A(b)(3).

If a penalty is imposed on a taxpayer for failure to disclose a listed transaction, an additional reporting obligation may arise for some taxpayers. If the taxpayer is required to file periodic reports with the Securities & Exchange Commission (SEC), listed or reportable transaction penalties must be disclosed as part of certain SEC filings. *See* I.R.C. § 6707A(e) (flush text). Failure to report these penalties as part of a taxpayer's SEC filings can result in yet another penalty under section 6707A(e).

In addition to the section 6707A reporting penalty, identifying a transaction as a listed transaction results in enhanced penalties if the taxpayer's treatment of the transaction is not upheld. Section 6662(a) generally imposes an accuracy-related penalty when there is an underpayment of tax required to be shown on a return. However, if a transaction is identified

effect of holding open the period of limitations on a return that was filed before the transaction was listed, but at a minimum, the interplay of these two provisions creates uncertainty.

[11] Notably, the IRS's identification of a transaction as a listed transaction has no bearing on the merits of the transaction itself, and the IRS has previously listed, and subsequently delisted, a transaction that was upheld by courts. In Notice 98-5, 1998-1 C.B. 334, 334, the IRS characterized certain transactions as "abusive tax-motivated transactions with a purpose of acquiring or generating foreign tax credits that can be used to shelter low-taxed foreign-source income from residual U.S. tax." When the first group of listed transactions was announced, the IRS included transactions described in Part II of Notice 98-5. Notice 2000-15, 2000-1 C.B. 826. But the Courts of Appeals for the Eighth and Fifth Circuits upheld the taxpayers' treatment of transactions described in Notice 98-5. *See Compaq Comput. Corp. & Subs. v. Commissioner*, 277 F.3d 778 (5th Cir. 2001); *IES Indus., Inc. v. United States*, 253 F.3d 350 (8th Cir. 2001). Ultimately, the IRS withdrew Notice 98-5. Notice 2004-19, 2004-1 C.B. 606.

as a listed transaction by the IRS, and the taxpayer's treatment of that transaction is not upheld by a court, a penalty can be imposed whether or not there is a tax deficiency. *See* I.R.C. § 6662A. The starting point for the calculation of a section 6662A penalty is not the amount of tax owed; instead, it is the "reportable transaction understatement" amount. *See* I.R.C. § 6662A(b)(1)(A)(i). A section 6662A penalty is not determined on the basis of the taxpayer's actual tax rate but at the highest rate of tax imposed. I.R.C. § 6662A(b)(1)(A)(ii). To calculate the penalty, this hypothetical understatement is multiplied by 20%; if the transaction was not disclosed to the IRS, the penalty rate increases to 30%.[12] This section 6662A penalty is separate from, and in addition to, the penalty for failure to disclose under section 6707A. It is the IRS's act of identifying a transaction as a listed transaction (as it did in Notice 2017-10) that makes section 6662A and 6707A penalties applicable.

2. *Reporting Obligations on Advisors*

The identification of a transaction as a listed transaction does not merely impose new reporting obligations on taxpayers who participate in the transaction; it also imposes new

[12] To explain this calculation using a hypothetical, assume a taxpayer's return shows a net loss of $1 million and a tax liability of zero. Assume that a transaction that generated a $600,000 loss is disallowed. The result of the disallowance of that loss is that the taxpayer's return will show a net loss of $400,000 and a tax liability of zero. Because the taxpayer's bottomline tax liability is unchanged, there would be no penalty under the general accuracy-related penalty rules of section 6662. If this is a listed transaction, however, a penalty would apply. The starting point for calculating the penalty is the amount of the disallowed loss, or hypothetically here $600,000. The amount of the reportable transaction understatement is calculated by multiplying that amount by the highest marginal tax rate. If the taxpayer is an individual, the highest marginal tax rate is 39.6%, resulting in a reportable transaction understatement of $237,600. I.R.C. § 1. To calculate the penalty, that amount is multiplied by either 20% (if the transaction was disclosed) or 30% (if it was not disclosed), yielding a penalty of up to $71,280 for a transaction that resulted in no understatement of tax. If the IRS had not listed that transaction, the amount of the penalty would be zero.

reporting obligations on tax advisors. A material advisor[13] with respect to a reportable transaction[14] is required to make a return setting forth detailed information. I.R.C. § 6111(a). Simply described, this rule applies to anyone who advises with respect to a reportable transaction and receives fees in excess of a threshold amount. *See* I.R.C. § 6111(b).

The reporting requirement imposed on a material advisor is significant. The IRS has adopted Form 8918, Material Advisor Disclosure Statement, as the form on which material advisor reporting must be made. Treas. Reg. § 301.6111-3(d). In addition to specific items of information, Form 8918 also requires several narrative responses. Some responses require brief descriptions; however, Form 8918 also requires a rather substantial narrative, as follows:

> Describe the reportable transaction for which you provided material aid, assistance or advice, including but not limited to the following: the nature of the expected tax treatment and expected tax benefits generated by the transaction for all affected years, the years the tax benefits are expected to be claimed, the role of the entities or individuals mentioned in [Form 8918] lines 7a or 8a (if any) and the role of the financial instruments mentioned in [Form 8918] line 9 (if any). Explain how the Internal Revenue Code sections listed in [Form 8918] line 12 are applied and how they allow the taxpayer to obtain the desired tax treatment. Also, include a description of any tax result protection with respect to the transaction.

The IRS's identifying a listed transaction essentially obligates the taxpayer's advisor to become an unwilling advisor to the IRS. This obligation arises only because the IRS has identified the transaction as a listed transaction.

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[13] A material advisor, defined in section 6111(b)(1)(A), is any person—

> (i) who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and
>
> (ii) who directly or indirectly derives gross income in excess of the threshold amount (or such other amount as may be prescribed by the Secretary) for such aid, assistance, or advice.

The threshold amount is $50,000 in the case of a reportable transaction. *See* I.R.C. § 6111(b)(1)(B)(i).

[14] As previously mentioned, when the IRS identifies a new listed transaction, it is deemed to be a reportable transaction subject to additional reporting obligations. I.R.C. §§ 6111(b)(2), 6707A(c)(2); Treas. Reg. § 1.6011-4(b)(1) and (2).

In addition to the obligation to disclose a listed transaction to the IRS, material advisors also become records repositories for the IRS. Material advisors are required to maintain lists identifying each person they advised. I.R.C. § 6112(a). As with the disclosure under section 6111, the information required to be maintained as part of these lists under section 6112 is substantial. Some of the information required to be maintained is brief and straightforward, *see* Treas. Reg. § 301.6112-1(b)(3)(i), while other items of information are broad and include a "detailed description of each reportable transaction that describes both the tax structure of the transaction and the purported tax treatment of the transaction," *see id.* subdiv. (ii). The IRS also requires material advisors to retain documents such as

> [c]opies of any additional written materials, including tax analyses or opinions, relating to each reportable transaction that are material to an understanding of the purported tax treatment or tax structure of the transaction that have been shown or provided to any person who acquired or may acquire an interest in the transactions, or to their representatives, tax advisors, or agents, by the material advisor or any related party or agent of the material advisor.

Id. subdiv. (iii)(B). The obligation on the part of material advisors to prepare this list and retain these documents arises solely because the IRS has identified a transaction as a listed transaction.

A material advisor's failure to disclose a transaction under section 6111 or to provide a list upon demand can expose the individual to significant penalties. Like the section 6707A penalty for a taxpayer's failure to report a listed transaction, a similar penalty under section 6707 can be imposed on a material advisor. *See* Treas. Reg. § 301.6707-1. Failure to furnish the list of information required to be maintained under section 6112(a) within 20 business days after the date of request can result in a penalty of $10,000 per day until the list is provided. I.R.C. § 6708. Again, it is the IRS's act of identifying a transaction as a listed transaction (as it did in Notice 2017-10) that makes section 6707 and 6708 penalties applicable.

In sum, by its issuance, Notice 2017-10 creates new substantive reporting obligations for taxpayers and material advisors, including petitioner and the LLCs, the violation of which prompts exposure to financial penalties and

sanctions—the prototype of a legislative rule. *See Mann Constr., Inc.*, 27 F.4th at 1144. We cannot see how Notice 2017-10 could be considered an interpretative rule; consequently, we find it to be a legislative rule. *See Schwalbach v. Commissioner*, 111 T.C. 215, 220–21 (1998).

B. *Is Notice 2017-10 Otherwise Exempt from the Notice-and-Comment Requirements Found Under the APA?*

1. *Legal Background*

Having determined that Notice 2017-10 is a legislative rule, we are to assume that this IRS action—having the force and effect of law—must go through notice-and-comment rulemaking under the APA regime. *See* 5 U.S.C. § 553. Respondent contends, however, that Congress clearly exempted the IRS from following the APA's normal procedures when it enacted section 6707A and that Notice 2017-10 thus was properly issued without notice-and-comment rulemaking. Therefore, the remaining question before us is whether Congress has established procedures so different from those required by the APA that it intended to displace the norm. For the reasons discussed below, we reject respondent's position.

We note how the APA also provides that an agency may depart from normal notice-and-comment procedures for good cause. *See* 5 U.S.C. § 553(b)(B). In this instance the IRS elected not to invoke the good cause exception when issuing Notice 2017-10; consequently, we have no reason to analyze whether and when the exception may be used. In other instances the government has invoked the good cause exception when promulgating temporary Treasury regulations.

As previously stated, the APA limits the ability of a subsequent statute to modify or supersede its procedures "except to the extent that it does so expressly." 5 U.S.C. § 559. Consistent with this limiting text, appellate courts have held that 5 U.S.C. § 559 "forbids amendment of the APA by implication." *Lane v. USDA*, 120 F.3d 106, 110 (8th Cir. 1997); *see Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1127 (7th Cir. 2008) ("[Title 5 U.S.C. §] 559 therefore prevents a statute from amending the APA by implication."). The Supreme Court has likewise emphasized that "[e]xemptions from the

terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in [5 U.S.C. § 559] that modifications must be express." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).[15]

Our view on the APA's express-statement requirement is also consistent with the Supreme Court's "already-powerful presumption against implied repeals." *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring). The Supreme Court has also stated that, absent a clearly expressed congressional intention, repeals by implication are disfavored, *id.* (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion)), and implied repeals will be found only where provisions in two statutes are in "irreconcilable conflict" or where the latter act covers the whole subject of the earlier one and "is clearly intended as a substitute," *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

In *Marcello* the Supreme Court relied upon statutory text and legislative history to hold that the 1952 Immigration and Nationality Act displaced the hearing requirements of the APA. *Marcello*, 349 U.S. at 310. In reaching this conclusion, the Supreme Court explained:

> [W]e cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act to the deportation process, the specific points at which deviations from the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings.

Id. That is not to say that Congress must "employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act." *Id.* However, what is needed is an "express[]" indication of congressional intent. *Id.* Accordingly, mere differences between a statutory scheme and the APA are insufficient to establish Congress' intent to dispense with the standard APA procedures. For example, the U.S. Court of Appeals for the District of Columbia Circuit has concluded

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[15] *See also Dickinson v. Zurko*, 527 U.S. 150, 155 (1999); *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 889 (D.C. Cir. 2021) ("The APA imposes a high bar, met only if 'Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm.'" (quoting *Asiana Airlines*, 134 F.3d at 397)).

that the Federal Election Campaign Act and the APA could "readily coexist," despite various distinct procedures and requirements in the former statutory scheme. *See Citizens for Resp. & Ethics in Wash.*, 993 F.3d at 892.

The Supreme Court has further described the necessary indicia of congressional intent by the terms "necessary implication," "clear implication," and "fair implication." *See Dorsey v. United States*, 567 U.S. 260, 274–75 (2012). The Supreme Court has used these terms interchangeably. *Id.* at 274.[16]

In *Asiana Airlines* the D.C. Circuit looked to the statutory text in question and found an express exception granted by Congress justifying the agency's departure from standard notice and comment under the APA. *Asiana Airlines*, 134 F.3d at 397–98. In interpreting this exemption from the APA, the D.C. Circuit found irreconcilable differences between the procedures under the law in question and those of the APA. *Id.* at 398. However, the D.C. Circuit also stated generally that "[w]e have looked askance at agencies' attempts to avoid the standard notice and comment procedures, holding that exceptions under [5 U.S.C.] § 553 must be 'narrowly construed and only reluctantly countenanced.'" *Id.* at 396 (quoting *New Jersey Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

Previously, the D.C. Circuit rejected the argument that terms in the Clean Water Act requiring states to create procedures for "public notice" and "public hearings" established congressional intent to displace the APA's notice-and-comment requirements. *See Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011) (per curiam). For its part, the U.S. Court of Appeals for the Ninth Circuit found unconvincing an agency's argument that Congress' authorization of "interim final rules" in the Affordable Care Act context displayed an intention to displace the APA's presumed notice-and-comment rulemaking. *See California v. Azar*, 911 F.3d 558, 579–80 (9th Cir. 2018).

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[16] In the dissent Justice Scalia agreed that express-statement requirements of the sort presented in *Dorsey* are ineffective and noted how congressional repeal can be by clear implication. *Dorsey*, 567 U.S. at 289 (Scalia, J., dissenting). Justice Scalia further agrees that the standard for overcoming the strong presumption against implicit repeal is accurately described as "necessary implication" or "clear implication" but took issue with the "fair implication" formulation. *Id.* at 289–90.

In the light of the foregoing jurisprudence and in determining whether Congress expressly intended to exempt the IRS from the presumed APA procedures when issuing Notice 2017-10, an analysis of the "listed transaction regime" as created under the AJCA and its potential departure from the APA takes center stage.

2. *Application*

Respondent contends that Congress authorized the IRS to identify listed transactions without notice-and-comment rulemaking. Respondent points to the text of section 6707A, Treasury Regulation § 1.6011-4, and other AJCA provisions, along with the context and legislative history of the AJCA.[17]

We begin with the observation that section 6707A offers no express indication from Congress exempting the IRS from the standard notice-and-comment rulemaking of the APA. *See* 5 U.S.C. § 559. Likewise, section 6011 (which is referenced by section 6707A) is also silent on any express congressional intent, and provides: "When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary." I.R.C. § 6011(a). As the Sixth Circuit observed, "[t]he statutes do not say anything, expressly or otherwise, that modifies the baseline procedure for rulemaking established by the APA." *Mann Constr., Inc.*, 27 F.4th at 1146. Unlike *Asiana Airlines*, where the D.C. Circuit found sufficient evidence of congressional intent within the statutory text, there is no comparable text found in the statute before us. *Asiana Airlines*, 134 F.3d at 399. Neither section 6011 nor 6707A says anything that would lead us to conclude that the IRS is exempt from the baseline procedures for rulemaking under the APA.

Respondent also attempts to fill the void left by Congress in the foregoing statutory text with the IRS's own regulations. Specifically, respondent notes that, before the enactment of section 6707A, Treasury regulations were issued defining a listed

[17] Some of these arguments were also made by the Commissioner in *Green Rock, LLC v. IRS*, No. 2:21-cv-01320 (N.D. Ala. filed Oct. 2, 2021), which is currently pending before the U.S. District Court for the Northern District of Alabama.

transaction as one "identified by notice, regulation, or other form of published guidance." *See* Treas. Reg. § 1.6011-4(b)(2). Respondent contends that this regulation apprised Congress that it would operate outside of the APA by issuing future notices (such as Notice 2017-10) without notice and comment. Respondent further maintains that when Congress later defined reportable transaction in section 6707A(c)(1), it incorporated this procedure set forth in Treasury Regulation § 1.6011-4. We are not persuaded. As an initial matter, we are less confident that Congress understood that the IRS's reference to the term "notice" within Treasury Regulation § 1.6011-4 was a clearly defined procedure for identifying listed transactions separate from traditional APA procedures, particularly since Congress' statutory text in no way authorizes such a course. To the contrary, we believe that Congress operates under the expectation that administrative agencies respect their APA obligations except when Congress expressly chooses different procedures. 5 U.S.C. § 559.

Furthermore, Congress' descriptive reference in section 6707A(c)(1) to "regulations prescribed under section 6011" does not suggest otherwise. To provide the full context, section 6707A(c)(1) defines a reportable transaction as "any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion." This definitional text of section 6707A(c) only links the penalty for reportable and listed transactions to the five different types of reportable transactions (including listed transactions) specifically designated in Treasury Regulation § 1.6011-4(b)(2) through (7). In other words, we conclude that section 6707A(c) "addresses a 'which transactions' question, not a 'what process' question." *See Mann Constr., Inc.*, 27 F.4th at 1146.

Respondent also emphasizes the phrase "as determined under regulations prescribed under section 6011," contending that it refers solely to the manner of determination under Treasury Regulation § 1.6011-4 and implicitly blesses all processes contained therein, including the IRS's noncompliance with notice-and-comment rulemaking. As an initial matter, the general reference to "regulations prescribed under section

6011" does not establish an express congressional intention to displace fundamental APA principles for future reportable transactions. As noted previously, the D.C. Circuit concluded that statutory text in the Clean Water Act providing for alternative notice and hearing procedures did not satisfy an express congressional intent sufficient to deviate from the APA. *Lake Carriers' Ass'n*, 652 F.3d at 6. In these cases, the text of section 6707A does not reference any procedures whatsoever; and accordingly, we cannot conclude it establishes Congress' express intention to disregard APA procedures.

Considering the statutory text before us, we are unable to reasonably conclude that Congress demonstrated its express intention to deviate from normal APA procedures by implementing a reticulated scheme of the sort described in *Marcello*. To the contrary, we find respondent has failed to establish that Congress expressed any alternative procedures "so clearly different from those required by the APA that it must have intended to displace the norm." *See Asiana Airlines*, 134 F.3d at 397; *see also Mann Constr., Inc.*, 27 F.4th at 1146. Rather, the "listed transaction regime" procedures as created by Congress can be reconciled with the APA since the statutes merely establish a disclosure and penalty regime to be administered by the IRS. *See Mann Constr., Inc.*, 27 F.4th at 1146; *see also Citizens for Resp. & Ethics in Wash.*, 993 F.3d at 892. Furthermore, the so-called fair implication standard of an express congressional intent to replace the APA—as argued by respondent—understates the burden imposed by Congress and contravenes the Supreme Court's interchangeable use of the relevant formulations. *Dorsey*, 567 U.S. at 274; *see supra* p. 97. We therefore reject this argument.

Even if we were to look to the congressional text "regulations prescribed under section 6011" in conjunction with Treasury Regulation § 1.6011-4, respondent's argument fares no better. Like the statutory text, Treasury Regulation § 1.6011-4 does not seem very concerned with setting up processes but rather is directed to naming categories of transactions subject to IRS reporting requirements. While Treasury Regulation § 1.6011-4 does include those transactions as determined by the IRS to be tax avoidance transactions and identified "by notice, regulation, or other form of published guidance," we remain convinced this regulatory text can also be read to demonstrate

that the "as determined" clause was intended to co-exist with the requirements of the APA and for the IRS to identify future reportable transactions under the APA's ordinary regime of notice and comment. *See Citizens for Resp. & Ethics in Wash.*, 993 F.3d at 892. In any event, our task is to determine whether Congress, not the IRS, amended the APA's presumed application.

We acknowledge that Congress understood that the IRS had identified listed transactions before the enactment of the AJCA. We also recognize that Congress, through its enactment of the AJCA, was acknowledging the IRS's disclosure framework already in place, with the goal of strengthening its efficacy. *See* S. Rep. No. 108-192, at 90 (2003); s*ee also* H.R. Rep. No. 108-548, pt. 1, at 261 (2004).[18] But we cannot accept the enactment of the AJCA as Congress' blanket approval of the IRS's method of identifying a syndicated conservation easement as a listed transaction in Notice 2017-10 without notice and comment.

Next, respondent contends that Congress is "presumed to [have been] aware" of the IRS's actions when it amended section 6707A to enhance the monetary penalties for taxpayers through subsequent enactment; however, Congress is likewise equally aware of the normal APA rulemaking requirements, which it must "expressly" override. *See* 5 U.S.C. § 559; *see also Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011) (rejecting the concept of carving out unique treatment for tax law under the APA). Like the Sixth Circuit, we disagree with respondent's contention that Congress' subsequent inaction means that it was "endorsing and ratifying" the IRS's practice to bypass the notice-and-comment requirements for future reportable transactions. As well stated by the Sixth Circuit, "[i]naction may, but does not always, mean ratification" and "rarely suffices to show express modification of the APA's bedrock procedural guarantees given the raft of

[18] Respondent also points to repealed text found in section 6707A, which required the IRS to submit an annual report to Congress' two tax writing committees, as congressional oversight and evidence sufficient to supplant the standard APA procedures. It is true that at one point in recent history there was an annual mandatory reporting requirement; however, we do not see how the IRS's prior reporting obligation establishes Congress' clear intent to override the APA.

potential explanations for inaction on Capitol Hill." *Mann Constr., Inc.*, 27 F.4th at 1147.

We similarly find it inappropriate to assume Congress expected that any subsequent amendment or addition to the listed transaction regime by the IRS would be made without notice and comment under the APA. In these cases, Notice 2017-10 was not issued until 2016.[19] Accordingly, we cannot subscribe to any alternative theory that prior notice and comment made at the time of promulgation of Treasury Regulation § 1.6011-4 satisfies the IRS's ongoing obligation to comply with the APA when issuing Notice 2017-10. To the contrary, we find Congress has made it clear that each substantive rule of general applicability, including amendment or revision thereto, must comply with the APA. *See* 5 U.S.C. § 552.

Finally, we do not find a committee print from 2020 relating to continued congressional oversight of syndicated conservation easement transactions to be persuasive evidence that Congress intended to override the APA's applicability to the IRS's listing of transactions. *See* Staff of S. Comm. on Finance, 116th Cong., Syndicated Conservation-Easement Transactions Exhibits 1–133, S. Prt. 116-44 (Comm. Print 2020).[20]

We do not dispute the significance of congressional oversight of so-called Syndicated Conservation-Easement Transactions and the efforts to curtail these transactions. However, we do dispute a conclusion that congressional oversight hearings, written statements by the respective chairs of the Senate Finance Committee at the oversight hearings, and testimony related to these transactions from executive branch members can serve as express congressional intent sufficient to override the requirements of the APA with respect to Notice 2017-10.[21] The foregoing congressional actions alone are insufficient to supplant the APA, since the Supreme Court has

[19] We find the matter before us to be limited to the IRS's actions with respect to Notice 2017-10, and we do not reach any conclusion as to those listed transactions the IRS identified when Treasury promulgated Treasury Regulation § 1.6011-4(b)(2).

[20] The exhibits included letters from both IRS Acting Commissioner, David J. Kautter, dated July 12, 2018, and IRS Commissioner Charles P. Rettig, dated February 12, 2020, regarding congressional requests for information and analyses related to Notice 2017-10.

[21] Generally speaking, legislative history related to the Code includes congressional members' statements made in markup sessions, congressional

told us exemptions from the terms of the APA are not presumed and must be expressed by Congress. *See Marcello*, 349 U.S. at 310 (considering legislative history in conjunction with the final operative statutory text to find Congress' express intent to override the APA).

After considering these additional arguments, we remain unconvinced that Congress expressly authorized the IRS to identify a syndicated conservation easement transaction as a listed transaction without the APA's notice-and-comment procedures, as it did in Notice 2017-10.

IV. *Conclusion*

We determine summary adjudication to be appropriate in petitioner's favor as to prohibiting the imposition of section 6662A penalties against the LLCs in these cases since Notice 2017-10 was issued without notice and comment as required under the APA. Accordingly, we will grant petitioner's Cross-Motions for Summary Judgment, in part, and set aside[22] Notice 2017-10, including the imposition of section 6662A penalties with respect to reportable transactions.

To reflect the foregoing,

An appropriate order will be issued.

Reviewed by the Court.

FOLEY, GUSTAFSON, MORRISON, BUCH, ASHFORD, URDA, COPELAND, JONES, GREAVES, and MARSHALL, *JJ.*, agree with this opinion of the Court.

KERRIGAN, PARIS, PUGH, and TORO, *JJ.*, concur in the result, and TORO, *J.*, agrees with Part III.A.

GALE and NEGA, *JJ.*, dissent.

PUGH, *J.*, concurring in the result: I write separately to explain why, after careful consideration of the history of the

tax writing committees, committee reports, conference committee reports, and postenactment tax committee reports.

[22] Although this decision and subsequent order are applicable only to petitioner, the Court intends to apply this decision setting aside Notice 2017-10 to the benefit of all similarly situated taxpayers who come before us.

statute at issue alongside the tools of statutory construction and precedent, set forth below, I reach the same conclusion as the majority.

Section 6707A was enacted in the American Jobs Creation Act of 2004 (AJCA), 811(a), Pub. L. No. 108-357, 118 Stat. 1418, 1575–76. It did two things. First, it imposed penalties for failure to disclose information with respect to a "reportable transaction." § 6707A(a) and (b). Second, it defined "reportable transaction" and "listed transaction" (a subcategory of reportable transaction) by reference to the IRS's process for identifying those transactions in the already-existing regulations under section 6011. Section 6707A(c)(1) confirmed the IRS's authority to "determine[] under regulations prescribed under section 6011" whether a transaction is "of a type which the [IRS] determines as having a potential for tax avoidance or evasion," thereby making it a "reportable transaction." A reportable transaction that is "the same as, or substantially similar to, a transaction specifically identified by the [IRS] as a tax avoidance transaction for purposes of section 6011" is a "listed transaction." § 6707A(c)(2).

Pursuant to this authority, the IRS identified syndicated conservation easement transactions as listed transactions in I.R.S. Notice 2017-10, 2017-4 I.R.B. 544.[1] They joined a list first issued in 2000 that originally included 7 transactions, added 23 more transactions by the time the AJCA was enacted, and added 5 more by the time Notice 2017-10 was issued (making syndicated conservation easement transactions the 36th). *See Recognized Abusive and Listed Transactions*, IRS, https://www.irs.gov/businesses/corporations/listed-transactions (last visited Aug. 1, 2022).[2]

I agree with the opinion of the Court that Notice 2017-10 is a legislative rule. "[A] substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and creates new law or imposes new rights or duties." *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989). By identifying syndicated conservation easement transactions as listed transactions, Notice 2017-10 exposed taxpayers and representatives required to disclose

[1] The opinion of the Court and my concurrence address the validity of Notice 2017-10 only, not the tax treatment of the underlying transaction.

[2] No transactions have been added to the list since Notice 2017-10.

these transactions under Treasury Regulation § 1.6011-4 to stiff penalties under section 6707A for failure to disclose. Notice 2017-10, § 3, 2017-4 I.R.B. at 546; *see also* op. Ct. pp. 88–95 (discussing obligations imposed by Notice 2017-10 on taxpayers and material advisors).

And the IRS used authority delegated to it under sections 6011 and 6707A to do so. *See CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1587 (2021) (noting that "the Code [through sections 6011 and 6707A] delegates to the Secretary of the Treasury, acting through the IRS, the task of identifying particular transactions with the requisite risk of tax abuse" and stating the IRS "[u]se[d] that authority" to determine "that so-called micro-captive transactions must be reported because of their potential for tax evasion"); *see also Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1144 (6th Cir. 2022) (stating that "the reality" is "that the relevant statutory terms [section 6707A(c)] are not self-defining, which explains why Congress delegated to the IRS authority to 'determine[]' and 'identif[y]' which transactions need to be reported"). "When an agency relies on expressly delegated authority to establish policy . . . courts generally treat the agency action as legislative, rather than interpretive, rulemaking." *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 622 (4th Cir. 2018) (citations omitted) (holding that a U.S. Department of Health & Human Services policy for calculating the amount of financial assistance available to certain hospitals set forth in a Frequently Asked Questions document is a legislative rule in part because the agency relied on statutorily delegated authority to "determine[]" what constitutes "costs incurred").

In general a legislative rule is subject to the notice-and-comment requirements of the Administrative Procedure Act (APA) under 5 U.S.C. § 553(b). *SIH Partners LLLP v. Commissioner*, 150 T.C. 28, 41 (2018), *aff'd*, 923 F.3d 296 (3d Cir. 2019). The parties agree that issuance of Notice 2017-10 did not comply with these notice-and-comment requirements.

The APA enumerates exceptions to its general rule of notice-and-comment rulemaking, including "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The

IRS did not invoke the good cause exception when it issued Notice 2017-10. *See* op. Ct. p. 95.

Another exception to the notice-and-comment requirement is a necessary consequence of courts' applying a basic precept of statutory construction: "[O]ne legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). A succeeding legislature can alter a prior legislative act "when the legislature shall please to alter it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). As Justice Scalia wrote in his concurrence in *Lockhart v. United States*, 546 U.S. 142, 148 (2005):

> Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them. Thus, in *Marcello v. Bonds*, 349 U.S. 302 (1955), we interpreted the Immigration and Nationality Act [(INA), ch. 477, 66 Stat. 163 (1952),] as impliedly exempting deportation hearings from the procedures of the [APA], despite the requirement in § 12 of the APA that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly," 60 Stat. 244. The Court refused "to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act." 349 U.S., at 310. We have made clear in other cases as well, that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute. In *Great Northern R. Co. v. United States*, 208 U.S. 452, 465 (1908), we said of an express-statement requirement that "[a]s the section . . . in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly *or by necessary implication* in a subsequent enactment." (Emphasis added.) A subsequent Congress, we have said, may exempt itself from such requirements by "fair implication"—that is, *without* an express statement. *Warden v. Marrero*, 417 U.S. 653, 659–660, n. 10 (1974). *See also Hertz v. Woodman*, 218 U.S. 205, 218 (1910).

The opinion of the Court cites Justice Scalia's concurrence in *Lockhart* for the proposition that the APA's express-statement requirement is consistent with the presumption against implied repeals. *See* op. Ct. p. 96. And Justice Scalia acknowledges the Supreme Court's admonition in *Marcello* that exemptions from the APA are "not lightly to be presumed" in the light of the APA's express-statement requirement. 5 U.S.C. § 559; *Lockhart*, 546 U.S. at 148–49; *see Marcello*, 349 U.S. at 310. But he then states that this assertion "may add little or nothing to our already-powerful presumption against implied

repeals." *Lockhart*, 546 U.S. at 149 ("An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." (quoting *Branch v. Smith*, 538 U.S. 254, 273 (2003))). Justice Scalia's stated reason for writing separately was to emphasize that express-statement requirements are not binding and that "[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Id.* at 147, 149; *see also Dorsey v. United States*, 567 U.S. 260, 274–75 (2012) (quoting this statement when describing the requisite inquiry as not a search for a magical password but rather for assurance that "ordinary interpretive considerations point clearly in th[e] direction" of superseding an express-statement requirement). I understand Justice Scalia (and the Supreme Court) to be cautioning us not to elevate express-statement requirements to exalted status or to gloss over the text of the later enacted statute in the name of "fundamental APA principles." *See* op. Ct. pp. 99-100.

Our task, then, is to read the later statute (section 6707A) and determine whether its plain import directly conflicts with an earlier statute (5 U.S.C. § 553(b)). Stated differently, we must decide "whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm." *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) (analyzing a non-APA statutory scheme for potential conflict with the APA's baseline rule of notice and comment).

This analysis will produce a range of results. Some procedures will fall on the "irreconcilable-with-the-APA" side of the line. *See, e.g.*, *Marcello*, 349 U.S. at 309 (holding that INA procedures superseded the APA's notice-and-comment requirement because, among other reasons, Congress mandated that the INA procedures "shall be the sole and exclusive procedure for determining the deportability of an alien under this section" (quoting INA § 242(b), 66 Stat. at 210)); *Asiana Airlines*, 134 F.3d at 398 (holding statute mandating that the FAA "publish in the Federal Register an initial fee schedule and associated collection process as an interim final rule, pursuant to which

public comment will be sought and a final rule issued" superseded the APA's notice-and-comment requirement because it required the FAA to follow procedures that could not be reconciled with the APA (quoting 49 U.S.C. § 45301(b)(2))). Other procedures will fall on the "coexistence-with-the-APA" side of the line. *See, e.g.*, *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 17, 19 (D.D.C. 2010) (holding statute providing that an agency "may promulgate any interim final rules as the Secretary determines are appropriate to carry out this [part]" did not supersede the APA because the enabling provision was "permissive," "wide-ranging," and "d[id] not contain any specific deadlines for agency action").

There is little doubt that in enacting section 6707A Congress knew about and endorsed the existing administrative procedure for determining reportable transactions and identifying listed ones. The statute defines the terms by reference to the procedure by which the IRS determines or identifies them. *See* § 6707A(c)(1) (defining a "reportable transaction" by reference to the IRS's "determin[ation] under regulations prescribed under section 6011" that the transaction has a potential for tax avoidance or evasion); § 6707A(c)(2) (defining "listed transaction" by reference to "a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011").

Specifically, the procedure invoked by section 6707A is "identifi[cation] by notice,[3] regulation, or other form of published guidance." Treas. Reg. § 1.6011-4. This existing procedure "un-

[3] Here, "notice" refers to an IRS notice—"a public pronouncement by the [Internal Revenue] Service that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law" and is published in the Internal Revenue Bulletin, Internal Revenue Manual 32.2.2.3.3 (Aug. 11, 2004); it should be distinguished from a "notice of proposed rulemaking" published in the Federal Register pursuant to the APA, 5 U.S.C. § 553(b); *see, e.g.*, Treas. Reg. § 1.6662-3(b)(2) ("The term 'rules or regulations' includes the provisions of the Internal Revenue Code, temporary or final Treasury regulations issued under the Code, and revenue rulings or *notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin*." (Emphasis added.)).

We have concluded in other contexts that IRS notices are mere statements of the Commissioner's position and lack the force of law. *Phillips Petroleum Co. v. Commissioner*, 101 T.C. 78, 99 n.17 (1993), *aff'd*, 70 F.3d 1282 (10th Cir. 1995). Here, by contrast, we have concluded that Notice 2017-10

der regulations prescribed under section 6011" of determining reportable transactions and identifying listed ones was introduced in temporary regulations in 2000 that were finalized in 2003. T.D. 9046, 2003-1 C.B. 614, 616, 68 Fed. Reg. 10,161, 10,163 (Mar. 4, 2003).

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (citations omitted). "So too, where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Id.* at 581. We thus presume that Congress knew of Treasury's (and the IRS's) interpretation of section 6011 in the reportable and listed transaction disclosure regulations when Congress enacted section 6707A in 2004. Therefore, section 6707A is a "[s]ubsequent statute" that adopts a procedure that could potentially "supersede or modify" the general APA requirement in 5 U.S.C. § 553 that legislative rules must go through notice and comment. 5 U.S.C. § 559.

The opinion of the Court discounts these principles of statutory construction and the history of section 6707A. It begins its analysis with its conclusion that "section 6707A offers no express indication from Congress exempting the IRS from the standard notice-and-comment rulemaking." *See* op. Ct. p. 98. It is difficult to conjure up what would satisfy this requirement short of a magical password, to wit, "the APA is displaced." And I respectfully disagree with its dismissal of section 6707A(c) as mere "definitional text" that "only links" the statutory penalties to the regulatory scheme, and its summary adoption of the U.S. Court of Appeals for the Sixth Circuit's conclusion that section 6707A(c) "addresses a 'which transac-

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is a legislative rule because it imposes substantive obligations on taxpayers by operation of section 6707A.

Because we are to presume Congress is aware of existing law, including existing regulations, I am more confident than the majority, *see* op. Ct. p. 99, that Congress understood that the IRS had already identified and would continue to identify transactions as listed, perhaps even by issuing notices. But, as I explain below, I do not believe that this presumption that Congress knew about the IRS procedure for listing transactions by notice wins the day for the IRS. And on this point, the majority and I do agree.

tions' question, not a 'what process' question." *See* op. Ct. p. 99 (quoting *Mann Constr.*, 27 F.4th at 1146).[4]

Two additional points also respond to this conclusion in the opinion of the Court. First, whereas the opinion of the Court starts (and apparently ends) with the heading of section 6707A(c), *see* op. Ct. p. 99 ("This definitional text . . . ."), I would begin with the text of section 6707A. *See Yates v. United States*, 574 U.S. 528, 553 (2015) (Kagan, J., dissenting). Second, despite (or in contradiction of) its conclusion that section 6707A addresses a "which transactions" question, the Sixth Circuit also recognized "the reality that the relevant statutory terms [section 6707A(c)(1) and (2)] are not self-defining, which explains why Congress delegated to the IRS authority to 'determine[]' and 'identif[y]' which transactions need to be reported." *Mann Constr.*, 27 F.4th at 1144. That is, the statute points elsewhere: to the "regulations prescribed under section 6011" and their method for determining reportable transactions and identifying listed transactions. By failing to follow where the statute leads, the opinion of the Court implies that Congress cannot adopt procedures by referencing them in a statute. This abridges "the power [of Congress] to make its will known in whatever fashion it deems appropriate." *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring).

The remaining question then is whether, in adopting this procedure by reference, Congress "must have intended to displace the norm" of APA notice and comment because the adopted procedure is "so clearly different from" it. *Asiana Airlines*, 134 F.3d at 397.

The procedures at issue in *Marcello* and *Asiana Airlines* set a high bar for "displacing the norm" of APA notice and comment. In both Congress mandated that the agency use a procedure different from or in direct conflict with the one in the APA. The statute in *Marcello* provided an alternate procedure and stated that it "shall be the sole and exclusive procedure." 349 U.S. at 309 (quoting INA § 242(b)). The statute in *Asiana Air-*

[4] Our decision in this case is appealable to the U.S. Court of Appeals for the Fourth Circuit. *See* § 7482(b)(1); *Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). As a court of nationwide jurisdiction, we should not simply adopt the opinion of another circuit, but rather are obliged to perform the necessary analysis of section 6707A ourselves, situating it among the range of statutory provisions that may or may not have displaced APA notice-and-comment rulemaking.

lines required the use of a procedure that, by its terms, "cannot be reconciled with the notice and comment requirements of [the APA]." 134 F.3d at 398 ("[T]he agency was to issue not a proposed rule, but an 'interim final rule,' and comment was to be sought 'pursuant to,' not in anticipation of, that rule." (quoting 49 U.S.C. § 45301(b)(2))).

Here, Congress did not mandate a specific alternative rulemaking procedure different from or in direct conflict with the APA. Rather, section 6707A authorized the IRS to identify listed transactions "by notice, regulation, or other form of published guidance," Treas. Reg. § 1.6011-4(b)(2), permissive text more similar to that in *Coalition for Parity, Inc.*, 709 F. Supp. 2d at 19. And the procedure "by notice, regulation, or other form of published guidance" can, by its terms, be reconciled with the APA; nothing in it directly conflicts with the APA like the "sole and exclusive" or "interim final rule, pursuant to which public comment will be sought" procedures at issue in *Marcello* and *Asiana Airlines*.

Any argument to the contrary puts a great deal of weight on the contention that identification "by notice" is irreconcilable with the APA. And the weight that the phrase "by notice" can bear is circumscribed by the adoption of penalties in section 6707A to give force to the listed transaction regime. To conclude that Congress was ratifying the IRS's pre-AJCA practice of listing transactions without notice and comment we must explain why, after section 6707A added penalties, notice and comment could not be required for future notices.[5] The imposition of penalties is, after all, a critical reason we conclude that the listing of a transaction is a legislative rule subject to APA notice and comment.

I would be loath to supplant the APA requirements even if I could come up with my own policy justification for their non-application; that is not our place, but Congress'. Congress also is presumed to be aware that to supersede APA notice and comment, it must do so "expressly," *see* 5 U.S.C. § 559, or by "necessary implication," "clear implication," or "fair implica-

[5] Our holding does not invalidate notices that had been issued before Congress enacted penalties. Those notices are not before us today and the circumstances surrounding their issuance are distinguishable. And Congress would be presumed to know about and adopt pre-existing notices when it adopted pre-existing procedures for identifying listed transactions.

tion," *see Dorsey*, 567 U.S. at 274–75. And a policy justification for skipping notice and comment does not necessarily render a statutory scheme irreconcilable with the APA.

Finally, it is worth noting that if notice-and-comment rulemaking impedes the IRS's ability to identify transactions with the potential for tax avoidance or evasion, the APA and the Internal Revenue Code already provide options. Under the APA, the IRS could invoke the good cause exception, as it did when issuing regulations targeting another listed transaction, the so-called Son-of-Boss transaction, for example. *See* T.D. 9062, 2003-2 C.B. 46, 48 ("These temporary regulations are necessary to prevent abusive transactions of the type described in the Notice 2000-44. Accordingly, good cause is found for dispensing with notice and public procedure pursuant to 5 U.S.C. 553(b)(B) and for dispensing with a delayed effective date pursuant to 5 U.S.C. 553(d)(1) and (3)."). And under section 7805(b)(3), the IRS "may provide that any regulation may take effect or apply retroactively to prevent abuse."

In sum, I concur in the result because the procedure referenced by section 6707A—"identifi[cation] by notice, regulation, or other form of published guidance" by the IRS, Treas. Reg. § 1.6011-4(b)(2)—is not a "procedure[] so clearly different from [that] required by the APA that it must have intended to displace the norm," *Asiana Airlines*, 134 F.3d at 397.

KERRIGAN, PARIS, ASHFORD, and COPELAND, *JJ.*, agree with this opinion concurring in the result.

TORO, *J.*, concurring in the result: As the opinion of the Court and Judge Pugh correctly conclude, I.R.S. Notice 2017-10, 2017-4 I.R.B. 544, which identified the type of transaction at issue in this case as a listed transaction, is a legislative rule under the Administrative Procedure Act (APA). *See* 5 U.S.C. §§ 551, 553. But the Internal Revenue Service (IRS) did not follow the APA's notice-and-comment procedures when adopting the rule. *See* 5 U.S.C. § 553(b) and (c). Therefore, to resolve this case, we must decide whether the American Jobs Creation Act of 2004 (AJCA), Pub. L. No. 108-357, 118 Stat. 1418, exempted the Secretary of the Treasury from follow-

ing the APA's requirements for purposes of identifying listed transactions after the enactment of the AJCA. *See* 5 U.S.C. § 559. If not, then the section 6662A penalty determined by the Commissioner here cannot apply.

The parties' dispute focuses on section 6707A(c), and in particular, whether that provision adopted by reference Treasury Regulation § 1.6011-4, T.D. 9046, 2003-1 C.B. 614, 616, 68 Fed. Reg. 10,163 (Mar. 4, 2003) (2003 regulation).[1] In my view, it is unnecessary to decide whether Congress did or did not incorporate the 2003 regulation in section 6707A(c). Even if (for the sake of analysis) I were to agree with the Commissioner that (1) the 2003 regulation established procedures for identifying listed transactions and (2) Congress adopted those procedures by reference when enacting section 6707A(c), the Commissioner still would not prevail because the procedures reflected in the 2003 regulation are not, by their terms, inconsistent with the APA. Put another way, the Commissioner could have followed both the procedures set out in the 2003 regulation and the APA when issuing Notice 2017-10.

Specifically, contrary to the Commissioner's position, the statement in the 2003 regulation that the IRS may identify listed transactions "by notice," *see* Treas. Reg. § 1.6011-4(b)(2), is fully compatible with the APA. For example, the IRS could comply with the APA by issuing a notice that establishes good cause for proceeding without a prior opportunity for comment. *See* 5 U.S.C. § 553(b)(B). Moreover, as Judge Pugh observes, *see* Pugh concurring op. p. 111, "the weight that the [pre-AJCA regulatory] phrase 'by notice' can bear is circumscribed by [Congress's] adoption of" a new and significant enforcement mechanism. "The imposition of penalties is, after all, a critical reason we conclude that the listing of a transaction is a legislative rule subject to APA notice and comment." *See* Pugh concurring op. p. 111. I am not persuaded that Congress, when instituting this penalty regime, intended to strip away the protections of the APA for future listed transactions, *see, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019) (explaining that the purpose of no-

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[1] The regulation has since been amended, but for purposes of this discussion I focus on the version that was in effect before the adoption of the AJCA. One pre-AJCA amendment, *see* T.D. 9108, 2004-1 C.B. 429, 68 Fed. Reg. 75,128 (Dec. 30, 2003), had no effect on the provisions discussed.

tice-and-comment rulemaking is to "give[] affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes" while "afford[ing] the agency a chance to avoid errors and make a more informed decision"); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1929 n.13 (2020) (Thomas, J., concurring in the judgment in part, dissenting in part) ("[T]he notice and comment process at least attempts to provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process." (quoting Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 708 (1999))), or to ratify a practice developed for a fundamentally different context, i.e., the IRS's pre-AJCA practice of listing transactions without notice and comment and without a showing of good cause for not providing notice and comment.

Absent conflict in the instructions Congress provided in the AJCA and the instructions Congress provided in the APA, the Commissioner had an obligation to follow both. *See Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) ("Where there are two acts upon the same subject, effect should be given to both if possible."); *see also Dorsey v. United States*, 567 U.S. 260, 274 (2012) (discussing the standard for departures from the APA); *Nat'l City Bank*, 296 U.S. at 503 (discussing the standard for implied repeals); *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) (discussing the standard for implied repeals). As all agree, this the Commissioner did not do. Accordingly, the section 6662A penalty may not be sustained, as the opinion of the Court properly concludes.

I write separately to offer a few observations on the extent to which section 6707A(c) might be viewed as incorporating the 2003 regulation, given the focus on this issue by the parties and my colleagues.

AJCA Background

To begin with, I agree with Judge Pugh and the Commissioner that the context in which Congress enacted section 6707A and the other provisions of the AJCA is important. *See Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (noting that the Court could not "ignore the background of the . . . legislation"). To summarize the context here, in 2000, in an effort

to address tax shelters, the U.S. Department of the Treasury and the IRS issued temporary and proposed regulations under section 6011. *See* Temp. Treas. Reg. § 1.6011-4T, 65 Fed. Reg. 11,205 (Mar. 2, 2000); Prop. Treas. Reg. § 1.6011-4, 65 Fed. Reg. 11,271 (Mar. 2, 2000). The regulations, which were finalized in 2003 after several rounds of revision,[2] required taxpayers to provide information with respect to "reportable transactions," *see* Treas. Reg. § 1.6011-4(a), a category that was defined to include "listed transactions," *see id.* para. (b)(1) and (2). Thus, the statutory terms we are focused on in this case were first defined by temporary and proposed regulations culminating in the 2003 regulation.

When it adopted the AJCA in 2004, Congress established new penalties and other rules that hinged on the terms "reportable transaction" and "listed transaction." *See, e.g.*, AJCA §§ 811 and 812, 814–816, 118 Stat. at 1575–84.[3] Congress appears to have drawn on the regulatory definitions of those terms to craft the statutory definitions. *See* I.R.C. § 6707A(c); Treas. Reg. § 1.6011-4(b)(1) and (2). Additionally, the statutory definitions refer to "determin[ations] under regulations prescribed under section 6011," *see* I.R.C. § 6707A(c)(1), and to "identif[ications] . . . for purposes of section 6011," *see* I.R.C. § 6707A(c)(2). So, in my view, there is no doubt that Congress "legislated against the backdrop of [the 2003 regulation]" when it enacted the AJCA, as the Commissioner contends, *see* Resp't's Mem. in Supp. of Obj. to Mot. for Partial Summ. J. 35, and that Congress sought, at least to some extent, to incorporate the structure Treasury and the IRS had established there into the new penalty regime.

But this general observation is insufficient to determine with precision what Congress incorporated when it enacted

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[2] The revisions included changes made later in 2000, *see* Temp. Treas. Reg. § 1.6011-4T, 65 Fed. Reg. 49,909 (Aug. 16, 2000); Prop. Treas. Reg. § 1.6011-4, 65 Fed. Reg. 49,955 (Aug. 16, 2000), one set of changes in 2001, *see* Temp. Treas. Reg. § 1.6011-4T, 66 Fed. Reg. 41,133 (Aug. 7, 2001); Prop. Treas. Reg. § 1.6011-4, 66 Fed. Reg. 41,169 (Aug. 7, 2001), and two sets of changes in 2002, *see* Temp. Treas. Reg. § 1.6011-4T, 67 Fed. Reg. 41,324 (June 18, 2002); Prop. Treas. Reg. § 1.6011-4, 67 Fed. Reg. 41,362 (June 18, 2002); Temp. Treas. Reg. § 1.6011-4T, 67 Fed. Reg. 64,799 (Oct. 22, 2002); Prop. Treas. Reg. § 1.6011-4, 67 Fed. Reg. 64,840 (Oct. 22, 2002).

[3] These penalties and rules appear in sections 6111, 6112, 6501, 6662A, 6664, 6707, and 6707A, among others.

section 6707A(c). To answer that question, I turn to the text of the provisions at issue. *See Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 544 (2012) ("[T]he best evidence of Congress's intent is the statutory text."); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); *Grajales v. Commissioner*, 156 T.C. 55, 61 (2021) ("*NFIB*, 567 U.S. 544, directs us to look to the statutory text as 'the best evidence of Congress's intent.'"), *aff'd*, 47 F.4th 58 (2d Cir. 2022).

Section 6662A Penalty and Section 6707A(c) Definitions

The question ultimately before the Court is whether petitioner may be held liable for the penalty imposed by section 6662A. That penalty applies if a taxpayer's return reflects a "reportable transaction understatement," which includes, among others, items attributable to "any listed transaction." I.R.C. § 6662A(a) and (b). Section 6662A(d) defines the terms "listed transaction" and "reportable transaction" by reference to "the respective meanings given to such terms by section 6707A(c)."

Section 6707A(c)(2) tells us that "[t]he term 'listed transaction' means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011." In other words, a listed transaction is a reportable transaction with certain characteristics.

The term "reportable transaction" is also a defined term. It means "any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion." I.R.C. § 6707A(c)(1).

Analysis

Several observations relevant to the APA analysis follow from the statutory text. First, neither section 6662A nor section 6707A (or, for that matter, section 6011) refers to the APA. Second, although section 6707A(c)(2), which defines

listed transactions, contemplates that the Secretary must "specifically identif[y]" certain types of transactions as having the characteristics required to be listed transactions, the statute is silent on how that identification should be made. Third, section 6707A(c)(1), which defines reportable transactions, is more explicit about the Secretary's procedural responsibilities. It provides that the authority contemplated by it—that is, the authority to require certain information to be included with a return or statement for a specific reason—will be exercised "as determined under regulations prescribed under section 6011."

Nothing in the statutory text thus expressly turns off the APA requirements that would otherwise govern the Secretary's designation of a listed transaction under section 6707A(c)(2). *See* 5 U.S.C. § 559. Moreover, I see nothing in the text of section 6707A(c)(2) that gives rise to a "fair" implication of a departure from the APA requirements, let alone a "necessary" or "clear" one. *See Dorsey*, 567 U.S. at 274.

The Commissioner, however, contends that Congress's use of the clause "as determined under regulations prescribed under section 6011" in defining reportable transactions, I.R.C. § 6707A(c)(1), signals its wish to supplant the APA's procedures in favor of the 2003 regulatory provision. That regulation defines listed transactions to include transactions that the IRS "identified by notice, regulation, or other form of published guidance as a listed transaction." Treas. Reg. § 1.6011-4(b)(2). I am skeptical that the "as determined" clause bears the weight the Commissioner places on it, for a few reasons.

To begin, it is worth noting that the "as determined" clause (with its reference to regulations under section 6011) appears in the definition of the term "reportable transaction" in section 6707A(c)(1), but is absent from the definition of the term "listed transaction" in section 6707A(c)(2). The term that matters most in deciding this case is "listed transaction," not "reportable transaction."[4] And courts assume that when Congress includes specific language in one provision and excludes it from a neighboring provision, it does so intentionally. *See,*

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[4] The Commissioner asserts that the returns in this case improperly reported a listed transaction. *See* I.R.C. § 6662A(a) and (b)(1) and (2)(A). He does not assert that the returns reported a reportable transaction other than a listed transaction with a significant purpose of avoiding or evading federal income tax. *See* I.R.C. § 6662A(b)(2)(B).

e.g., *Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))); *Grajales v. Commissioner*, 47 F.4th at 62 ("When Congress uses certain language in one section of the statute yet omits it in another section of the same Act, 'it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion' of that language." (quoting *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 602 (2d Cir. 2021))), *aff'g* 156 T.C. 55. Thus, whatever meaning one is intended to glean from the "as determined" clause for purposes of section 6707A(c)(1), it does not shed much light on the procedural steps the Secretary must take in making the specific identification called for by section 6707A(c)(2). And it would be curious for Congress to signify its decision to depart from APA procedures with respect to listed transactions by adding the "as determined" clause to section 6707A(c)(1) (which defines a reportable transaction), rather than section 6707A(c)(2) (which defines a listed transaction). Put differently, one would have expected instructions about how the Secretary must "specifically identif[y]" the transactions that should be listed in the definition of that term, rather than in the definition of the more general "reportable transaction."

Furthermore, the 2003 regulation was focused on the characteristics of reportable transactions and not on processes for identifying them. Indeed, it did not contain any overall provisions prescribing any process the Secretary would follow in identifying reportable transactions. Rather, it simply provided that "[a] reportable transaction is a transaction described in any of the paragraphs (b)(2) through (7) of this section." Treas. Reg. § 1.6011-4(b)(1). It went on to explain that "[t]here are six categories of reportable transactions: listed transactions, confidential transactions, transactions with contractual protection, loss transactions, transactions with a significant book-tax difference, and transactions involving a brief asset holding period." *Id.* The only text that may be fairly viewed as process focused in the entire 2003 regulation is a phrase of nine words in the definition of a listed transaction, as described

below. In the absence of any overall direction in the 2003 regulation about process, it seems difficult to agree with the Commissioner's view that the "as determined" clause was intended to signify a congressional decision to depart from the APA-mandated process for administrative rulemaking.

Of course, as the Commissioner would surely point out, we are concerned specifically with listed transactions in this case. And in defining listed transactions, the 2003 regulation did specify a process, as follows:

> A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified *by notice, regulation, or other form of published guidance* as a listed transaction.

Treas. Reg. § 1.6011-4(b)(2) (emphasis added). In the Commissioner's view, the "as determined" clause in section 6707A(c)(1) incorporated this regulatory definition, including the nine procedural words highlighted above.

This argument, however, overlooks a critical fact: When it enacted the AJCA, Congress adopted its own statutory definition of "listed transaction" at section 6707A(c)(2):

> The term "listed transaction" means a reportable[5] transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011.

Comparing the two definitions, one can see that the statute essentially paraphrases the regulatory definition with one key difference: It omits the nine procedural words italicized above. The Commissioner's entire case rests on those nine words, and their omission in the statute is notable in light of the otherwise parallel definitions.

To put this point in another way, if Congress had intended to adopt a specific process for the Secretary to use in identifying listed transactions, Treasury Regulation § 1.6011-4(b)(2) provided a ready model. Yet, despite apparently incorporating

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[5] The regulatory definition begins by stating that a listed transaction is "a transaction" instead of "a reportable transaction." But the inclusion of the word "reportable" in the statutory definition is consistent with the structure of the 2003 regulation, which defined listed transactions as a subset of reportable transactions. *See* Treas. Reg. § 1.6011-4(b)(1) and (2).

other words from the regulation into the statutory definition, Congress did not incorporate the nine procedural words. Instead, it chose to modify them, omitting any mention of process from section 6707A(c)(2). Faced with that Congressional choice, I would be disinclined to read section 6707A(c)(1) and the "as determined" clause as a back-door way of establishing a process for identifying listed transactions under section 6707A(c)(2) (as the Commissioner urges). *See Knight v. Commissioner*, 552 U.S. 181, 188 (2008) ("The fact that [Congress] did not adopt [a] readily available and apparent alternative strongly supports rejecting [a] reading . . . [that relies on the rejected alternative text].").

To summarize then, the Commissioner argues that section 6707A(c)(1) overrides the APA by cross-referencing the 2003 regulation. But he overlooks that (1) the regulation is barely concerned with process, mentioning it in just nine words in the definition of listed transaction; (2) Congress adopted a statutory definition of listed transaction that paraphrases the regulation but excludes the nine procedural words; and (3) unlike the definition of reportable transaction in section 6707A(c)(1), the definition of listed transaction in section 6707A(c)(2), which is what we are primarily concerned with here, does not include a cross-reference to regulations under section 6011.

All of this suggests that the "as determined" clause in section 6707A(c)(1) is an awfully thin reed to support an express or implied departure from the APA. *See* 5 U.S.C. § 559. Although I do not think we need to decide the issue to dispose of this case, it seems to me difficult to conclude that Congress incorporated in section 6707A(c) the process set in the 2003 regulation when Congress seems to have gone out of its way to exclude the process-related words of the regulation from the text that it used.

With these observations, I agree with the opinion of the Court's disposition of the section 6662A penalty issue.

COPELAND, *J.*, agrees with this opinion concurring in the result.

GALE, *J.*, dissenting: In my view, in enacting section 6707A, with its express reference to the regulations under section 6011, Congress intended to except the identification of "listed transactions" from the notice-and-comment requirements of the Administrative Procedure Act (APA). *See* 5 U.S.C. § 553(b). I would first note that I agree with the lion's share of the analysis in Judge Pugh's concurring opinion, including the conclusion that the Internal Revenue Service's identification of syndicated conservation easement transactions as listed transactions is a legislative rule. Importantly, I agree with its critique of the opinion of the Court's and the Court of Appeals for the Sixth Circuit's conclusion that the reference in section 6707A to the section 6011 regulations "addresses a 'which transactions' question, not a 'what process' question." *See* op. Ct. p. 99 (quoting *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1146 (6th Cir. 2022)). Instead, I conclude that the reference to the section 6011 regulations goes to the heart of the process question.

And, as Judge Pugh notes, the procedure in the section 6011 regulations for making a transaction a "listed" one, subject to disclosure requirements, that is referenced in section 6707A for penalty purposes, is "identifi[cation] *by notice*, regulation, or other form of published guidance." Treas. Reg. § 1.6011-4(b)(2) (2003) (emphasis added). The reference to identification "by notice" is significant. A "notice" is a long recognized species of written guidance published by the Internal Revenue Service "when the Service determines that a public concern requires a speedy response" and is correspondingly "[i]ssued without public notice and comment." Stephanie Hunter McMahon, *Classifying Tax Guidance According to End Users*, 73 Tax Law. 245, 256–58 (2020). This type of "notice" is to be distinguished from the notice entailed in notice-and-comment rulemaking enumerated in the APA. *See* 5 U.S.C. § 553(b).

Regulations under section 6011 permitting the identification of listed transactions "by notice" were first promulgated as temporary and proposed regulations in 2000. *See* T.D. 8877, 2000-1 C.B. 747; Prop. Treas. Reg. § 1.6011-4, 65 Fed. Reg. 11,269 (Mar. 2, 2000). The regulations (Treas. Reg. § 1.6011-4) were made final in 2003. T.D. 9046, 2003-1 C.B. 614. By the time section 6707A was enacted in 2004, the

Service had identified 30 "listed transactions" pursuant to the section 6011 regulations, all without adherence to the notice-and-comment requirements of the APA. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). "So too, where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Id.* at 581. In this instance, Congress was not only presumptively aware when cross-referencing the section 6011 regulations of the Service's interpretation of its authority under section 6011 to identify a listed transaction without adhering to the notice-and-comment requirements of the APA. *See* 5 U.S.C. § 553(b). Congress was actually aware, having cited the temporary and final regulations permitting identification "by notice" in all accompanying committee reports. *See* H.R. Rep. No. 108-755, at 595 (2004) (Conf. Rep.), *as reprinted in* 2004 U.S.C.C.A.N. 1341, 1649; S. Rep. No. 108-192, at 89 (2003), 2003 WL 22668223, at *89; H.R. Rep. No. 108-548, pt. 1, at 260 (2004), 2004 WL 1380512, at *260. Consistent with the foregoing, Judge Pugh's concurring opinion finds "little doubt that in enacting section 6707A Congress knew about and endorsed the existing administrative procedure for determining reportable transactions and identifying listed ones." Pugh concurring op. p. 108. Since this existing administrative procedure is "identifi[cation] by notice, regulation or other form of published guidance," Judge Pugh acknowledges that it could potentially supersede or modify the APA's general requirement that legislative rules must go through notice and comment. *See* 5 U.S.C. § 553; Pugh concurring op. p. 109. Whether the APA has been superseded or modified depends, Judge Pugh reasons, upon the application of a caselaw test best summarized as "whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm." *See* 5 U.S.C. § 553; Pugh concurring op. p. 107 (quoting *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998)).

I agree with Judge Pugh that this is the appropriate test in the circumstances. I part ways, however, with her application

of the test. Plainly put, identification of a listed transaction "by notice" cannot be reconciled with APA notice-and-comment procedures. *See* 5 U.S.C. § 553. The latter requires prior notice to and opportunity for comment from the public for an identification to become effective—a significant and time-consuming set of procedural steps—while the former does not. Congress cross-referenced and thereby incorporated the former procedure, well established at the time, into section 6707A. I find it very unlikely that, in cross-referencing the extant identification procedures in the section 6011 regulations, Congress intended as significant a modification to them as APA notice and comment would require without any mention of that modification in the accompanying committee reports. The "necessary," "clear," or "fair implication," *see Dorsey v. United States*, 567 U.S. 260, 274–75 (2012), of Congress' action in incorporating the section 6011 regulations into the statute is that Congress intended to displace the otherwise applicable notice-and-comment requirements of the APA. *See* 5 U.S.C. § 553.

I find further support for this interpretation of section 6707A in Congress' subsequent enactment of section 4965 two years later. Section 4965 imposes excise taxes on tax-exempt entities and their managers for participation in listed transactions. *See* Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 516, 120 Stat. 345, 368 (2006). At that time, in its description of then-present law, the conference report on this legislation described a listed transaction as follows:

> A listed transaction means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011 . . . *and identified by notice*, regulation, or other form of published guidance as a listed transaction.

H.R. Rep. No. 109-455, at 125 (2006) (Conf. Rep.), *as reprinted in* 2006 U.S.C.C.A.N. 234, 321 (emphasis added). Thus, a subsequent Congress understood and reconfirmed the authority of the Secretary (and the Service as his or her designee) to identify a transaction as "listed" merely "by notice." The views of a subsequent Congress in a committee report concerning the interpretation of a prior enactment are entitled to significant weight. *Seatrain Shipbuilding Corp. v. Shell Oil*

Co., 444 U.S. 572, 596 (1980); *Sykes v. Columbus & Greenville Ry.*, 117 F.3d 287, 293–94 (5th Cir. 1997); *United States v. Wilson*, 884 F.2d 174, 178 n.7 (5th Cir. 1989); *Sorrell v. Commissioner*, 882 F.2d 484, 489–90 (11th Cir. 1989), *rev'g* T.C. Memo. 1987-351; *Johnsen v. Commissioner*, 794 F.2d 1157, 1163 (6th Cir. 1986), *rev'g* 83 T.C. 103 (1984).

Because I conclude that Congress intended in section 6707A to displace the APA requirement of notice and comment for the identification of listed transactions, I dissent from the opinion of the Court.

NEGA, *J.*, dissenting: The American Jobs Creation Act of 2004 (AJCA), Pub. L. No. 108-357, 118 Stat. 1418, and its legislative history are consistent with the Congress' decades-long effort to respond to the kind of transactions addressed by the AJCA. Such transactions historically have been viewed as a threat to the voluntary compliance tax system measured in terms greater than any direct loss in revenue from the transactions themselves. This long history set the stage for the AJCA.

Further, I am not aware of any debate over whether the AJCA was intended to allow the Internal Revenue Service (IRS) to improve the administration of the tax law and enhance general compliance. In my view, the legislation does exactly that by limiting the application of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706. I cannot agree that Congress enacted legislation so obviously in contradiction of the APA as the majority does.

Under one basic rule of statutory interpretation, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). We can also take judicial notice that Congress would be aware of the inherent delays were the APA fully applicable. Congress could easily have decided that the delays inherent in the APA were outweighed by faster application of the AJCA to tax returns reflecting such transactions. I believe this to be true.

The issue is whether, in adopting the IRS's existing regulations into the statutory scheme, Congress "must have intended to displace the norm" of APA notice and comment because the adopted procedure is "so clearly different from" it. *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998). I find that to be the case.

I believe that the majority's holding is worryingly close to a standard requiring "magical passwords in order to effectuate an exemption from the Administrative Procedure Act." *Marcello v. Bonds*, 349 U.S 302, 310 (1955). In that case, after exhaustive analysis, the Supreme Court found that there was enough evidence to find that the 1952 Immigration and Nationality Act did not violate the APA.

Congress was aware of the IRS's rulemaking in this area when it enacted the AJCA to bolster the IRS's efforts by adding a penalty to the existing regime. Congress ratified the existing procedures for identifying these transactions even in the absence of strict adherence to the APA's notice-and-comment requirements in those procedures. Section 6707A(c)(1) and (2) confirm my understanding. The cross-reference to the regulations under section 6011 constitutes strong textual evidence of Congress' intent to replace the ritual application of the APA in this area.

I disagree that Congress failed to "expressly" override the application of the APA to the IRS process incorporated into law by the AJCA. The nature of the legislation as well as the legislative history associated with it that the opinion of the Court finds unpersuasive leads me to the conclusion that Congress did not intend to enact the AJCA penalty regime subject to the time-consuming notice-and-comment procedures of the APA. In the light of congressional knowledge of the existence of the APA when enacting the AJCA, I cannot agree that Congress added a penalty regime to enforce the existing IRS rulemaking without addressing an obvious APA vulnerability, at least, to the then-listed transactions.

For these reasons, I dissent.

HALLMARK RESEARCH COLLECTIVE, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 21284-21. Filed November 29, 2022.

The Tax Court previously ordered dismissal of this deficiency case for lack of jurisdiction because P's Petition was filed late, for purposes of I.R.C. § 6213(a)—i.e., not 90 but 91 days after the IRS mailed its notice of deficiency. After the Supreme Court decided *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022), P moved to vacate our dismissal on the grounds that the deadline to file a deficiency case is a non-jurisdictional statute of limitations subject to equitable tolling. P requests that this case be reopened to give P an opportunity to show cause for equitable tolling of the limitations period. *Held*: The "text, context, and relevant historical treatment", *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010), of I.R.C. § 6213(a) confirm Congress's intention that the deadline to file a deficiency case be jurisdictional. *Held, further*, because the deadline of I.R.C. § 6213(a) is jurisdictional, it cannot be equitably tolled. *Held, further*, this case was properly dismissed for lack of jurisdiction, and we will not vacate the dismissal.

Christopher Reed Haunschild and *James Brooks Mann*, for petitioner.

Yervant P. Hagopian, *Whitney N. Moore Warren*, and *Michael K. Park*, for respondent.

OPINION

GUSTAFSON, *Judge*: Before the Court is "Petitioner's Motion to Vacate Order of Dismissal for Lack of Jurisdiction", in which Hallmark Research Collective ("Hallmark") cites the Supreme Court's recent decision in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022), and asks us to vacate our order of dismissal because it wrongly treats the 90-day[1] deadline of section 6213(a)[2] as jurisdictional. The issue for decision is

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[1] The filing deadline is 90 days for Hallmark and most other taxpayers and is 150 days when the deficiency notice is addressed to a taxpayer outside the United States. In this Opinion we use the phrase "90-day deadline" as shorthand.

[2] Unless otherwise indicated, statutory references are to the Internal Revenue Code ("the Code", Title 26 of the United States Code) as in effect at the relevant times; and references to Rules are to the Tax Court Rules of Practice and Procedure. A citation of a "Doc." in this Opinion refers to a

whether section 6213(a) limits the Tax Court's jurisdiction to deficiency petitions filed on or before that deadline. We hold that the timely filing of a deficiency petition is a jurisdictional requirement, and we will accordingly deny Hallmark's motion to vacate.

Background

Hallmark Research Collective

Hallmark is evidently a corporation with its principal place of business in California.[3] Hallmark filed its 2015 return untimely, and it did not file its 2016 return. Pursuant to section 6020(b), the Internal Revenue Service ("IRS") prepared for 2016 a substitute for return.

Pursuant to section 6212, the IRS sent a statutory notice of deficiency ("NOD") to Hallmark's last known address, by certified mail, on June 3, 2021. The NOD determined deficiencies, additions to tax, and penalties against Hallmark for the years 2015 and 2016 and further advised Hallmark of the following:

> **If you disagree with the Notice of Deficiency**
>
> If you want to contest our final determination, you have 90 days from the date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court.
>
> **How to file your petition**
>
> You can get a petition form and the rules for filing from the Tax Court's website at www.ustaxcourt.gov, by contacting the Office of the Clerk at the address below, or by calling 202-521-0700. Send your completed petition form, a copy of this letter, and copies of all statements and schedules you received with this letter to the address below.
>
> United States Tax Court
> 400 Second Street, NW
> Washington, DC 20217
>
> . . . .

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document so numbered in the Tax Court docket record of this case, and a pinpoint citation therein refers to the pagination as generated in the PDF file.

[3] Hallmark has a California address and states in its memorandum that "its principal place of business [is] in the Ninth Circuit", and the Commissioner does not say otherwise. Thus, venue for an appeal in this case would evidently be the U.S. Court of Appeals for the Ninth Circuit. *See* § 7482(b).

> **Time limits on filing a petition**
>
> The court can't consider your case if you file the petition late.
>
> - A petition is considered timely filed if the Tax Court receives it within:
>
>   - 90 days from the date this letter was mailed to you, or
>
>   - 150 days from the date this letter was mailed to you if this letter is addressed to you outside of the United States.
>
> - A petition is also generally considered timely if the United States Postal Service postmark date is within the 90 or 150-day period and the envelope containing the petition is properly addressed with the correct postage. The postmark rule doesn't apply if mailed from a foreign country.
>
>   . . . .
>
> - The time you have to file a petition with the Tax Court is set by law and can't be extended or suspended, even for reasonable cause. We can't change the allowable time for filing a petition with the Tax Court.
>
>   . . . .
>
> **If we don't hear from you**
>
> If you . . . don't file a timely petition with the Tax Court, we'll assess and bill you for the deficiency (and applicable penalties and interest) after 90 days from the date of this letter (150 days if this letter is addressed to you outside the United States).

The NOD included on its front page the caption:

> Last day to file petition with US tax court: SEP 01 2021

Hallmark's petition

Using the "e-filing" procedure provided on the Tax Court's website, Hallmark electronically filed its petition for redetermination of the deficiencies at 9:36 p.m. on September 2, 2021—one day late. In its petition Hallmark stated: "My CPA . . . contracted COVID/DELTA over the last 40 days and kindly requests additional time to respond." For purposes of this Opinion, we assume that Hallmark was not to blame for the late filing and that equitable considerations, if taken into account, might excuse the untimeliness.

Order to Show Cause and the parties' responses

On November 17, 2021, we issued an Order to Show Cause (Doc. 6), wherein we

> ORDERED that, on or before December 15, 2021, petitioner and respondent each shall file a response to this Order, showing cause, in writing, why the Court, on its own motion, should not dismiss this case for lack of jurisdiction on the ground that the petition was not timely filed.

Hallmark filed its response, in which it requested that we defer ruling until the Supreme Court issued its decision in *Boechler* (in which the Court had granted a petition for a writ of certiorari). Hallmark argued that the deadline to file a deficiency petition in section 6213(a) "is functionally the same as the deadline[] in [section] 6330(d)(1) (at issue in *Boechler* . . .)". Hallmark further argued that its "circumstances are compelling and an objective review would clearly result in equitable tolling of the filing deadline for the single day required."

In his response the Commissioner asserted that "there is no cause as to why the Court should not, on its own motion, dismiss this case for lack of jurisdiction on the ground that the petition was not timely filed."

Order of dismissal for lack of jurisdiction

We did not defer ruling. On April 1, 2022, we entered an Order of Dismissal for Lack of Jurisdiction (Doc. 18), in which we followed longstanding precedent, held that the 90-day deadline of section 6213(a) for deficiency cases is jurisdictional, and dismissed Hallmark's deficiency petition for lack of jurisdiction.

Boechler, P.C. v. Commissioner

On April 21, 2022, the Supreme Court issued its opinion in *Boechler*, holding that "[s]ection 6330(d)(1)'s 30-day time limit to file a petition for review of a collection due process determination is an ordinary, nonjurisdictional deadline subject to equitable tolling." *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1501.

Hallmark's motion to vacate our order of dismissal

On May 2, 2022, Hallmark timely filed its motion to vacate (Doc. 21) and its memorandum of law in support thereof (Doc. 22). The motion principally argues that

> the [Supreme] Court's reasoning in *Boechler* compels the conclusion that the 90-day filing deadline in section 6213(a) for deficiency cases is not jurisdictional, and thus is subject to equitable tolling. This Court should . . . apply[] the *Boechler* analysis to the filing deadline set forth in section 6213([a]), vacat[e] the Order, and request[] submissions from Petitioner and Respondent concerning the potential application of equitable tolling to the facts surrounding Petitioner's submission.

The Commissioner filed his response (Doc. 29) on June 22, 2022, and Hallmark filed its reply (Doc. 31) on July 15, 2022.

Discussion

As we and other courts have often held: "It is well settled that in order to maintain an action in this Court there must be [1] a valid notice of deficiency [issued by the Commissioner] and [2] a timely filed petition". *Abeles v. Commissioner*, 91 T.C. 1019, 1025 (1988).[4] Hallmark argues that two jurisdictional prerequisites[5] for a deficiency case are at least one too many. Hallmark contends we should not follow prior prece-

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[4] *See, e.g.*, *Elings v. Commissioner*, 324 F.3d 1110, 1112 (9th Cir. 2003) ("The tax court has jurisdiction only if two requirements are met: (1) the IRS issued a valid notice of deficiency, and (2) the [taxpayer] filed a timely petition"); *Portillo v. Commissioner*, 932 F.2d 1128, 1132 (5th Cir. 1991) ("Therefore, the Tax Court only has jurisdiction when the Commissioner issues a valid deficiency notice and the taxpayer files a timely petition for redetermination"), *aff'g in part*, *rev'g in part* T.C. Memo. 1990-68; *Commissioner v. Rosenheim*, 132 F.2d 677, 679–80 (3d Cir. 1942) ("The sending of the appropriate notice in this case by registered mail and the transferee's petition for a redetermination of the liability within ninety days of the date of the notice supplied the requirements of Section 272(a) [predecessor to section 6213(a)] so far as the Board's jurisdiction to hear and determine the matter was concerned"), *rev'g and remanding on other grounds* 45 B.T.A. 1018 (1941).

[5] In contrast, for tax refund suits one can count five jurisdictional prerequisites: (1) full payment of the tax, *see Flora v. United States*, 362 U.S. 145 (1960); (2) a proper administrative refund claim, *see* § 7422(a); (3) a timely administrative refund claim, *see* § 6511; (4) disallowance of the claim, or the passage of 6 months, *see* § 6532; and (5) the timely filing of the refund suit, *see* § 6532.

dents holding the 90-day deadline to be jurisdictional, because "*Boechler* undercut the theory and reasoning underlying" those precedents, so that "[t]he cases are now clearly irreconcilable", and that "efficient and harmonious judicial administration here would seem to require this Court to review the Supreme Court's *Boechler* opinion and issue a new precedent on the section 6213(a) filing deadline." We now undertake such a review, and we conclude that the Supreme Court's reasoning in *Boechler* does not apply to the 90-day deadline of section 6213(a).

I. *The Supreme Court has articulated a "clear statement" standard for discerning jurisdictional rules.*

A. *"Jurisdictional" rules are different from "claim-processing" rules.*

Where a federal court's subject-matter jurisdiction depends on a timely filing, "a litigant's failure to comply with the bar deprives a court of all authority to hear a case". *United States v. Kwai Fun Wong*, 575 U.S. 402, 408–09 (2015). Courts must enforce the deadline sua sponte; the deadline cannot be tolled or waived; and there is no room for equitable exceptions to be made on account of the specific facts of a case. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). Late-filed cases in such instances must be dismissed for lack of jurisdiction. *Id.*

Claim-processing rules, on the other hand, are those that "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times", *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), "but do not deprive a court of authority to hear a case", *Kwai Fun Wong*, 575 U.S. at 410. "Filing deadlines . . . are quintessential claim-processing rules", *Henderson*, 562 U.S. at 435, and "ordinarily are not jurisdictional", *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013). This is true "even when the time limit is important . . . and even when it is framed in mandatory terms". *Kwai Fun Wong*, 575 U.S. at 410. Deadlines that are claim-processing rules are subject to the rebuttable presumption that they may be equitably tolled upon the particular facts of a case. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990). *But see*

id. at 96 ("Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants. . . . But the principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect"). A litigant's failure to meet the deadline risks dismissal for failure to state a claim, *see Arbaugh*, 546 U.S. at 511–13, but the statute of limitations defense must be raised in the answer (or amended answer); otherwise, the issue is waived, and the case may proceed, *see Kontrick v. Ryan*, 540 U.S. 443, 459 (2004).

Perceiving a problem with "drive-by jurisdictional rulings", *see Arbaugh*, 546 U.S. at 511 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)), the Supreme Court has endeavored to "bring some discipline" to the use of the jurisdictional label, *see Henderson*, 562 U.S. at 435. The Court has instructed that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455.

B. *For a deadline to be considered jurisdictional, an analysis employing the principles of statutory construction must show that the rule "clearly states" it is jurisdictional.*

"Only Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* at 452 (citing U.S. Const. art. III, § 1). "Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 551 U.S. 205, 212–13 (2007). "Congress is free to attach the conditions that go with the jurisdictional label to . . . a claim-processing rule", *Henderson*, 562 U.S. at 435, and "it is no less 'jurisdictional' when Congress prohibits federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed", *Bowles*, 551 U.S. at 213.

However, Congress must "clearly state[]" that a filing deadline is jurisdictional; and absent such a clear statement, "courts should treat the restriction as nonjurisdictional in

character." *Arbaugh*, 546 U.S. at 515–16. "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Kwai Fun Wong*, 575 U.S. at 410. Congress "need not use magic words", *Henderson*, 562 U.S. at 436, and a statutory deadline may be jurisdictional even without the word "jurisdiction", *see, e.g.*, *Bowles*, 551 U.S. at 208–10 (holding 28 U.S.C. § 2107(a) and (c) to be jurisdictional); *United States v. Brockamp*, 519 U.S. 347, 350–51 (1997) (holding section 6511 to be jurisdictional); but the "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences", *Kwai Fun Wong*, 575 U.S. at 410.

"To determine whether Congress has made the necessary clear statement, we examine the 'text, context, and relevant historical treatment' of the provision at issue." *Musacchio v. United States*, 577 U.S. 237, 246 (2016) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010)). Statutes that meet this standard share several qualities: They speak of a court's power "in jurisdictional terms or refer in any way to the jurisdiction" of the court. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–94 (1982). They "define a federal court's jurisdiction . . . , address its authority to hear untimely suits, [and] cabin its usual equitable powers." *Kwai Fun Wong*, 575 U.S. at 411. Their context, such as placement within their statutory regime, history of reenactments, or a long-standing judicial interpretation, reflects that Congress imbued a deadline with "jurisdictional consequences". *See, e.g.*, *Kwai Fun Wong*, 575 U.S. at 410; *Henderson*, 562 U.S. at 439; *Bowles*, 551 U.S. at 209–13; *Zipes*, 455 U.S. at 394.

With these principles in mind, we now examine the 90-day deadline that Congress provided in section 6213(a).

II. *Section 6213(a) clearly states that its 90-day deadline for filing a deficiency case is jurisdictional.*

A. *The Tax Court is the exclusive forum for deficiency cases.*

1. *Deficiency procedures defer assessment of income tax.*

The Constitution confers on Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises". U.S. Const. art. I, § 8, cl. 1. The Sixteenth Amendment to the Constitution,

ratified in 1913, authorizes Congress to impose a federal income tax without apportionment among the States. Congress promptly enacted the Revenue Act of 1913, ch. 16, 38 Stat. 114. Under our income tax system, taxpayers are required to file annual returns reporting their income and claiming entitlement to certain deductions and credits enumerated in the Code. §§ 6001, 6012. The IRS is authorized to examine those returns, § 7602, and to determine that additional tax may be owed, § 6212. Any additional tax determined to be owed that is greater than the amount shown by the taxpayer on his return is referred to as the "deficiency". § 6211.

Before the IRS may forcibly collect the deficiency, it must first "assess" that deficiency[6] by recording the liability on the Treasury's tax rolls, *see* § 6203, and then the IRS may make notice and demand, *see* § 6303, and collect by lien or levy, *see* §§ 6321, 6331. To protect the rights of taxpayers, Congress has established deficiency proceedings as a remedy for challenging the IRS's determination before the tax is collected. This pre-payment remedy is not required by the Constitution. Rather, the minimum requirements of constitutional due process are satisfied by the taxpayer's right to sue for a refund of overpaid tax after paying it. *Phillips v. Commissioner*, 283 U.S. 589, 595–99 (1931). But Congress created an additional remedy, in the predecessor to section 6213(a), by which a taxpayer may seek de novo pre-payment review of a determination by the IRS that he is liable for a deficiency in tax. Congress created the Tax Court's predecessor, the Board of Tax Appeals, specifically to give taxpayers this opportunity. Deficiency jurisdiction is the principal purpose for this Court's existence.

Under the deficiency procedures that Congress established, specific steps must be taken before the IRS may assess a deficiency. *See generally* §§ 6211–6216. First, the IRS must notify the taxpayer that a deficiency has been determined against him for a particular year. § 6212. Second, the taxpayer has an opportunity to challenge the IRS's deficiency determination. In 1919 Congress authorized the Commissioner to establish rules and procedures for taxpayers to make an administrative appeal of a deficiency determination, *see* Rev-

[6] Not relevant here is the Government's filing a collection suit, under section 7403(a), "without assessment". § 6501(a).

enue Act of 1918, ch. 18, § 228, 40 Stat. 1057, 1075; and in 1921 Congress established the administrative deficiency appeal procedures by statute, *see* Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 266.

2. *Pre-assessment judicial review of IRS deficiency determinations is assigned to the Tax Court.*

Congress was soon unsatisfied with a lone administrative remedy for pre-payment review of deficiency determinations, and in the Revenue Act of 1924, ch. 234, § 900, 43 Stat. 253, 336, it established the Board of Tax Appeals ("BTA") as an independent executive agency to be the unique forum for hearing and resolving deficiency disputes. In 1942 Congress renamed the BTA the Tax Court of the United States ("TCUS"), but Congress left the TCUS as an independent agency within the executive branch. Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957. Then in 1969 Congress "established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court." Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified as amended at § 7441).[7] Congress intentionally designed the Tax Court, like its predecessors the BTA and the TCUS, to be the exclusive forum for pre-payment review of deficiencies. The effect of a "decision of the Tax Court which has become final" is that the redetermined deficiency "shall be assessed and shall be paid upon notice and demand". § 6215(a).

B. *Section 6213(a) is the jurisdictional grant to the Tax Court for deficiency cases.*

The Tax Court may exercise jurisdiction only to the extent expressly provided by statute. *Breman v. Commissioner*, 66 T.C. 61, 66 (1976).

1. *A general description of the Tax Court's jurisdiction appears in section 7442.*

Congress has described the jurisdiction of the Tax Court in section 7442, which provides:

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[7] As amended in 2015, section 7441 adds: "The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government."

Sec. 7442. Jurisdiction.

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.

A careful reading of section 7442 shows that it does not itself confer jurisdiction but states the truism that the Tax Court "shall have such jurisdiction" as is "conferred" by other provisions elsewhere in the Code and other revenue laws. In the absence of any other such provisions, section 7442 by itself would not vest the Tax Court with any jurisdiction; and in the absence of section 7442, the Tax Court would nonetheless possess the jurisdiction that had been "conferred on [it] by this title".

This general jurisdictional description in section 7442 has its origin in an equivalent provision enacted in 1926. Section 1000 of the Revenue Act of 1926, ch. 27, 44 Stat. 9, 105, added section 904 to the Revenue Act of 1924; and section 904 provided: "The Board and its divisions shall have such jurisdiction as is conferred on them by Title II [income tax] and Title III [estate tax] of the Revenue Act of 1926 or by subsequent laws." When the BTA was first established, the Revenue Act of 1924 made no mention of the BTA's "jurisdiction". Rather, section 900(e), 43 Stat. at 337, provided that "[t]he Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312", and section 274(a), 43 Stat. at 297 (the predecessor statute of section 6213(a)), provided that "[w]ithin 60 days after such notice [of deficiency] is mailed the taxpayer may file an appeal with the Board of Tax Appeals". Two years later the general provision addressing "jurisdiction" was enacted as section 904 (now section 7442) and thus clarified what had already been true: Congress gave the BTA jurisdiction over deficiency cases not by announcing that the Board of Tax Appeals shall have "jurisdiction" over deficiency cases but simply by providing in section 274(a) that "the taxpayer may file" a deficiency case "with the Board of Tax Appeals" and providing in section 900(e) that "the Board . . . shall hear" those deficiency cases.

The current general description in section 7442 thus confirms for the Tax Court (as former section 904 confirmed for the BTA) that the Court does have "jurisdiction" as is else-

where conferred by "this title" (Title 26 of the United States Code).

2. *The particular grant of the Tax Court's deficiency jurisdiction appears in section 6213(a).*

The particular provision in Title 26 that does confer jurisdiction over deficiency cases is section 6213(a).[8] We print it here in its entirety (with bracketed numbering of the sentences inserted):

> Sec. 6213. Restrictions applicable to deficiencies; petition to Tax Court.
>
> (a) Time for filing petition and restriction on assessment.—[1] *Within 90 days*, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), *the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency*. [2] Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. [3] Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. [4] 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. [5] 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.

(Emphasis added.)

Section 6213 is not a court-promulgated rule;[9] rather, it is Congress's mandate of the Tax Court's deficiency authority

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[8] We discuss below in Part III.A Hallmark's contention that deficiency jurisdiction is conferred by section 6214.

[9] *Cf. Kontrick*, 540 U.S. at 453–54 ("The provision conferring jurisdiction over objections to discharge, however, contains no timeliness condition.

and of its place within the federal tax system,[10] and we must follow its directive. *Breman*, 66 T.C. at 66. Therefore, we "attempt to ascertain Congress' intent regarding the particular type of review at issue in this case", *Henderson*, 562 U.S. at 437–38; and to do so we first examine the text of section 6213(a).

C. *The placement and context of the 90-day deadline in section 6213(a) show it is jurisdictional.*

1. *Section 6213(a) states two prerequisites for a deficiency case.*

Section 6213(a) authorizes the taxpayer to postpone the IRS's assessment of a deficiency it has determined by filing a deficiency petition in the Tax Court within the 90-day period, and it thereby gives the Tax Court jurisdiction to adjudicate that petition. By the first sentence of section 6213(a), Congress created a class of cases—deficiency cases—and specified the time period within which to file them. *See Bowles*, 551 U.S. at 212–13 ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). No court has ever questioned whether the Tax Court has deficiency jurisdiction, and no court has ever held that the basis for that jurisdiction is any statute other than section 6213(a).

As we stated above, the prerequisites for a Tax Court deficiency case are (1) a valid notice of deficiency issued by the Commissioner and (2) a petition timely filed by the taxpayer. *See supra* note 4 and accompanying text. Each of these pre-

[28 U.S.C. §] 157(b)(2)(J) instructs only that 'objections to discharges' are '[c]ore proceedings' within the jurisdiction of the bankruptcy courts. The time constraints applicable to objections to discharge are contained in Bankruptcy Rules prescribed by this Court for 'the practice and procedure in cases under title 11.' 28 U.S.C. § 2075; cf. § 2072 (similarly providing for Court-prescribed 'rules of practice and procedure' for cases in the federal district courts and courts of appeals). '[I]t is axiomatic' that such rules 'do not create or withdraw federal jurisdiction.' *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)").

[10] The Supreme Court acknowledged in *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991), that "[t]he Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts".

requisites has a clear basis in the statutory text, and as we will show, both are jurisdictional.

a. *The IRS must issue a valid notice of deficiency.*

Under section 6213(a), a deficiency petition may be filed only "after the notice of deficiency authorized in section 6212 is mailed". According to section 6212, such a notice (1) must determine a deficiency, (2) must be sent by certified or registered mail, and (3) must be sent to the taxpayer's last-known address.

The notice of deficiency is known as the "ticket" to Tax Court. A defect in its fulfillment of those requirements of section 6212 may cause a misfire in the deficiency procedure and may deprive us of authority to hear a deficiency case. *See, e.g.*, *Scar v. Commissioner*, 814 F.2d 1363 (9th Cir. 1987), *rev'g* 81 T.C. 855 (1983). The requirements of section 6212 that define an NOD are essential to the Tax Court's authority over a deficiency case because they are incorporated by reference into section 6213(a).

In this case there is no dispute about the first of the two prerequisites of section 6213(a)—the validity of the NOD that the IRS issued to Hallmark. However, we pause to note that the unanimously acknowledged jurisdictional necessity of the issuance of the NOD arises from section 6213(a)—the same statute that (we hold here) makes jurisdiction also depend on a timely petition. If a taxpayer files a petition in the Tax Court attempting to dispute the existence of a deficiency *before* the IRS has issued an NOD, then the petition will be dismissed for lack of jurisdiction. The Supreme Court has so held. *See Laing v. United States*, 423 U.S. 161, 165 n.4 (1976) ("A deficiency notice is of import primarily because *it is a jurisdictional prerequisite* to a taxpayer's suit in the Tax Court for redetermination of his tax liability." (Emphasis added.)).[11] Or, as the

[11] *See also Abrams v. Commissioner*, 84 T.C. 1308, 1310 (1985) ("The PFN [pre-filing notification] letters do not satisfy these requirements. They do not rise to the level of notices of deficiencies. They do not state that they are notices of deficiencies. They do not state that a *determination* has been made"), *aff'd*, 787 F.2d 939 (4th Cir. 1986), *and aff'd*, 814 F.2d 1356 (9th Cir. 1987), *and aff'd sub nom. Spector v. Commissioner*, 790 F.2d 51 (8th Cir. 1986), *and aff'd sub nom. Donley v. Commissioner*, 791 F.2d 383 (5th Cir. 1986), *and aff'd sub nom. Becker v. Commissioner*, 799 F.2d 753 (7th Cir. 1986), *and aff'd sub nom. Alford v. Commissioner*, 800

Tax Court put it: "It is elemental that the Tax Court does not have jurisdiction where the Commissioner has not determined a deficiency and a statutory notice of deficiency has not been sent to the taxpayer-petitioner." *Johnston v. Commissioner*, 52 T.C. 792, 793–94 (1969), *aff'd*, 429 F.2d 804 (6th Cir. 1970). But this "elemental" proposition is based on the jurisdictional character of the first sentence of section 6213(a). The requirement of a valid NOD and the 90-day deadline are inseparably linked in that sentence. If, as Hallmark contends, the 90-day deadline were not jurisdictional, then we do not see how the requirement of a valid NOD could (as the Supreme Court has held) be jurisdictional. Rather, both prerequisites would then have to be treated as mere claim-processing rules, which might be waived and which, if invoked, would result in dismissal not for lack of jurisdiction but for failure to state a claim—i.e., a merits determination. But that is a thought experiment. No court has ever denied (and Hallmark does not dispute) that the Tax Court's jurisdiction over a deficiency case depends on the issuance of the NOD.

b. *The taxpayer must file a timely petition.*

Section 6213(a) creates a window of opportunity for the taxpayer: "Within 90 days . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." Under the plain meaning of this provision, the grant to the taxpayer of the right to file a deficiency petition is constrained by the time in which to do so, and only a petition meeting that deadline can be said (in the words of *Kontrick*, 540 U.S. at 455) to "fall[] within . . . [the Tax C]ourt's adjudicatory authority".

2. *The 90-day deadline is embedded in the jurisdictional grant in sentence 1.*

The 90-day deadline is imposed in the jurisdictional statute, section 6213(a). Admittedly, a requirement "does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions". *Auburn*, 568 U.S. at 155. On the other hand, "Congress's separation of a

F.2d 987 (10th Cir. 1986), *and aff'd sub nom. Gaska v. Commissioner*, 800 F.2d 633 (6th Cir. 1986).

filing deadline from a jurisdictional grant often indicates that the deadline is not jurisdictional", *Kwai Fun Wong*, 575 U.S. at 403; whereas the 90-day deadline at issue here is not just "in a section of" the jurisdictional statute but is in the same *sentence* as, and is embedded in, the jurisdictional grant: "Within 90 days . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." We therefore construe the placement of the deadline in the jurisdictional statute as some indication that the 90-day deadline may be jurisdictional, and we continue our analysis.

3. *The injunction provision in sentence 4 of section 6213(a) suggests that "jurisdiction" depends on timeliness.*

Section 6213(a) must be construed as a whole,[12] and sentence 4 clarifies that deficiency "jurisdiction" (conferred in sentence 1) depends on a petition's timeliness, and implies the jurisdictional character of the deadline provided in sentence 1. *Cf. Zipes*, 455 U.S. at 393–94 ("The provision granting district courts jurisdiction under Title VII, 42 U.S.C. §§ 2000e–5(e) and (f), [unlike section 6213(a),] does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts" (footnote omitted)). The only mention of "jurisdiction" in subsection (a) itself is that fourth sentence, which makes provision as to when the Tax Court has "jurisdiction to enjoin . . . or order any refund". This statement indirectly indicates that deficiency jurisdiction depends on a timely petition by precluding injunction or refund "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". That is, the statute says there may be supplemental injunction or refund "jurisdiction" where a deficiency petition is before the Court, but only if the petition was "timely". Section 6213(a) therefore speaks to

[12] *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

both the petition's timeliness and the Tax Court's injunctive power. *Cf. Kwai Fun Wong*, 575 U.S. at 411 ("[Title 28 U.S.C. § 2401(b)] does not define a federal court's jurisdiction over tort claims generally, address its authority to hear untimely suits, or in any way cabin its usual equitable powers").

If timeliness were a jurisdictional prerequisite for the supplemental injunction or refund but not for the predicate deficiency case, then an oddity might result: Where a deficiency case was filed untimely, the Court might nonetheless have deficiency jurisdiction via equitable tolling, but by the statute it could not have jurisdiction over any related injunction or refund claim. The traditional tools of statutory construction encourage us to view the statutory text as a whole and to prefer to avoid this anomaly by recognizing "timely petition" to be a jurisdictional prerequisite for both the injunction power and the underlying deficiency case.

It must be borne in mind, however, that this observation is analogous to one that did not carry the day in *Boechler*, where the Commissioner had argued that "[i]t would be strange . . . to make the deadline a jurisdictional requirement for a particular remedy (an injunction) [i.e., enjoining a lien or levy], but not for the underlying merits proceeding itself [there, a collection due process hearing under section 6330(d)(1); here, a deficiency case under section 6213(a)]." *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1499. The Supreme Court held, however, that this potential anomaly "might strengthen the Commissioner's argument that his interpretation is superior" but held that an interpretation that a timely filing requirement is jurisdictional "must be not only better, but also clear". *Id.* Consequently, at this point in the analysis we posit simply that the explicit "jurisdiction" provision in the fourth sentence of section 6213(a) that invokes the time limit of the first sentence "strengthen[s]" (but does not clinch) the argument that the 90-day deadline of the first sentence is jurisdictional.

4. *Congress's amendments adjusting the deadline show that the deadline is fixed.*

From time to time, Congress has marginally extended the deadline of section 6213(a) to accommodate a variety of potentially sympathetic situations. In 1926 Congress provided that if the deadline (then the 60th day) fell on a Sunday (as

it had in *Appeal of Satovsky*, 1 B.T.A. 22, 24 (1924)), then that Sunday would not count as the 60th day, because Sunday was not a business day and papers could not be filed.[13] In 1934 Congress extended the deadline to 90 days and excluded any holiday as the 90th day.[14] In 1942 Congress extended the deadline to 150 days for persons abroad.[15] In 1945 Congress excluded Saturday as the 90th day.[16] And most recently, in 1998, in order to help prevent taxpayers from miscalculating the 90-day deadline, Congress passed a provision (not codified in 26 U.S.C.) mandating that the Commissioner include on the notice of deficiency a statement of the last date to file a petition and then made a corresponding amendment to section 6213(a) making that stated date a safe harbor.[17] Each of these modifications to the deadline for filing a deficiency petition was made to address a scenario that the Tax Court could have addressed with equitable tolling if it had such power. But Congress recognized that the Tax Court does not have the power to extend the jurisdictional deadline imposed by section 6213. Thus, Congress, in the course of its amendments, has treated the deadline of section 6213(a) (and its predecessor statutes) as a jurisdictional deadline that the Tax Court cannot alter or toll.

D. *Section 7459(d) confirms the jurisdictional nature of the 90-day deadline of section 6213(a).*

1. *Section 7459(d) provides a general rule that dismissal of a deficiency case sustains the IRS's deficiency determination.*

The Code indicates that when the Tax Court dismisses an untimely petition, it does so "for lack of jurisdiction". Section 7459(d) provides as follows:

> Sec. 7459(d). Effect of decision dismissing petition.—If a *petition* for a redetermination of a deficiency has been *filed by the taxpayer*, a decision

[13] *See* Revenue Act of 1926, ch. 27, § 274, 44 Stat. 9, 55.

[14] *See* Revenue Act of 1934, ch. 277, § 272, 48 Stat. 680, 741.

[15] *See* Revenue Act of 1942, ch. 619, § 168, 56 Stat. 798, 876.

[16] *See* International Organizations Immunities Act of 1945, ch. 652, § 203, 59 Stat. 669, 673 (excluding Saturdays as the 90th day).

[17] *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3463, 112 Stat. 685, 767.

> of the Tax Court dismissing the proceeding shall be considered as its decision that the *deficiency* is the amount *determined by the Secretary*. An order specifying such amount shall be entered in the records of the Tax Court unless the Tax Court cannot *determine such amount from the record* in the proceeding, or *unless the dismissal is for lack of jurisdiction*.

(Emphasis added.) This statute thus addresses situations where (1) there has been a "deficiency . . . determined by the Secretary"; (2) there has been a "petition . . . filed by the taxpayer" in the Tax Court; and (3) the "amount" of the deficiency is "determine[able] . . . from the record". When those conditions are met and a deficiency petition is dismissed, the statute provides that some such cases are thereby resolved on their merits and some are not. The general rule of section 7459(d) is that dismissal of a deficiency petition is the functional equivalent of a merits decision sustaining the determination of the deficiency; consequently, the deficiency "shall be assessed and shall be paid upon notice and demand". *See* § 6215(a). This general rule precludes a taxpayer from using a deficiency case to bar indefinitely the assessment of tax. When he files his petition, he does halt the assessment process until the Tax Court enters its decision; but he cannot then contrive to have his case dismissed (whether by agreement, or for failure to prosecute, or for any other reason), thereby forestalling assessment by keeping the Tax Court from entering decision. Rather, under section 7459(d), dismissal will generally be tantamount to the taxpayer's losing on the merits, and an adverse decision will be entered.

2. *Section 7459(d) provides an exception, even though the IRS determined a deficiency and the taxpayer filed a petition, when a dismissal is "for lack of jurisdiction".*

Section 7459(d) makes specific an exception for circumstances where "the dismissal is for lack of jurisdiction". We stress the truism that this exception can apply only if the general rule of section 7459(d) would otherwise apply—that is, only where the IRS has determined a deficiency and where the taxpayer has filed a petition. The general rule of section 7459(d) could not apply (and decision would *not* be entered) if there is no "deficiency . . . determined by the Secretary", or if there is no "petition . . . filed by the taxpayer". The exception in section 7459(d) therefore makes provision for a

dismissal without adverse decision in the circumstance where there *has* been a notice of deficiency issued by the IRS *and* there *has* been a taxpayer-filed petition but there is nonetheless a "lack of jurisdiction". This prompts the question of what sort of "jurisdictional" defect might be possible where there was a deficiency determination and a filed petition.

The easy answer to the question is that jurisdiction might be lacking (and the Court should dismiss without entering decision) either when the notice of deficiency is defective under section 6212 or when the petition is untimely. The jurisprudence of the Tax Court (and its predecessors) has long held that either of those two defects in compliance with section 6213(a) calls for dismissal for lack of jurisdiction without a decision as to the amount of the deficiency.

One who insists that section 6213(a) does not state "jurisdictional" prerequisites must conclude that neither invalidity of the notice nor untimeliness of the petition could cause "lack of jurisdiction" over a deficiency case, and he must then explain what "jurisdictional" circumstances Congress meant to except when it provided in section 7459(d) that there can be "lack of jurisdiction" even where there has been a deficiency determination and the filing of a petition. This non-jurisdictional reading of section 6213(a) and its prerequisites is untenable for two reasons that we now discuss.

3. *Non-jurisdictional dismissals of cases with untimely petitions would produce incongruous results.*

When a deficiency case is dismissed because it is untimely under the first sentence of section 6213(a) or its predecessor statutes, the unvarying practice of the Tax Court and its predecessors for almost 100 years has been to dismiss the case for lack of jurisdiction and therefore (consistent with section 7459(d) and its predecessor statutes) not to enter decision as to an amount of a deficiency. This dismissal leaves the IRS free to assess the deficiency (because no timely petition was filed to halt assessment pursuant to the second sentence of section 6213(a) and its predecessor statutes); but because there has been no adjudication of the liability that could give rise to res judicata, this dismissal also leaves the taxpayer free to pay the tax and then pursue his refund remedies.

If the jurisprudence had been wrong, if the 90-day deadline were a claim-processing rule, and if the dismissal of an untimely petition were not jurisdictional but rather "for failure to state a claim",[18] then section 7459(d) would call for a different treatment. It would call for dismissal of the untimely petition with an order "that the deficiency is the amount determined" in the NOD. This surprising outcome counsels against the non-jurisdictional construction of section 6213(a) not because it provokes sympathy for a taxpayer[19] for whom this would be an unfavorable result but because it puts section 6213(a) and section 7459(d) at odds with each other and with the manifest purpose of the statutory regime.

Rightly construed, the two statutes work harmoniously in tandem. Section 6213(a) gives the taxpayer the unilateral power, merely by filing a timely petition, to halt the deficiency assessment process until the Tax Court enters decision; and section 7459(d) assures that the taxpayer cannot then avoid the conclusion of that deficiency process by contriving a dismissal of his case before the Tax Court does so. Sec-

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[18] *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits'"); *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."); *Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002) ("[A] dismissal for failure to state a claim under Rule 12(b)(6) is a 'judgment on the merits' to which res judicata applies" (quoting *Moitie*, 452 U.S. at 399 n.3)).

[19] In fact, sometimes a non-jurisdictional dismissal would be an unfavorable result for the Commissioner. Sometimes the Commissioner uses the deficiency case as an occasion to assert liabilities in addition to those in the NOD (as section 6214(a) permits him to do); but res judicata arising from a merits decision issued pursuant to section 7459(d) upon a (supposedly) non-jurisdictional dismissal of an untimely petition would slam the door on any further litigation of the tax year at issue (at least in the absence of fraud, *see Zackim v. Commissioner*, 887 F.2d 455 (3d Cir. 1989) (construing § 6212(c)), *rev'g in part* 91 T.C. 1001 (1988)). On the other hand, when a taxpayer's deficiency petition is dismissed for lack of jurisdiction (and there is no outcome that is res judicata), then the taxpayer remains free to request audit reconsideration, *see Tucker v. Commissioner*, 135 T.C. 114, 148 (2010), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012), or await IRS collection and attempt a "collection due process" hearing under section 6330 (or an equivalent hearing before the IRS's Independent Office of Appeals), or he may pay the tax, request a refund, and, if his claim is not allowed, sue for refund under section 7422.

tion 7459(d) prevents that abuse by requiring that the Tax Court will enter decision in every case in which it has been given the power to do so—but not in cases (such as those with untimely petitions) as to which Congress expressly withheld that power from the Tax Court. A non-jurisdictional reading of section 6213(a) might allow equitable tolling, but it would, in conjunction with the operation of section 7459(d), require the Tax Court to exercise power over untimely cases by entering decisions sustaining the deficiencies determined in the NOD. But whatever "90 days" means in section 6213(a) (i.e., whether a literal 90 days, or a 90 days plus equitable tolling where applicable), it certainly means that the Tax Court *cannot* redetermine the deficiency where the petition was *not* filed "[w]ithin 90 days"; yet Hallmark's non-jurisdictional construction of section 6213(a) would have us do just that.

It is no answer to this anomaly to point out (as Hallmark does) that "if this unfortunate res judicata result were to happen, it would be a matter for Congress to consider altering by legislation". It is certainly correct that courts must not choose an interpretation because it brings about a desired outcome, and it is true that defects in a statute are for Congress to fix, not the courts. But choosing desired outcomes is not the same thing as following the principles of statutory construction that counsel against choosing an interpretation that creates a conflict in the legislative regime (and that therefore would require Congress to then address the conflict by corrective legislation). *See USA Gymnastics v. Liberty Ins. Underwriters, Inc.*, 27 F.4th 499, 516 (7th Cir. 2022) ("[T]he harmonious-reading canon [instructs that] '[t]he provisions of a text should be interpreted in a way that renders them compatible'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012))).

This consequence of Hallmark's position—requiring the Tax Court to enter decision where Congress plainly withheld power to do so—demonstrates the error of that position and the distortions that would result from adopting it.

4. *Applying section 7459(d) only to dismissals other than those called for by section 6213(a) would contradict the actual history and intent of section 7459(d).*

Since Hallmark argues that untimely petitions are not dismissed "for lack of jurisdiction" for purposes of section 7459(d), Hallmark must posit the petitions that *are* dismissed for lack of jurisdiction. Hallmark points to five situations (which it states concisely and on which we comment in footnotes) in which "a petition is dismissed for lack of jurisdiction because [1] the notice of deficiency was invalid because not sent to the taxpayer's last known address[,][20] [2] the petition is barred by the automatic stay in bankruptcy,[21] [3] a corporation lacks capacity to file the petition at the time[,][22] [4] the

[20] The last-known-address provision first appeared as section 272(k) of the Revenue Act of 1928, ch. 852, § 272(k), 45 Stat. 791, 854, the same Revenue Act in which the predecessor to section 7459(d) was enacted. As Hallmark's description admits, this last-known-address defect is simply one instance of the NOD being "invalid"; that is, the case is dismissed for lack of jurisdiction because one of the two prerequisites of section 6213(a) was not met.

[21] The automatic stay provision in its current form was not enacted until the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. "[T]he Revenue Act of 1924 [was] silent as to the Board's jurisdiction in the event of bankruptcy", but "section 282(a) of the Revenue Act of 1926[, 44 Stat. at 62] . . . says: 'No petition for any such redetermination *shall be filed* with the Board after the adjudication of bankruptcy or the appointment of the receiver.'" *Plains Buying & Selling Ass'n v. Commissioner*, 5 B.T.A. 1147, 1150, 1153 (1927). For purposes of this Opinion, it is sufficient to observe that before 1928, as now, a pending bankruptcy might call for dismissal of a deficiency case for lack of jurisdiction. *See Thompson v. Commissioner*, 84 T.C. 645, 648 (1985). Cases involving section 282(a) first appeared on the BTA reports' list of cases dismissed for "Want of Jurisdiction" in 1926. *See* 4 B.T.A. 1303, 1307 (1926).

[22] Rule 60(c) currently provides that "[t]he capacity of a corporation to engage in such litigation shall be determined by the law under which it was organized"; but there seems to have been no such provision in the Rules of the BTA in 1928. *See* 7 B.T.A. 1357–71. We are unable to find any opinion of the BTA that discusses the capacity of a corporation to file a petition, nor any dismissal on the grounds of a corporation's lack of capacity. Other similar Rule 60 issues (not mentioned by Hallmark) that involve capacity or "proper party" might result in dismissal for lack of jurisdiction; but we find no reason to suppose that the Congress enacting section 7459(d) had in mind those relatively uncommon issues when the frequently recurring issue of the untimely petition was staring it in the face.

filing fee as not been paid[,][23] and [5] the taxes have been paid[24] before the notice of deficiency was issued." Hallmark's list does not account for section 7459(d) nor explain the actual history of its adoption. To make Hallmark's point (that the "lack of jurisdiction" exception in section 7459(d) addresses defects other than those in section 6213(a)), it is thus necessary to show that Congress added the exception not to address circumstances of invalid NODs or untimely petitions (as in section 6213(a)) but instead to address other jurisdictional circumstances Hallmark has identified. Such a showing cannot be made.

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[23] The BTA was first "authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition" in section 1000 of the Revenue Act of 1926, 44 Stat. at 106 (adding section 904 to the Revenue Act of 1924); and BTA Rule 8 thereafter provided: "A fee of $10 is hereby imposed for the filing . . . of any petition. No such petition may be filed until such fee is paid to the Board, nor will the filing of any petition be antedated to a time prior to the payment of such fee." 7 B.T.A. 1360. (Current Rule 20(d) includes no such provision as to "antedat[ing]".) After the imposition of the filing fee, the BTA did not characterize non-payment of the filing fee as a "Want of Jurisdiction" issue on its lists of dismissed cases but rather presumably included such cases in the general category of "Appeals Dismissed for Failure to File Petition in Accordance with Rules of Practice" that had appeared at the beginning. *See* 1 B.T.A. 1267, 1275. Similar to section 904 as added in 1926, modern section 7451(a) "authorize[s]" the Tax Court "to impose a fee" but does not require it, so the Court's acceptance of late payment is within its discretion.

[24] Hallmark refers here to the circumstance, as in *Anderson v. Commissioner*, 11 T.C. 841, 843 (1948), in which

> on the date of the mailing of the letter purporting to be a notice of deficiency, it appears that the tax there involved had already been paid, it must be held that *the letter was not a valid notice of deficiency* within the definition of the Internal Revenue Code. The inescapable prerequisite of our jurisdiction is consequently lacking. Accordingly, . . . this [p]roceeding is dismissed for lack of jurisdiction.

(Citation omitted.) Congress later clarified that this jurisdictional problem does not exist where the tax is paid after the notice of deficiency is issued, when it provided in section 6213(b)(4): "In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency . . . ." This provision expressly presumes that, by the prior operation of section 6213(a), the Tax Court has "jurisdiction over such deficiency" and provides that any payment will not "deprive the Tax Court of jurisdiction"; and the enactment of this provision as a subsection of section 6213 confirms that jurisdiction is established there.

Hallmark is correct that the "lack of jurisdiction" provision now in section 7459(d) was added by section 601 of the Revenue Act of 1928, 45 Stat. at 871, and that "[t]he legislative history of the Revenue Act of 1928 contains no discussion of the reason for the addition". We have found no congressional report explaining the addition, but it is not difficult to reconstruct the relevant history. In 1924 the BTA began resolving cases, and it construed its deficiency statute—"Within 60 days after such notice [of deficiency] is mailed the taxpayer may file an appeal with the Board of Tax Appeals", section 274(a)—to require dismissal, for lack of jurisdiction, of an untimely petition:

> [I]nasmuch as the Revenue Act of 1924 contains no indication that Congress had any intention of permitting any extension of the 60 days within which to file an appeal, this Board is without power to grant an extension of the time. The language of the Act is inflexible and upon it depends the jurisdiction of the Board.

Satovsky, 1 B.T.A. at 24. The point here is not that the BTA's opinion was correct (we believe it was) but simply that this was the announced view of the BTA. That view was announced repeatedly over the ensuing years in opinions, *see infra* Appendix, and also in orders of dismissal:

Starting with the first volume, the United States Board of Tax Appeals Reports included at the back an appendix listing "Appeals Dismissed or Otherwise Disposed of", in which the first category was cases dismissed for "Want of Jurisdiction". Four jurisdictional subcategories were listed: "(A) Appeals Not Based Upon Statutory Determination by Commissioner", "(B) Appeals Not Filed Within Statutory Period", "(C) Appeals Involving Taxes Paid", and "(D) Appeals Involving Taxes Not Within Jurisdiction".[25] That is, from the very beginning, the BTA dismissed for lack of "jurisdiction" cases that lacked a valid NOD (its subcategories (A) and (C)) or lacked a timely petition (its subcategory (B)). Beginning with 4 B.T.A., an additional jurisdictional subcategory was added: "Appeals Dismissed under Section 282(a), Revenue Act of 1926" (a bank-

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[25] *See* 1 B.T.A. 1267–71; *see also* 2 B.T.A. 1333–35; 3 B.T.A. 1367–74; 4 B.T.A. 1303–07; 5 B.T.A. 1297–301; 6 B.T.A. 1385–87; 7 B.T.A. 1333–35; 8 B.T.A. 1303–04; 9 B.T.A. 1419–20; 10 B.T.A. 1417–18; 11 B.T.A. 1433–35; 12 B.T.A. 1445–47; 13 B.T.A. 1391–93. Beginning with 5 B.T.A., the word "Appeals" in the subcategories was changed to "Proceedings".

ruptcy provision). That was the BTA's situation in 1926 when Congress added to the Revenue Act of 1924 the first predecessor of section 7459(d) as then-section 906(c), *see* Revenue Act of 1926, § 1000, 44 Stat. at 107, which provided:

> (c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the pleadings.

This provision required merits determinations for dismissals (and did not include the exception "or unless the dismissal is for lack of jurisdiction"). As we would apply section 7459(d) today, the BTA applied section 906(c) after its initial enactment, as illustrated in *Appeal of Pennock*, 4 B.T.A. 1271, 1271 (1926), where no jurisdictional defect was alleged: "In view of the lack of evidence to support the petitioner's allegations, we must dismiss the appeal under the provisions of section 906(c) of the Revenue Act of 1924, as amended by section 1000 of the Revenue Act of 1926." Presumably, the "decision" document in *Pennock* sustained the amount set out in the notice of deficiency.

However, a wrinkle arising from section 906(c) had appeared in *Appeal of United Paper Co.*, 4 B.T.A. 257 (1926), in which the taxpayer had filed before 1926 an untimely petition that had not yet been dismissed at the time section 906(c) was enacted. The taxpayer cited section 906(c) to argue that, even if its not-yet-dismissed petition was untimely and must now be dismissed, "the Board must, under section 906(c) . . . , enter an order specifying the deficiency to be the amount determined by the Commissioner." *Id.* at 258. *United Paper* was therefore an occasion for the BTA to remark on the form that dismissals take, and on the distinction that ought to be made between dismissals where an amount of deficiency should or should not be stated:

> The petition not having been filed within the time prescribed by subdivision (a) of section 274 of the Revenue Act of 1924, it seems clear that there has been no appeal, taken under that section. At the time the petition was filed the Board had no jurisdiction to hear and determine any issue, and without such jurisdiction the filing of the petition can not

> constitute an appeal to the Board. An act has been performed which has no validity or significance.
>
> . . . .
>
> . . . Necessarily the Board has the power to determine whether jurisdiction exists and, if not, to make an appropriate record of its determination. This has customarily taken the form of an order. While in form a dismissal, the order is in effect a determination that no appeal has been taken, and there can be no jurisdiction even to dismiss the appeal in the sense in which dismissal is used in the statute [i.e., in section 906(c), now section 7459(d)]. In those cases *where the Board determines that it has no jurisdiction of the appeal, it does not provide in its order that the deficiency is the amount determined by the Commissioner*.

United Paper, 4 B.T.A. at 258 (emphasis added). That is, notwithstanding section 906(c), the BTA continued to follow its practice as to untimely petitions—dismissing them for lack of jurisdiction and without a statement of a deficiency amount—though that practice was not explicitly warranted in section 906(c) as originally enacted.

In conformity with the BTA's practice described in *United Paper*, Congress amended the statute in 1928 by adding to section 906(c) (now section 7459(d)) the now-familiar phrase:

> (c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, *or unless the dismissal is for lack of jurisdiction*.

Revenue Act of 1928, § 601, 45 Stat. at 871–72 (emphasis added). To construe the phrase "for lack of jurisdiction", we need to know: What "jurisdiction[al]" circumstances did Congress address in making this amendment in 1928? The obvious answer is that Congress addressed the very circumstance that the BTA had described in *United Paper*—i.e., "the Board determines that it has no jurisdiction" because "[t]he petition [was] not . . . filed within the time prescribed". We find no BTA opinion discussing the issue of sustaining a deficiency in a jurisdictional dismissal in connection with any jurisdictional issue other than the untimeliness of a petition (as in *United Paper*). With reasonable confidence we also impute to Congress the knowledge that, as the BTA had reported since 1924, it was dismissing for "want of jurisdiction" where

there was no valid NOD. We see no reason to suppose that Congress ignored the actual activity of the BTA, left unsolved the timeliness-related conundrum described in *United Paper*, and instead amended the statute to address as-yet-unrealized difficulties in future cases that might involve lack of corporate capacity. We do see, in the BTA's appendices, dismissals for lack of jurisdiction because of pending bankruptcies and because taxes not assigned to the BTA were petitioned, and those dismissals, too, would fall within the "lack of jurisdiction" exception of section 906(c). That these, too, involve "lack of jurisdiction" does not at all undermine the obvious congressional intent to address, as cases involving "lack of jurisdiction", those that were being dismissed because they lacked the prerequisites of section 274(c) (now section 6213(a)), i.e., a valid NOD and—as in *United Paper*—a timely petition.

Section 906(c) was reenacted in 1939, 1954, and 1986. Congress took this repeated action against the backdrop of caselaw uniformly interpreting the deadline to file a deficiency petition to be jurisdictional, as we now show.

E. *The historical treatment of section 6213 by Congress and the circuit courts of appeals further indicates that the deadline for filing a deficiency case is jurisdictional.*

According to the Supreme Court, "[w]hen 'a long line of this Court's decisions left undisturbed by Congress,' . . . has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course." *Henderson*, 562 U.S. at 436 (quoting *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 82 (2009)). This statement describes the traditional tool of statutory construction known as the "prior-construction canon."[26] If a statute is reenacted using words or phrases that have already received authoritative

[26] *See generally* Scalia & Garner, *supra*, at 325 ("The criterion ought to be whether the uniform weight of authority is significant enough that the bar can justifiably regard the point as settled law".). *But see id.* at 326 ("[W]e emphasize that this canon applies only to presumed legislative approval of prior judicial or administrative interpretations in statutes adopted after those interpretations. The mere failure of a legislature to correct extant lower-court, intermediate-court, or agency interpretations is not, in our view, a sound basis for believing that the legislature has 'adopted' them. The bar may well have relied on those interpretations, but until they have

construction by the highest court in a jurisdiction, or have been uniformly construed by inferior courts or the responsible agency, then the later version of that statute preserving the wording is presumed to carry forward that interpretation, and they are to be understood according to that construction. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (citing an "unwavering line of administrative and judicial interpretation" that included no Supreme Court opinions, and holding, "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well"); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it part of the enactment'" (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924))).

Over nearly a hundred years of reenactments and amendments of section 6213(a), Congress has left substantially unchanged the wording of its jurisdictional grant, and Congress's additions to section 6213(a) have clarified that its deadline is jurisdictional. The deadline to file a deficiency case has been uniformly construed as jurisdictional not only by the Tax Court and its predecessors but also by the circuit courts of appeals. The appendix attached to this Opinion includes a chronological listing of each enactment, reenactment, and amendment, relevant legislative history, and citations of caselaw, in order to demonstrate the volume of uniform, uncontradicted authority. We begin at the origin of deficiency litigation in the BTA.

1. *The Revenue Act of 1924*

The predecessor to section 6213 is section 274 of the Revenue Act of 1924, § 274, 43 Stat. at 297, which provided:

> Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title [i.e., Title II.—Income Tax], the taxpayer, except as provided in subdivision (d) [regarding jeopardy assessment and collection], shall be notified of such deficiency by registered mail, but such deficiency shall be assessed

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been approved by the jurisdiction's highest court or implicitly adopted in a subsequent statute, they are not the law" (footnotes omitted)).

> only as hereinafter provided. *Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals* established by section 900.
>
> . . . .
>
> (c) *If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section* [*i.e., 60 days*], *the deficiency of which the taxpayer has been notified shall be assessed*, and shall be paid upon notice and demand from the collector.

(Emphasis added.) Thereafter the inaugural BTA decisions interpreted this provision as requiring a taxpayer to timely file a petition in order to confer upon the BTA jurisdiction over that case. *See Satovsky*, 1 B.T.A. at 24 ("[W]e are of the opinion that, inasmuch as the Revenue Act of 1924 contains no indication that Congress had any intention of permitting any extension of the 60 days within which to file an appeal, this Board is without power to grant an extension of the time. The language of the Act is inflexible and *upon it depends the jurisdiction* of the Board" (emphasis added)); *see also Appeal of Hatch & Bailey Co.*, 1 B.T.A. 25, 26 (1924); *Appeal of William Frantze & Co.*, 1 B.T.A. 26 (1924); *Appeal of Hurst, Anthony & Watkins*, 1 B.T.A. 26, 27 (1924); *Appeal of Strutwear Knitting Co.*, 1 B.T.A. 41, 41 (1924); *Appeal of B.B. Davis & Co.*, 1 B.T.A. 587, 587 (1925); *Appeal of Matteson Co.*, 1 B.T.A. 905, 905–06 (1925); *Appeal of Eastman Gardiner Naval Stores Co.*, 4 B.T.A. 242, 245 (1926).

2. *The Revenue Act of 1926*

Against the backdrop of that caselaw, Congress enacted the Revenue Act of 1926, § 274(c), 44 Stat. at 55–56, which amended section 274 by adding "(not counting Sunday as the sixtieth day)", thereby giving taxpayers marginal protection at the deadline by exempting Sunday from being the final day. This amendment shows Congress's intention that the expiration of the deadline to file a deficiency petition continue to be significant, because it left unchanged subsection (c), providing that "[i]f the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section [i.e., 60 days], the deficiency, notice of which has been mailed to the taxpayer, shall be assessed".

The Court of Appeals for the District of Columbia Circuit was the first circuit court of appeals to decide whether the dead-

line to file a deficiency case is jurisdictional. In *Lewis-Hall Iron Works v. Blair*, 23 F.2d 972, 974 (D.C. Cir. 1928), *cert. denied*, 277 U.S. 592, the D.C. Circuit held:

> [T]he Board's decision dismissing the petition was correct, for the requirement that such petitions shall be filed within 60 days after the mailing of notice of the deficiency, is statutory and jurisdictional and is not merely procedural. Revenue Act of 1926, Sec. 274(a). The Board, therefore, was without jurisdiction to hear the petition.

See also Chambers v. Lucas, 41 F.2d 299, 300 (D.C. Cir. 1930).

3. *The Revenue Act of 1934*

By 1934, the BTA was 10 years old, and at that time (as thereafter) the jurisprudence was unanimous that the deficiency case deadline is jurisdictional. Section 274 was renumbered section 272 in the Revenue Act of 1934, § 272, 48 Stat. 680, 741, wherein Congress extended the filing deadline in subsection (a) from 60 days to "[w]ithin 90 days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day)". Congress therefore sought to give taxpayers more time within which to file a deficiency petition, and it provided an additional marginal extension of the deadline by exempting Sundays and federal holidays from being the final day. But despite the enhanced protections granted to taxpayers in subsection (a), Congress did not amend subsection (c), which still provided that "[i]f the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed".

Thereafter, the Fifth, Ninth, and Tenth Circuits joined the D.C. Circuit and the BTA in holding the timely filing of a deficiency petition to be a jurisdictional requirement. *See Poyner v. Commissioner*, 81 F.2d 521, 522 (5th Cir. 1936); *Cont'l Petroleum Co. v. United States*, 87 F.2d 91, 94 (10th Cir. 1936); *Edward Barron Estate Co. v. Commissioner*, 93 F.2d 751, 753 (9th Cir. 1937).

4. *The Internal Revenue Code of 1939*

Congress's enactment of the Internal Revenue Code of 1939, ch. 2, § 272, 53 Stat. 1, 82, was a milestone for the U.S. tax

system. The 1939 Code retained the text of section 272 verbatim. And thereafter the Tenth and D.C. Circuits followed their precedents and continued to interpret the deficiency case deadline to be a jurisdictional requirement. *See Ryan v. Alexander*, 118 F.2d 744, 750 (10th Cir. 1941); *Stebbins' Estate v. Helvering*, 121 F.2d 892, 894 (D.C. Cir. 1941), *aff'g* 40 B.T.A. 613 (1939).

5. *The Revenue Act of 1942*

In the Revenue Act of 1942, §§ 168, 504, 56 Stat. 798, 876, 957, Congress renamed the BTA as the Tax Court of the United States and again modified the deficiency case deadline—but otherwise left section 272 unchanged. The Act added the following to section 272: "If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days." Congress thus granted to a specific class of taxpayers—i.e., those outside of the country—additional time to file a deficiency petition to ensure those taxpayers had adequate time in which to do so. Congress did not amend subsection (c), which continued to provide that a deficiency would be assessed "[i]f the taxpayer does not file a petition with the Board within the time prescribed".

Thereafter, the Third and Sixth Circuits joined the Fifth, Ninth, Tenth, and D.C. Circuits (as well as the BTA) in holding that the timely filing of a petition is a jurisdictional requirement. *See Commissioner v. Rosenheim*, 132 F.2d at 679–80; *Worthington v. Commissioner*, 211 F.2d 131, 131–32 (6th Cir. 1954) (per curiam).

6. *The 1945 International Organizations Immunities Act*

In 1945, after more than 20 years of deficiency litigation, Congress amended section 272(a)(1) to include Saturday in the days exempt from being "the ninetieth day". International Organizations Immunities Act of 1945, § 203, 59 Stat. at 673. Once again, Congress marginally extended the taxpayers' deadline but otherwise left subsections (a) and (c) unchanged.

Thereafter, the Second Circuit joined the Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits (as well as the BTA) in holding that the timely filing of a deficiency petition is a jurisdic-

tional requirement. *See Mindell v. Commissioner*, 200 F.2d 38, 39 (2d Cir. 1952). And the Third, Sixth, and Ninth Circuits followed their precedents in continuing to construe the deficiency case deadline as jurisdictional. *See Di Prospero v. Commissioner*, 176 F.2d 76, 77 (9th Cir. 1949); *Cent. Paper Co. v. Commissioner*, 199 F.2d 902, 903 (6th Cir. 1952); *Drouin v. Commissioner*, 203 F.2d 953 (3d Cir. 1953) (per curiam).

7. *The Internal Revenue Code of 1954*

The enactment of the Internal Revenue Code of 1954, ch. 736, § 6213, 68A Stat. 3, 771, was another major development in U.S. tax law. Congress renumbered section 272 as section 6213, with revisions not material to our subject (which numbering persists today). Section 6213 provided:

> Sec. 6213. Restrictions Applicable to Deficiencies; Petition to Tax Court.
>
> (a) Time for filing petition and restriction on assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . .
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> . . . .
>
> (c) Failure to file petition.—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate.

That is, Congress substantially retained the statutory text—"Within 90 days . . . after the notice of deficiency authorized in section 6212 is mailed . . . , the taxpayer may file a petition with the Tax Court"—that for three decades had been construed as jurisdictional. Thereafter the Second, Third, Fifth, Ninth, and Tenth Circuits followed and affirmed their precedents interpreting the deadline for filing a deficiency petition to be a requirement to confer jurisdiction on the Tax Court. *See Underwriters, Inc. v. Commissioner*, 215 F.2d 953, 954 (3d Cir. 1954) (per curiam); *Galvin v. Commissioner*, 239 F.2d 166, 166 (2d Cir. 1956) (per curiam); *Rich v. Commissioner*, 250 F.2d 170, 175 (5th Cir. 1957) (Johnsen, J., concurring in part); *Teel v. Commissioner*, 248 F.2d 749, 751 (10th Cir. 1957), *aff'g* 27 T.C. 375 (1956); *DeWelles v. United States*, 378 F.2d 37, 39 (9th Cir. 1967).

8. *The Tax Reform Act of 1969*

When Congress established the Tax Court as an Article I court in 1969, it did not amend section 6213. Thereafter, the Tax Court promulgated Rule 13 of its Rules of Practice and Procedure—"Jurisdiction"—providing that "[i]n all cases, the jurisdiction of the Court also depends on the timely filing of a petition. See Code Sections 6213, 7502." Rule 13(b), 60 T.C. 1057, 1072. This rule followed the uniform body of precedent since 1924.

Thereafter, the Eighth and Eleventh[27] Circuits joined the Second, Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits, as well as the BTA and the Tax Court, in holding the timely filing of a deficiency petition to be a jurisdictional requirement. *See Andrews v. Commissioner*, 563 F.2d 365, 366 (8th Cir. 1977); *Pugsley v. Commissioner*, 749 F.2d 691, 692 (11th Cir. 1985). And the Second, Fifth, Ninth, and D.C. Circuits followed their precedents to the same effect. *See DiViaio v. Commissioner*, 539 F.2d 231, 234 (D.C. Cir. 1976); *Shipley v. Commissioner*, 572 F.2d 212, 213 (9th Cir. 1977), *aff'g* T.C. Memo. 1976-383; *Johnson v. Commissioner*, 611 F.2d 1015, 1018 (5th Cir. 1980), *rev'g* T.C. Memo. 1977-382; *Tadros v. Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985).

9. *The Tax Reform Act of 1986*

When Congress passed significant amendments to the Code resulting in the Internal Revenue Code of 1986, it reenacted section 6213 as it had appeared in the 1954 Code, without amendment. The Second, Fifth, Sixth, and Ninth Circuits continued to hold that the timely filing of a deficiency case is a jurisdictional requirement. *See Mulder v. Commissioner*, 855 F.2d 208, 210–11 (5th Cir. 1988), *rev'g* T.C. Memo. 1987-363; *Hoffenberg v. Commissioner*, 905 F.2d 665, 666 (2d Cir. 1990) (per curiam), *aff'g* T.C. Memo. 1989-676; *Patmon & Young Prof. Corp. v. Commissioner*, 55 F.3d 216, 217 (6th Cir. 1995), *aff'g* T.C. Memo. 1993-143; *Correia v. Commissioner*, 58 F.3d 468, 469 (9th Cir. 1995) (per curiam).

[27] On October 14, 1981, the Fifth Circuit was divided into the Fifth Circuit and newly formed Eleventh Circuit. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.

10. *The Internal Revenue Service Restructuring and Reform Act of 1998*

The most recent amendment to section 6213(a) was in 1998, when Congress directed that "[t]he Secretary of the Treasury or the Secretary's delegate shall include on each notice of deficiency under section 6212 . . . the date determined by such Secretary (or delegate) as the last day on which the taxpayer may file a petition with the Tax Court", and amended section 6213(a) "by adding at the end the following new sentence: '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.'" Internal Revenue Service Restructuring and Reform Act of 1998, § 3463, 112 Stat. at 767. This amendment of section 6213(a) is particularly telling of Congress's intention that the Tax Court not have jurisdiction over late-filed deficiency petitions. Congress left unchanged the text that had been construed as jurisdictional, ensured by its amendment that the taxpayer would be made aware of the date of expiration of the deadline for filing a deficiency case, and clarified that a petition filed on that stated date would be timely.

The legislative history[28] of this amendment gives useful information about Congress's awareness and understanding of the state of the law on the issue of the 90-day rule as jurisdictional. The conference report gave the following explanation:

Present Law

Taxpayers must file a petition with the Tax Court within 90 days after the deficiency notice is mailed (150 days if the person is outside the

[28] As we noted above, the Supreme Court held in *Henderson*, 562 U.S. at 436 (quoting *Union Pac. R.R. Co.*, 558 U.S. at 82), that "[w]hen 'a long line of this Court's decisions left undisturbed by Congress,' . . . has treated a similar requirement as 'jurisdictional,' we will *presume* that Congress intended to follow that course." (Emphasis added.) We consult the legislative history of the 1998 amendment, quoted in text above, because it enables us to presume not carelessly but reasonably that Congress intended to leave undisturbed the courts' unanimous consensus that "[i]f the petition is not filed within that time period, the Tax Court does not have jurisdiction to consider the petition." H.R. Rep. No. 105-599, at 289 (1998) (Conf. Rep.), *as reprinted in* 1998-3 C.B. 747, 1043; H.R. Rep. No. 105-364, pt.1, at 71 (1997), *as reprinted in* 1998-3 C.B. 373, 443.

> United States) (sec. 6213). *If the petition is not filed within that time period, the Tax Court does not have jurisdiction to consider the petition.*

H.R. Rep. No. 105-599, at 289 (emphasis added); H.R. Rep. No. 105-364, pt. 1, at 71 (emphasis added). By this amendment to section 6213(a), Congress communicated to taxpayers that the last day to file a deficiency petition is indeed the last day, thereby indicating—against the backdrop of explicitly observed "Present Law"—that the deadline is imbued with jurisdictional significance and is exempt from equitable exceptions.

Since then, the Seventh Circuit (applying the Supreme Court's clear-statement rule) has joined the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, as well as the BTA and the Tax Court, in holding the timely filing of a deficiency petition to be a jurisdictional requirement. *See Tilden v. Commissioner*, 846 F.3d 882, 886–87 (7th Cir. 2017), *rev'g and remanding* T.C. Memo. 2015-188. And the Fifth, Ninth, and D.C. Circuits continued to so hold. *See Rochelle v. Commissioner*, 293 F.3d 740, 741 (5th Cir. 2002) (per curiam), *aff'g* 116 T.C. 356 (2001); *Edwards v. Commissioner*, 791 F.3d 1, 4 (D.C. Cir. 2015); *Elings v. Commissioner*, 324 F.3d at 1112; *see also Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1092–93 (9th Cir. 2020) (applying the clear statement rule to section 6213(a) and concluding that its deadline is jurisdictional).

11. *Summary*

This history of reenactments of and amendments to section 6213(a) demonstrates that Congress's intention is to provide an adequate but strict timeframe within which a taxpayer may file a deficiency petition in the Tax Court. Congress has given taxpayers certain liberalizing adjustments to the last day of the deadline but has also made clear the deadline's finality. Furthermore, section 6213(c), providing that "[i]f the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency . . . shall be assessed, and shall be paid upon notice and demand", has remained constant.[29] This historical treatment of section 6213

[29] In balancing the rights of taxpayers and the interests of the Government in revenue, Congress designed the taxpayer's opportunity for filing a deficiency petition to close, after which the Tax Court cannot take juris-

reflects an intention of Congress, remarkably persistent over the past century, that, in balancing the rights of the taxpayer and the interests of the Government, the deficiency assessment regime give the taxpayer an adequate time within which to file a deficiency petition, but that (1) a taxpayer's failure to do so within the prescribed time will foreclose the opportunity to litigate his deficiency before the Tax Court, (2) the deficiency not timely petitioned will be assessed so that the IRS may begin collection, and (3) the taxpayer's remaining remedy is to pay the assessment and sue for a refund.[30]

Consistent with that regime, the Tax Court and the circuit courts of appeals[31] have expressly and uniformly treated the deadline of section 6213 as jurisdictional. Congress—presumptively aware of this treatment by the courts—has preserved the operative text in section 6213 through every reenactment and amendment, thereby carrying forward that

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diction over the deficiency. Section 6213(c) thus explicitly incorporates the deadline of subsection (a) and provides for the mandatory assessment of the deficiency by operation of statute. The taxpayer's opportunity ends because the deficiency "shall be assessed". It becomes no longer a deficiency but now a liability for which the IRS may issue notice and demand for payment. Section 6213(c) reflects Congress's decision that the IRS must be able to reliably discern when the legal requirements for assessment have been met and collection may begin. *Accord Robinson v. United States*, 920 F.2d 1157, 1158 (3d Cir. 1990); *Abrams v. Commissioner*, 787 F.2d at 942.

[30] Because the assessment procedure was created to advance the critical interests of the Government in collecting the tax revenue, it follows "that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system." *See Brockamp*, 519 U.S. at 352–53 (construing as jurisdictional the refund limitations of section 6511).

[31] The First and Fourth Circuits have not so held in published, precedential opinions, but both have acquiesced in unpublished decisions. *See, e.g.*, *Hansen v. Commissioner*, 201 F.3d 427 (1st Cir. 1998) (per curiam) (unpublished table decision); *Thomas v. Commissioner*, 194 F.3d 1305 (4th Cir. 1999) (unpublished table decision); *Briley v. Commissioner*, 622 F. App'x 305 (4th Cir. 2015) (per curiam). The Supreme Court has not addressed the issue but has denied a writ of certiorari in (by our count) five cases presenting the issue. *See, e.g.*, *Lewis-Hall Iron Works*, 23 F.2d 972, *cert. denied*, 277 U.S. 592 (1928); *Cont'l Petroleum Co.*, 87 F.2d 91, *cert. denied*, 300 U.S. 679 (1937); *Ryan*, 118 F.2d 744, *cert. denied*, 314 U.S. 622 (1941); *Delman v. Commissioner*, 384 F.2d 929 (3d Cir. 1967), *aff'g* T.C. Memo. 1966-59, *cert. denied*, 390 U.S. 952 (1968); *Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, *cert. denied*, 141 S. Ct. 2596 (2021).

interpretation. The 90-day deadline of section 6213(a) is therefore, as in *Bowles*, a limitation imposed by Congress for access to courts which has been uniformly construed and enforced as such for a "century's worth of precedent and practice in American courts." *Bowles*, 551 U.S. at 209 n.2; *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) ("[S]tare decisis in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.' Additionally, Congress has long acquiesced in the interpretation we have given" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)) (citations omitted)); *cf. Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1500 ("[N]o such long line of authority exists here" (quoting *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019))).

III. *Hallmark's remaining arguments that the deadline of section 6213 is non-jurisdictional are unavailing.*

A. *Section 6214(a) does not confer deficiency jurisdiction but rather supplements the jurisdiction conferred by section 6213(a).*

Hallmark argues that "[t]he jurisdictional grant for deficiency suits is in section 6214(a)." If correct, this would locate the grant of jurisdiction in a statute different from the statute that sets the 90-day deadline, making it easier to argue that the deadline itself is not jurisdictional. Section 6214 provides (in part):

> Sec. 6214. Determinations by Tax Court.
>
> (a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax.—Except as provided by section 7463, *the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency* even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.
>
> (b) Jurisdiction over other years and quarters.—The Tax Court *in redetermining a deficiency* of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing *shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.*

> Notwithstanding the preceding sentence, the Tax Court may apply the doctrine of equitable recoupment to the same extent that it is available in civil tax cases before the district courts of the United States and the United States Court of Federal Claims.

(Emphasis added.) According to Hallmark, "[s]ection 6214(a) derives from language originally appearing in section[] 274(a) [sic] (for income tax) . . . of the Revenue Act of 1926", and "[i]t was in 1926 that Congress first used the word 'jurisdiction' in connection with the Board of Tax Appeals." Hallmark argues that section 6214(a), rather than section 6213(a), is the jurisdictional grant to the Tax Court over deficiency cases because it explicitly mentions jurisdiction, whereas "[s]ection 6213(a)'s first sentence (which contains the filing deadline) does not even use the word 'jurisdiction'." Hallmark reasons that, because section 6214(a) is the jurisdictional grant for deficiency cases, and because it does not "refer to the 90-day deadline or to section 6213(a)", then the deadline of section 6213(a) is not jurisdictional because "[t]he remaining sentences in section 6213(a) do nothing to 'connect' this 90-day filing period to the jurisdictional grant contained in section 6214."

We do not agree. Hallmark's interpretation is both historically and contextually inaccurate. Hallmark is correct in observing that the origins of section 6214(a) trace back to section 274 of the Revenue Act of 1926, 44 Stat. at 56, though the predecessor is subsection (e) (rather than subsection (a)), which provided:

> Sec. 274(e). The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

To resolve the relationship of section 6213(a) (former section 274(a)) to section 6214(a) (former section 274(e)), we previously considered the history of these statutes in *Estate of Young v. Commissioner*, 81 T.C. 879, 884–86 (1983), and we concluded as follows:

> The origin of this Court lies in the Revenue Act of 1924, which established the Board of Tax Appeals. That act gave the Board jurisdiction to redetermine deficiencies determined by the Commissioner in a statutory

> notice. However, it did not give the Board jurisdiction to redetermine a deficiency greater than that determined by the Commissioner in the statutory notice. Such jurisdiction was given to the Board by section 274(e) of the Revenue Act of 1926 [now section 6214(a)] . . . . We think it is clear that section 274(e) [now section 6214(a)] was intended to cure a previous defect in this Court's jurisdiction so that the Commissioner's ultimate determination of a deficiency in such tax and additions to tax as were the proper subjects of a statutory notice could be resolved in one proceeding before this Court without the need for the issuance of an additional notice. . . .
>
> In view of the foregoing, we think that the jurisdiction conferred by section 6214(a) is merely complementary to the jurisdiction conferred by section 6213. . . .
>
> Our conclusion that section 6214(a) does not provide an independent basis for the exercise of jurisdiction . . . is also supported by the fact that section 274(e) of the Revenue Act of 1926 was enacted two years after the Board of Tax Appeals was created. As previously stated, section 900(e) of the Revenue Act of 1924 gave the Board jurisdiction to redetermine a deficiency determined by the Commissioner in a statutory notice. . . . Thus, if section 274(e) of the Revenue Act of 1926 were viewed as providing an independent basis for the exercise of jurisdiction, it would be mere surplusage because such jurisdiction had already been granted by section [274(a)] of the Revenue Act of 1924.

(Citations and footnote omitted.) Former section 274(e) (now section 6214(a)) was enacted to supplement the jurisdictional grant in former section 274(a) (now section 6213(a)) by specifying that the Tax Court, in exercise of its de novo redetermination of a deficiency for a particular year, may redetermine an amount greater than what is asserted in the notice of deficiency. The fundamental grant of deficiency jurisdiction is in section 6213(a).

The courts that have considered our deficiency jurisdiction have been correct in holding that it is derived from section 6213(a), not section 6214.

B. *Section 6213(a) does not "closely resemble" section 6330(d)(1).*

1. *In* Boechler *the Supreme Court rejected the analogy of section 6330(d)(1) to section 6213(a).*

Hallmark argues that "the [Supreme] Court's reasoning in *Boechler* compels the conclusion that the 90-day filing deadline in section 6213(a) for deficiency cases is not jurisdictional, and thus is subject to equitable tolling" because "the *Boechler*

opinion's analysis of Section 6330(d)(1), a provision that closely resembles section 6213(a), undermines the *Organic Cannabis* interpretation of section 6213(a)." However, just as the Commissioner failed in his argument for a jurisdictional reading of section 6330(d)(1) by way of its supposed similarities to section 6213(a) in *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1500, so Hallmark cannot here succeed in arguing for a non-jurisdictional reading of section 6213(a) based on its supposed similarities to section 6330(d)(1). *Boechler* emphatically teaches that these are different sections. Each must be analyzed in light of its own text, context, and history. Under the "clear statement" rule, the Supreme Court in *Boechler* analyzed the 30-day deadline for a CDP petition under section 6330(d)(1) and held it non-jurisdictional. Under the same rule, we have analyzed in this Opinion the 90-day deadline for a deficiency petition under section 6213(a), and we hold it to be jurisdictional.

2. *The 30-day deadline of section 6330(d)(1) lacks a history of prior judicial construction of its being jurisdictional and lacks congressional ratification of that construction in reenactments.*

We set out in detail (in Part II.E above and in the attached Appendix) the impressive history—almost a century long—of judicial construction of the 90-day deadline as jurisdictional and of Congress's repeated perpetuation of that construction by its amendments, reenactments, and codifications. No such history can be mustered for the asserted jurisdictional character of the 30-day deadline in section 6330(d)(1) (a provision which has existed in the Code only since 1998, *see* Internal Revenue Service Restructuring and Reform Act of 1998, § 3401(b), 112 Stat. at 749). As the Supreme Court said, "no such 'long line' of authority exists here" in connection with section 6330(d)(1). *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1500.

IV. *Conclusion*

Section 6213(a) clearly states that its 90-day deadline is jurisdictional, as indicated by its text, context, and uniform treatment during its long history. Congress has limited the Tax Court's deficiency jurisdiction to only those cases in which

a petition is timely filed, and we do not have authority to extend the deadline in section 6213(a) by equitable tolling. Late-filed deficiency petitions must therefore be dismissed for lack of jurisdiction.

An appropriate order will be issued.

Reviewed by the Court.

KERRIGAN, FOLEY, GALE, PARIS, MORRISON, BUCH, NEGA, PUGH, ASHFORD, URDA, COPELAND, JONES, TORO, GREAVES, MARSHALL, and WEILER, *JJ.*, agree with this opinion of the Court.

APPENDIX

Chronological listing of enactments, amendments, and codifications of statutes creating deficiency procedures, with intervening opinions of the courts, and selected legislative history and Rules of Practice and Procedure of the U.S. Tax Court (with boldface added for emphasis)

Revenue Act of 1924, ch. 234, §§ 273(1), 274(a)–(c), 900(e), (k), 43 Stat. 253, 296, 297, 337, 338 (enacting deficiency procedures with a 60–day deadline):

Sec. 273. As used in this title the term “deficiency” means—

(1) The amount by which the tax imposed by this title [i.e., Title II.—Income Tax] exceeds the amount shown as the tax by the taxpayer upon his return . . . .

Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title [i.e., Title II.—Income Tax], the taxpayer, except as provided in subdivision (d) [regarding jeopardy assessment and collection], shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. **Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals** established by section 900.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. . . .

(c) **If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section [i.e., 60 days], the deficiency of which the taxpayer has been notified shall be assessed**, and shall be paid upon notice and demand from the collector.

Sec. 900.

. . . .

(e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312. . . .

. . . .

(k) . . . The Board shall be an independent agency in the executive branch of the Government.

Subsequent Caselaw:

Appeal of Satovsky, 1 B.T.A. 22, 24 (1924) ("[I]nasmuch as the Revenue Act of 1924 contains no indication that Congress had any intention of permitting any extension of the 60 days within which to file an appeal, this Board is without power to grant an extension of the time. The language of the Act is inflexible and **upon it depends the jurisdiction of the Board"**).

Appeal of Hatch & Bailey Co., 1 B.T.A. 25, 26 (1924) ("The power of the Board to assume jurisdiction in a case such as this [i.e., where the petition is not filed within 60 days] has been fully discussed in the *Appeal of Sam Satovsky*, 1 B.T.A., 22, and, on the authority of that case, the appeal is dismissed").

Appeal of William Frantze & Co., 1 B.T.A. 26, 26 (1924) ("The Commissioner has moved to dismiss the appeal in this case on the ground that it was not filed within 60 days after the mailing of the Commissioner's notice of deficiency and that, therefore, **the Board is without jurisdiction**. . . . This case comes within the rule laid down by this Board in its decisions in the Appeal of Satovsky, 1 B.T.A., 22, and the Appeal of Hatch & Bailey Co., 1 B.T.A., 25, and on the authority of those cases the appeal is dismissed").

Appeal of Hurst, Anthony & Watkins, 1 B.T.A. 26, 27 (1924) ("[T]he appeal was not filed until the sixty-first day after the notice was mailed. This, therefore, obliges us to dismiss the appeal, upon the authority of the *Appeal of Sam Satovsky*, 1 B.T.A., 22, *Appeal of Hatch & Bailey Co.*, 1 B.T.A., 25, and *Appeal of William Frantze & Co., Inc.*, 1 B.T.A., 26").

Appeal of Strutwear Knitting Co., 1 B.T.A. 41, 41 (1924) ("The petition . . . was not received at the office of the Board of Tax Appeals in Washington until . . . 61 days after the mailing of the deficiency letter. . . . The appeal is dismissed, on the authority of *Appeal of Sam Satovsky*, 1 B.T.A., 22.").

Appeal of B. B. Davis & Co., 1 B.T.A. 587, 587 (1925) ("[T]he decision of this Board in *Satovsky's Appeal*, 1 B.T.A. 22, . . . is controlling on this point.").

Appeal of Matteson Co., 1 B.T.A. 905, 905–06 (1925) ("[A] petition must be deposited in the office of the Board within the time required by law in order to give the Board jurisdiction thereof. . . . The Board has no authority to extend the period provided by statute for the filing of an appeal whatever the equities of a particular case may be and regardless of the cause for its not being filed within the period required. . . . The Board, therefore, is **without jurisdiction to hear and determine the appeal** . . . .").

Revenue Act of 1926, ch. 27, §§ 274, 1000, 44 Stat. 9, 55–56, 105–06 (excluding Sunday as the 60th day and enacting the predecessor of section 6214(a)):

Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title [i.e., Title II.—Income Tax], the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. **Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency**. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) **If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section [i.e., 60 days], the deficiency, notice of which has been mailed to the taxpayer, shall be assessed**, and shall be paid upon notice and demand from the collector.

. . . .

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

Sec. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

. . . .

"Sec. 900. The Board of Tax Appeals (hereinafter referred to as the 'Board') is hereby continued as an independent agency in the Executive Branch of the Government. . . ."

. . . .

"Sec. 904. **The Board and its divisions shall have such jurisdiction as is conferred on them** by Title II [income tax] and Title III [estate tax] of the Revenue Act of 1926 or by subsequent laws. . . ."

Subsequent Caselaw:

Lewis-Hall Iron Works v. Blair, 23 F.2d 972, 974 (D.C. Cir. 1928) (citing *Satovsky*, 1 B.T.A. 22) ("[T]he requirement that such petitions shall be filed within 60 days after the mailing of notice of the deficiency, **is statutory and jurisdictional and is not merely procedural**. Revenue Act of 1926, Sec. 274(a). The Board, therefore, was **without jurisdiction** to hear the petition"), *cert. denied*, 277 U.S. 592 (1928).

Revenue Act of 1928, ch. 852, § 601, 45 Stat. 791, 871–72 (amending the predecessor of section 7459(d) to provide for dismissals for lack of jurisdiction):

Sec. 601. Board of Tax Appeals—Procedure.

Section[] 906 . . . of the Revenue Act of 1924, as amended, [is] further amended to read as follows:

"Sec. 906. . . .

. . . .

(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, or **unless the dismissal is for lack of jurisdiction**.["]

Subsequent Caselaw:

Chambers v. Lucas, 41 F.2d 299, 300 (D.C. Cir. 1930) ("The provision of the statute here under consideration [i.e., Revenue Act of 1926 § 274(a)] is in the nature of a limitation upon the right of the taxpayer to avail himself of the right of appeal, and there must be a strict compliance with its provisions").

Revenue Act of 1934, ch. 277, § 272, 48 Stat. 680, 741 (extending the deadline to 90 days, excluding holidays as the 90th day, and making other changes):

Sec. 272. Procedure in General.

(a) Petition to Board of Tax Appeals.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title [Title I.—Income Tax], the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. **Within 90 days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency**. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

. . . .

(b) Collection of Deficiency Found by Board.—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) Failure to File Petition.—**If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed**, and shall be paid upon notice and demand from the collector.

Legislative History:

H.R. Rep. No. 73-704, at 34 (1934), *as reprinted in* 1939-1 C.B. (Part 2) 554, 580 (“The present law allows the taxpayer in case of a deficiency a period of 60 days within which to file an appeal with the United States Board of Tax Appeals. Experience has shown this is not sufficient time in case of involved assessments, or in case of taxpayers living a very great distance from Washington. It is believed that lengthening this period to 90 days will not slow up collection of revenue, but will facilitate the closing of cases without the necessity of litigation. Moreover, the additional time allowed may give sufficient time for the Commissioner and the taxpayer to reconcile their differences, and thus eliminate in such cases the necessity for filing a petition before the Board”).

S. Rep. No. 73-558, at 42–43 (1934), *as reprinted in* 1939-1 C.B. (Part 2) 586, 619 (“The present law allows the taxpayer in case of a deficiency a

period of 60 days within which to file an appeal with the United States Board of Tax Appeals. Experience has shown this is not sufficient time in case of involved assessments, or in case of taxpayers living at a great distance from Washington. In the House bill the period for filing appeals was increased to 90 days. Your committee recommends the adoption of this section of the House bill with a slight change so that a legal holiday in the District of Columbia will not be counted as the ninetieth day").

Subsequent Caselaw:

Poyner v. Commissioner, 81 F.2d 521, 522 (5th Cir. 1936) ("[I]f the taxpayer does not file such petition with the Board of Tax Appeals within the time prescribed, that Board is required to assess the deficiency . . . . Those provisions negative the conclusion that the Board of Tax Appeals has the **right or power** to consider a petition for a redetermination of a deficiency where such petition is filed with it after the expiration of the prescribed period").

Cont'l Petroleum Co. v. United States, 87 F.2d 91, 94 (10th Cir. 1936) ("The filing of a petition within the fixed time is **essential to the jurisdiction** of the Board of the subject matter. The statute requiring that it be filed within such time has that effect."), *cert. denied*, 300 U.S. 679 (1937).

Edward Barron Estate Co. v. Commissioner, 93 F.2d 751, 753 (9th Cir. 1937) ("If the taxpayer filed a petition . . . within the period limited by the act, supra, **then the Board had jurisdiction** to consider the petition. If such petition was not so filed within the time limited by the act, the Board was **without jurisdiction** to consider the matter. The requirement that petitions for redeterminations be filed within a specified period after the mailing of the deficiency notice 'is **statutory and jurisdictional and is not merely procedural**.'" (quoting *Lewis-Hall Iron Works*, 23 F.2d at 974)).

Internal Revenue Code of 1939, ch. 2, §§ 272, 1101, 53 Stat. 1, 82–83, 158 (reenacting and codifying the deficiency procedures):

Sec. 272. Procedure in General.

(a)(1) Petition to Board of Tax Appeals.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter [Chapter I.—Income Tax], the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. **Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency**. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the

decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. . . .

. . . .

(b) Collection of Deficiency Found by Board.—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) Failure to File Petition.—**If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed**, and shall be paid upon notice and demand from the collector.

Sec. 1101. Jurisdiction.

The Board and its divisions shall have such jurisdiction as is conferred on them by chapters 1, 2, 3, and 4 of this title, by Title II and Title III of the Revenue Act of 1926, 44 Stat. 9, or by laws enacted subsequent to February 26, 1926.

Subsequent Caselaw:

Ryan v. Alexander, 118 F.2d 744, 750 (10th Cir. 1941) ("Filing of the petition for appeal within the 60-day period was **a jurisdictional requirement**"), *cert. denied*, 314 U.S. 622 (1941).

Stebbins' Estate v. Helvering, 121 F.2d 892, 893–94 (D.C. Cir. 1941) ("But, as we think, the matter is beyond our control, for it has been decided time and again that **the statutory period is jurisdictional**, and the duty to dismiss on failure to comply is mandatory"), *aff'g* 40 B.T.A. 613 (1939).

Revenue Act of 1942, ch. 619, §§ 168, 504, 56 Stat. 798, 876, 957 (extending the 90-day period to 150 days for foreign taxpayers and renaming the BTA as the Tax Court of the United States):

Sec. 168. Period for Filing Petition Extended in Certain Cases.

(a) Period Extended.—Section 272(a)(1) (relating to period for filing petition with Board of Tax Appeals) is amended by inserting at the end thereof the following new sentence: "If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days."

Sec. 504. Change of Name of Board of Tax Appeals.

(a) The Tax Court of the United States.—Effective on the day after the date of enactment of this Act, section 1100 (relating to status of Board of Tax Appeals) is amended by inserting at the end thereof the following new sentence: "The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States."

(b) Powers, Tenure, Etc., Unchanged.—**The jurisdiction**, powers, and duties **of The Tax Court of the United States**, its divisions and its officers and employees, and their appointment, including the designation of its officers, and the immunities, tenure of office, powers, duties, rights, and privileges of the presiding judge and judges of The Tax Court of the United States **shall be the same as by existing law provided in the case of the Board of Tax Appeals**. The Commissioner shall continue to be represented by the same counsel in the same manner before the Court as he has heretofore been represented in proceedings before the Board of Tax Appeals and the taxpayer shall continue to be represented in accordance with rules of practice prescribed by the Court. . . .

Subsequent Caselaw:

Commissioner v. Rosenheim, 132 F.2d 677, 679–80 (3d Cir. 1942) ("The sending of the appropriate notice in this case by registered mail and the transferee's petition for a redetermination of the liability within ninety days of the date of the notice supplied the requirements of Section 272(a) so far as **the Board's jurisdiction to hear and determine** the matter was concerned"), *rev'g and remanding on other grounds* 45 B.T.A. 1018.

International Organizations Immunities Act of 1945, ch. 652, § 59 Stat. 669, 673 (excluding Saturday as the 90th day):

Sec. 203. Petition to the Tax Court of the United States.

(a) Time for Filing Petition.—The second sentence[] of section[] 272(a)(1) . . . of the Internal Revenue Code [is] amended by striking out the parenthetical expressions appearing therein and inserting in lieu thereof the following: "(not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day)".

Subsequent Caselaw:

Di Prospero v. Commissioner, 176 F.2d 76, 77 (9th Cir. 1949) ("There is, at this late date, little doubt that **the 90 day requirement is jurisdictional**").

Cent. Paper Co. v. Commissioner, 199 F.2d 902, 903 (6th Cir. 1952) ("In support of The Tax Court's ruling, the Commissioner contends that the time limitation for filing the petition is **statutory and jurisdictional**, and that failure on the part of the taxpayer to file such a petition with the Tax

Court within the 90-day period provided is **a bar to its consideration**. Such is the **well established rule**, which is not challenged by the taxpayer”).

Mindell v. Commissioner, 200 F.2d 38, 39 (2d Cir. 1952) (“We agree that the filing of a timely petition for redetermination is jurisdictional”).

Drouin v. Commissioner, 203 F.2d 953, 953 (3d Cir. 1953) (per curiam) (“This is an appeal by a taxpayer from a decision of the Tax Court which dismissed his case there for want of jurisdiction. The lack of jurisdiction was found in the taxpayer’s failure to follow the statute with regard to time for proceedings in the Tax Court. The Tax Court’s action was correct”).

Internal Revenue Code of 1954, ch. 736, §§ 6213, 7442, 68A Stat. 3, 771, 879 (reenacting and re-codifying the deficiency procedures):

Sec. 6213. Restrictions Applicable to Deficiencies; Petition to Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.—**Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency**. Except as otherwise provided in section 6861 [jeopardy assessments] no assessment of a deficiency in respect of any tax imposed by subtitle A [income tax], or B [estate and gift tax] and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until expiration of such 90–day or 150–day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a) [prohibition of suits to restrain assessment or collection], the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

. . . .

(c) Failure to File Petition.—**If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed**, and shall be paid upon notice and demand from the Secretary or his delegate.

Sec. 7442. Jurisdiction.

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title [26 U.S.C.], 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.

Subsequent Caselaw:

Underwriters, Inc. v. Commissioner, 215 F.2d 953, 954 (3d Cir. 1954) (per curiam) ("[T]he petition was filed with the Tax Court . . . 91 days [after the notice of deficiency was mailed]. It was, therefore, filed out of time and **conferred no jurisdiction** on the court").

Worthington v. Commissioner, 211 F.2d 131, 132 (6th Cir. 1954) (per curiam) ("The Tax Court properly held that it had **no jurisdiction**, for the reason that the required petitions for redetermination to be filed by the taxpayers were not filed within ninety days after the mailing of the notices of deficiency, as provided in section 272(a) of the Internal Revenue Code, 26 U.S.C.A.").

Galvin v. Commissioner, 239 F.2d 166, 166 (2d Cir. 1956) (per curiam) ("[T]he court correctly held it had **no jurisdiction** of the petition, since it was not filed within the 90 days").

Rich v. Commissioner, 250 F.2d 170, 175 (5th Cir. 1957) (Johnsen, J., concurring in part) (stating, where a prisoner arranged for his petition to be mailed but the prison mail room held it for one month, thereby causing it to be filed late, that "[t]his is a hard case presenting a grossly inequitable situation, but neither the Tax Court nor this Court has any authority to relieve the taxpayer from the clear **jurisdictional requirements** of the law").

Jorgensen v. Commissioner, 246 F.2d 536, 537 (9th Cir. 1957) (per curiam) ("[T]he 90-day requirement prescribed by the Tax Court is **jurisdictional**").

Teel v. Commissioner, 248 F.2d 749, 750–51 (10th Cir. 1957) ("The courts have generally held that the filing of the petition is jurisdictional, and that a failure to file the petition within the 90 day period is a **bar to consideration** by the Tax Court. . . . The petition not having been filed within 90 days after such notice was mailed, the Tax Court was **without jurisdiction** to consider the same and it was properly dismissed"), *aff'g* 27 T.C. 375 (1956).

Bloch v. Commissioner, 254 F.2d 277, 278 (9th Cir. 1958) ("The great weight of authority is to the effect that **the 90–day requirement is jurisdictional**").

Pfeffer v. Commissioner, 272 F.2d 383, 384 (2d Cir. 1959) (per curiam) ("[S]ince timely filing is made **jurisdictional**, the Tax Court correctly held that it could not hear the petition").

Vibro Mfg. Co. v. Commissioner, 312 F.2d 253, 254 (2d Cir. 1963) (per curiam) ("Section 6213(a) clearly provides that the petition for redetermination of tax deficiency must be filed within 90 days of the date of mailing

of the notice of deficiency. . . . The Tax Court's dismissal **for lack of jurisdiction** was therefore appropriate").

Skolski v. Commissioner, 351 F.2d 485, 488 (3d Cir. 1965) ("[I]t will be for the Tax Court upon remand to . . . make such finding upon this **jurisdictional** question [i.e., the timeliness of the petition] as the evidence warrants").

Healy v. Commissioner, 351 F.2d 602, 603 (9th Cir. 1965) ("The requirement of filing the petition with the Tax Court within 90 days after the certified or registered notice of deficiency is mailed to the correct address of the taxpayer is **jurisdictional**, and no matter how allegedly inequitable the situation, there is no authority 'to relieve the taxpayer from the clear **jurisdictional requirements** of the law'" (citations omitted)).

Delman v. Commissioner, 384 F.2d 929, 934 (3d Cir. 1967) ("Taxpayers' petition was out of time and the Tax Court correctly dismissed the petition for this reason." (citations omitted)), *aff'g* T.C. Memo. 1966-59, 25 T.C.M. (CCH) 328, 333 ("[T]he petition was filed late, and for that reason this Court **lacks jurisdiction** to do anything more than dismiss it"), *cert. denied*, 390 U.S. 952 (1968).

DeWelles v. United States, 378 F.2d 37, 39 (9th Cir. 1967) ("If . . . the notice [of deficiency] is properly sent, the taxpayer is bound to petition the Tax Court within 90 days, and even a showing that he did not receive the notice at the last known address will not excuse the taxpayer. If the taxpayer does not act in time **no court may entertain his suit** to restrain the assessment" (citations omitted)).

Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (establishment of the U.S. Tax Court):

Sec. 951. Status of the Tax Court.

Section 7441 (relating to the status of the Tax Court) is amended to read as follows:

"SEC. 7441. STATUS.

"There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court."

Legislative History:

S. Rep. No. 91-552, at 302 (1969), *as reprinted in* 1969-3 C.B. 423, 614 ("Since the Tax Court has only judicial duties, the committee believes it is anomalous to continue to classify it with quasi-judicial executive agencies that have rulemaking and investigatory functions. The status of the Tax Court and the respect accorded to its decisions are high among those

familiar with its work. However, its constitutional status as an executive agency, no matter how independent, raises questions in the minds of some as to whether it is appropriate for one executive agency to be sitting in judgment on the determinations of another executive agency").

Subsequent Rule:

RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES TAX COURT, 60 T.C. 1057, 1072 (1973):

RULE 13. JURISDICTION

(a) Notice of Deficiency or of Transferee or Fiduciary Liability Required: In a case commenced in the Court by a taxpayer, the jurisdiction of the Court depends upon the issuance by the Commissioner of a notice of deficiency in income, gift, or estate tax or in the taxes imposed on private foundations under Code Sections 4940 through 4945. In a case commenced in the Court by a transferee or fiduciary, the jurisdiction of the Court depends upon the issuance by the Commissioner of a notice of liability to the transferee or fiduciary. See Code Sections 6212, 6213, 6901.

(b) Timely Petition Required: **In all cases, the jurisdiction of the Court also depends on the timely filing of a petition**. See Code Sections 6213, 7502.

Note

There is no counterpart to this rule in the present T.C. Rules. **Pars. (a) and (b) concern the two fundamental requirements for the Court's jurisdiction, [1] the issuance of a notice of deficiency or a notice of liability, and [2] the filing of a timely petition with the Court**. Their basic importance requires expression in the rules for the guidance of parties and practitioners.

Subsequent Caselaw:

Foster v. Commissioner, 445 F.2d 799, 800 (10th Cir. 1971) ("In Teel v. Commissioner of Internal Revenue, 248 F.2d 749 (10th Cir. 1957), we held that the filing of the petition is jurisdictional and that a failure to file the petition within the ninety (90) day period is a bar to consideration by the Tax Court").

DiViaio v. Commissioner, 539 F.2d 231, 234 (D.C. Cir. 1976) ("As this court stated in *Stebbins' Estate v. Helvering*, 74 U.S.App.D.C. 21, 121 F.2d 892, 893 (1941), 'it has been decided time and time again that **the statutory period is jurisdictional**, and the duty to dismiss on failure to comply is mandatory'").

Andrews v. Commissioner, 563 F.2d 365, 366 (8th Cir. 1977) ("The law is clear that the Tax Court **does not have jurisdiction** over an untimely petition").

Shipley v. Commissioner, 572 F.2d 212, 213 (9th Cir. 1977) ("Timely filing of the petition is **jurisdictional**"), *aff'g* T.C. Memo. 1976-383.

Johnson v. Commissioner, 611 F.2d 1015, 1018 (5th Cir. 1980) ("It cannot now be seriously questioned that the timely filing of the petition for redetermination is **jurisdictional**"), *rev'g* T.C. Memo. 1977-382.

Tadros v. Commissioner, 763 F.2d 89, 91 (2d Cir. 1985) ("Since the 90-day period of § 6213(a) is a **jurisdictional requirement**, failure to file within that time period requires dismissal of the petition" (citations omitted)).

Pugsley v. Commissioner, 749 F.2d 691, 692 (11th Cir. 1985) ("[T]imely filing of such a petition is a **jurisdictional prerequisite** for a suit in the tax court").

Tax Reform Act of 1986, Pub. L. No. 99-514, § 2, 100 Stat. 2085, 2095 (re-enacting and re-codifying the deficiency procedures):

Sec. 2. Internal Revenue Code of 1986.

(a) Redesignation of 1954 Code.—The Internal Revenue Title enacted August 16, 1954, as heretofore, hereby, or hereafter amended, may be cited as the "Internal Revenue Code of 1986".

(b) References in Laws, etc.—Except when inappropriate, any reference in any law, Executive order, or other document—

(1) to the Internal Revenue Code of 1954 shall include a reference to the Internal Revenue Code of 1986, and

(2) to the Internal Revenue Code of 1986 shall include a reference to the provisions of law formerly known as the Internal Revenue Code of 1954.

26 U.S.C. §§ 6213, 7442 (1986):

Sec. 6213. Restrictions Applicable to Deficiencies; Petition to Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.—**Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency**. Except as otherwise provided in section 6851 [termination assessments], 6852, or 6861 [jeopardy assessments] no assessment of a deficiency in respect of any tax imposed by subtitle A [income tax], or B [estate and gift tax], chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition

has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a) [prohibition of suits to restrain assessment or collection], the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

. . . .

(c) Failure to File Petition.—**If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed**, and shall be paid upon notice and demand from the Secretary.

Sec. 7442. Jurisdiction.

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title [26 U.S.C.], 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.

Subsequent Caselaw:

Scar v. Commissioner, 814 F.2d 1363, 1366 (9th Cir. 1987) ("The Tax Court has jurisdiction only when the Commissioner issues a valid deficiency notice, and the taxpayer files a timely petition for redetermination"), *rev'g* 81 T.C. 855 (1983).

Keado v. United States, 853 F.2d 1209, 1212 (5th Cir. 1988) ("If the taxpayer fails to file a Tax Court petition during this ninety day period, the Tax Court **lacks jurisdiction** to consider the deficiency").

Mulder v. Commissioner, 855 F.2d 208, 211 (5th Cir. 1988) ("[T]he taxpayer must file a petition within 90 days of this mailing [of the notice of deficiency]. Otherwise, the Tax Court **lacks jurisdiction**"), *rev'g* T.C. Memo. 1987-363.

Hoffenberg v. Commissioner, 905 F.2d 665, 666 (2d Cir. 1990) (per curiam) ("A late petition will be dismissed for **lack of jurisdiction**"), *aff'g* T.C. Memo. 1989-676 ("[T]he petition will have to be dismissed for **lack of jurisdiction**").

Ward v. Commissioner, 907 F.2d 517, 521 (5th Cir. 1990) ("In order for the Tax Court to have **jurisdiction** over a petition for redetermination, the taxpayer must file the petition within 90 days after 'the notice of deficiency authorized in § 6212 is mailed.' 26 U.S.C. § 6213"), *rev'g* 92 T.C. 949 (1989).

Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 387 (5th Cir. 1995) ("Sections 6212(a) and 6213(a) of the Internal Revenue Code provide that the Tax Court only **has jurisdiction** when the Commissioner issues a valid deficiency notice and the taxpayer files a petition for redetermination"), *aff'g in part, rev'g in part* T.C. Memo. 1992-168.

Patmon & Young Pro. Corp. v. Commissioner, 55 F.3d 216, 217 (6th Cir. 1995) ("In order to invoke the **jurisdiction** of the Tax Court, a taxpayer must file a petition within 90 days after the mailing of the notice of deficiency"), *aff'g* T.C. Memo. 1993-143.

Correia v. Commissioner, 58 F.3d 468, 469 (9th Cir. 1995) (per curiam) ("The timely filing of a petition for redetermination is a **jurisdictional requirement**").

Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3463, 112 Stat. 685, 767 (adding a sentence to section 6213(a)):

Sec. 3463. Notice of Deficiency to Specify Deadlines for Filing Tax Court Petition.

(a) In General.—The Secretary of the Treasury or the Secretary's delegate shall include on each notice of deficiency under section 6212 of the Internal Revenue Code of 1986 the date determined by such Secretary (or delegate) as the last day on which the taxpayer may file a petition with the Tax Court.

(b) Later Filing Deadlines Specified on Notice of Deficiency to be Binding.—Subsection (a) of section 6213 (relating to restrictions applicable to deficiencies; petition to Tax Court) is amended by adding at the end the following new sentence: "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."

Legislative History:

H.R. Rep. No. 105-599, at 289 (1998) (Conf. Rep.), *as reprinted in* 1998-3 C.B. 747, 1043 ("Taxpayers must file a petition with the Tax Court within 90 days after the deficiency notice is mailed (150 days if the person is outside the United States) (sec. 6213). **If the petition is not filed within that time period, the Tax Court does not have jurisdiction to consider the petition**").

H.R. Rep. No. 105-364, pt. 1, at 71 (1997), *as reprinted in* 1998-3 C.B. 373, 443 (identical language).

Subsequent Caselaw:

Rochelle v. Commissioner, 293 F.3d 740, 741 (5th Cir. 2002) (per curiam) ("[T]he Commissioner moved to dismiss the case for **lack of jurisdiction** . . . on the basis that the petition was not filed within the ninety-day period prescribed by I.R.C. § 6213(a) (1994). The Tax Court, in a reviewed opinion, granted the Commissioner's motion to dismiss and denied the taxpayer's motion. We agree with the Tax Court for the reasons set out in Judge Vasquez's excellent opinion (concurred in by nine other judges), which we adopt" (citations omitted)), *aff'g* 116 T.C.

356, 364 (2001) ("[The taxpayer] failed to file a timely petition with this Court. Accordingly, . . . [the Commissioner's] motion to dismiss for lack of jurisdiction will be granted").

Elings v. Commissioner, 324 F.3d 1110, 1112 (9th Cir. 2003) ("The tax court **has jurisdiction only if** two requirements are met: (1) the IRS issued a valid notice of deficiency, and (2) the petitioner filed a timely petition").

Edwards v. Commissioner, 791 F.3d 1, 4 (D.C. Cir. 2015) ("The tax court also **lacks jurisdiction** if the taxpayer's petition is not timely filed").

Tilden v. Commissioner, 846 F.3d 882, 887 (7th Cir. 2017) ("[W]e . . . treat the statutory filing deadline as a **jurisdictional** one"), *rev'g and remanding* T.C. Memo. 2015-188.

Organic Cannabis Found., LLC v. Commissioner, 962 F.3d 1082, 1092 (9th Cir. 2020) ("[W]e agree with the Tax Court that § 6213(a)'s time limits are **jurisdictional**"), *cert. denied*, 141 S. Ct. 2596 (2021), *and cert. denied sub. nom. N. Cal. Small Bus. Assistants, Inc. v. Commissioner*, 1415 S. Ct. 2598 (2021).