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UNITED STATES TAX COURT

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JUDGES OF THE UNITED STATES TAX COURT

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KATHLEEN KERRIGAN

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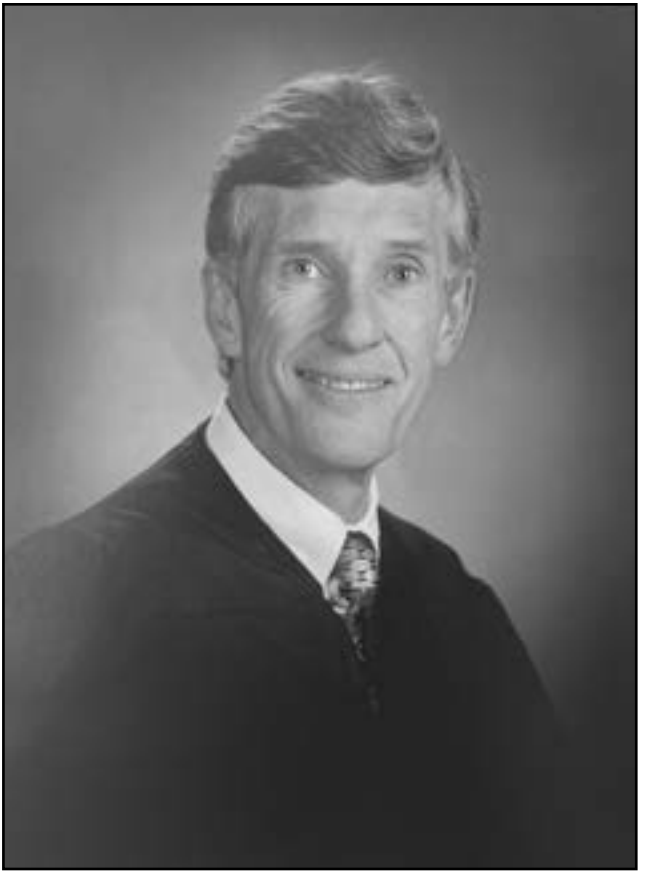
[1] Appointed April 21, 2024.

IN MEMORIAM

THE HONORABLE JOHN O. COLVIN

Judge, United States Tax Court



The Honorable John O. Colvin

IN MEMORIAM

APRIL 19, 2024

CHIEF JUDGE KERRIGAN: Good afternoon. Thank you for attending this special session of the Tax Court. My colleagues and I welcome all of you here today to honor and remember our friend, mentor, and colleague, the Honorable John O. Colvin.

First, I would like to acknowledge the family of Judge Colvin. Ava, his wife for over 53 years, his son, Tim Colvin and his wife, Dr. Alexis Colvin, and their sons Max, Sebastian, and Christian. His brother Bob and his wife Gay and their daughter Jessica Bauer and her husband Andrew. A very special welcome to all of you.

I would like to especially acknowledge our trial clerk today, Amber Golz, who since 2016 has served as Judge Colvin's chambers administrator. I know Judge Colvin would be pleased to have Amber serving in this role today. Thank you, Amber, for helping us honor Judge Colvin in this special way. Thank you to all the former clerks and employees and current employees of the Court that are here today to honor Judge Colvin. All our distinguished speakers today will talk about Judge Colvin's personal life and professional experience with firsthand knowledge. And I can say no one loved the Tax Court more than Judge Colvin.

Judge Colvin was born in Ohio in 1946, and attended the University of Missouri for his undergraduate degree and Georgetown University Law Center for his law degree, where he later received an LLM in taxation and taught. He started his career in the private sector, but then soon started a long and distinguished career in the public sector.

One of the highlights of his career was being chief counsel to the Senate Finance Minority Committee during the Tax Reform Act of 1986. This legislation is still heralded as landmark tax legislation today. Often when people are talking about how you do a tax bill in Congress, they still cite back to the 1986 Act, to the thorough and collegial way in which it was done. Many of you in this room know Judge Colvin and participated with him on getting that legislation through. And I think that because someone like Judge Colvin was so involved in the process, I think it's one of the reasons it's still cited as the way to do a piece of tax legislation.

He was appointed by President Ronald Reagan in 1988, and reappointed by President George W. Bush in 2004. He served as chief judge for six years and then filled in later for several months as chief judge. Our speakers today will discuss his early days as judge, his tenure as chief judge, and his time as a senior judge. Our first speaker may have been his first law clerk. I think there's an ongoing dispute about who really is his first law clerk, but I'm not going to try to figure that one out. So I would like to introduce Fig Ruggieri to come forward to you, and she started on October 9, 1988.

MS. RUGGIERI: Thank you, Chief Judge Kerrigan.

Good afternoon, Ava, Tim, Alexis, Maximillian, Sebastian, and Christian. Members of the Colvin family, members of the Court, distinguished friends and guests.

I first met Judge Colvin in January 1987, when he was teaching the Tax Reform Act of 1986, in the Georgetown University Law School graduate tax program. I was a legal editor at Tax Management then, and we had recently published two portfolios on the 1986 Tax Act, which Professor Colvin graciously allowed me to hawk to my fellow students for $5 a portfolio. All proceeds to Tax Management, of course.

As chief counsel to the Senate Finance Committee, Professor Colvin had an insider's view of the 1986 Tax Act and how it came to pass. His many anecdotes and storytelling of the horse trading that resulted in various provisions of the Act made the class engaging, and one I looked forward to each week. Over a year later, Professor, soon to be Judge Colvin, called to tell me I had received the highest grade in his class and to offer me a job as one of his law clerks at the Tax Court.

Along with Glen Hirabayashi, I had the pleasure and honor of serving as one of Judge Colvin's first attorney-advisors from October 1988 until mid-2005. Early on in our time at the Court, Judge Colvin told Glen and me we could stay for a year, two years, or three years, and then we never discussed it again. We were together as an office with Betty Scott-Boom, and later Tammy Staples for almost 17 years and hundreds of opinions. I guess we worked out all right.

Judge Colvin was a bit of a pioneer in having two career law clerks. We worked as a team drafting opinions, orders, and other work product. Judge Colvin expected us to use simple, plain language in our drafts. Passive voice was strictly forbidden. He believed that taxpayers were entitled to a prompt decision written in understandable language. One way he accomplished this was through his enthusiastic use of bench opinions, so as to give taxpayers decisions expediently. Glen and I drafted opinions that we hoped would persuade the judge that we had reached the right outcome. Judge Colvin welcomed discussion, and often we didn't know his views regarding the outcome until we presented our drafts. He took detailed notes at trial, and it became a game with Glen and me as to who could best decipher his handwriting because he invariably wrote notes and comments in pencil.

Working with Judge Colvin instilled in me many important guiding principles. He was committed to getting it right. He believed it was important to decide things promptly, whether by order or opinion, and was always willing to go above and beyond what's necessary. He recognized the need for all Tax Court employees to work together to address the issues and concerns of petitioners. For example, he had great respect for and valued the work of the docket section. He championed the work of the eProjects Committee. These guiding principles were especially important when I later worked as deputy general counsel to Chief Judge Colvin.

The Tax Court sits in 75 cities throughout the United States. One of my fond memories of life in chambers is the map Judge Colvin kept in his office. It was decorated with colorful pushpins for all the cities in which he had held sessions. According to Amber Golz, Judge Colvin's confidential assistant and today's trial clerk, Judge Colvin went to

every trial city except for Boise, Idaho. That has to be some kind of record.

Judge Colvin established a professional camaraderie in the office, and it was never dull in the chambers of Division 6. From the surprise visit of a Kentucky taxpayer who appeared in chambers while I was in the middle of working on her case, to the impromptu ukulele serenades by Glen, to the office field trip to the Silver Spring Library to visit my penguins display, to the veritable baby boom in which the stork visited Division 6 four times between 1990 and 1993. The Tax Court was a wonderful place to work.

Judge Colvin often invited newer judges and their law clerks to have lunch with us in chambers, to help welcome them to the Court. Judge Colvin was interested in us and our families. He was a fan of performances of Glen's band, the Aloha Boys. He attended my mom's memorial service at the Friends Meeting House in Baltimore, and hosted a baby shower for my then three-month-old son, Eric, in chambers. He was especially interested in Eric's swimming career, and was delighted when Eric swam at the Tom Dolan Invitational meet, notable because Tom Dolan was a high school relay teammate of Tim Colvin before Tom went on to Olympic gold.

Judge Colvin authored hundreds of opinions, many that have been cited as precedent. I will speak about three cases that were memorable to me personally, not necessarily for their legal importance. The first, *Colorado National Bankshares,* decided the petitioner proved that its core deposits intangible had an ascertainable value separate and distinct from the goodwill and going concern value of petitioner's acquired banks, and that it had a limited useful life, the duration of which could be ascertained with reasonable accuracy. The case was subsequently cited and quoted by the Supreme Court in *Newark Morning Ledger*. This nod of approval from the Supremes was a big deal for obvious reasons.

Dworschak decided that the taxpayer operated his direct marketing activity for profit. This case stands out in my mind because it was likely the first draft opinion received back from the chief judge that had no paperclips, that is, no comments from the chief judge or counsel to the chief judge. I still have the draft with my note to Judge Colvin regarding the absence of paperclips.

Lastly, and my favorite, is *Estate of Paul Brown*, where Judge Colvin decided that Paul Brown's estate included only one share, not 312 shares, of Cincinnati Bengals stock. Paul Brown, for whom the Cleveland Browns were named, was a founder of the Cincinnati Bengals NFL franchise. This case is near and dear to my heart because it merited an article in the Washington Post sports section.

I feel lucky to have spent 33 years with the Court, and my career here was in no small part due to Judge Colvin. He was an amazing mentor and enthusiastic teacher and a principled jurist. I will be forever grateful that he brought me into the Court family. While it's hard to imagine the Tax Court without him, I will always miss him and remember him fondly.

CHIEF JUDGE KERRIGAN: Thank you for those kind remarks, Fig. I wish someday I'd have a case that makes it in the sports section. And now I would like to turn it to Judge Haines, who joined the Court in 2003 and who had a personal and professional relationship with Judge Colvin.

JUDGE HAINES: I'd like to say that this first part of my report is I'm talking about Judge Colvin's personality, which is a hard thing to pin down. But the first part is based upon my first personal experience. The second part is based on hearsay. But the second part, I have voir dired the witnesses and it's very credible.

Judge Colvin was not a person to toot his own horn. He was interested in what people other than himself were doing and what they had to say. He didn't want to call attention to himself, and he never mentioned his problems with health, but he was a fighter to the end. That's not to say he wasn't amiable. He was kind, well liked, cordial, never said a word against anyone. But he did surprise me on occasions when he opened up about his own interests. I'd like to give you a couple of examples.

On my first day in court, John Colvin came into my chambers and had an armful of books, and they were chief judge opinions and orders, and he suggested that I read all of these books. I hadn't even found the telephone yet in my chambers, but he was there for it.

And as he was looking around, I had a bass viol that I brought from Montana that I couldn't fit in my apartment. So I brought it to the Court and it was lying on the floor. And

he looked at my bass viol and he said, oh, are you interested in music? And I said, yes. What kind of music? Classical. And he said, well, are you interested in any other? And I said, yes, I had a combo in college and I got my way through college partly by playing. And he said, well, have you ever heard of anything called bluegrass? And I said, yes, I've heard of bluegrass, but I haven't played any of that.

And so we kind of left the conversation there, and he left. A day later, he came back and he said, do you want to go to a bluegrass concert on the following Saturday? So I said, yes, but I didn't know if you went to an amphitheater or what. And he said, I'll pick you up Saturday morning. And I said, what kind of clothing shall I have? And he said, casual.

So he picked me up on a Saturday morning and we drove to Centreville, Virginia. And playing there was Charlie Waller. Charlie Waller's band was in the international, had been awarded an international award in the honors previously, and I didn't know that. Charlie Waller came out with his band in this street that was turned out, and they had taken church chairs and put them in the street for people to sit down on. This was an international star. And I sat there and listened to Charlie Waller and bluegrass and I'm telling you, the banjo playing, the mandolin playing, the guitar playing, the bass playing was spectacular. And I was sold on bluegrass.

I thought that was the end of it. The following week, John called me up and said, could you bring your bass to my house and maybe we can do some bluegrass together? And he had recordings of bluegrass, and we went into a room where Ava couldn't hear us, and we tried to do bluegrass together, but we couldn't get the rhythms right. So after the first week, he said, well, let's try it again the second week. And after that, we both decided music was not our calling. We turned to be judges, but he loved music. He loved music, and in particular, bluegrass.

John could be assertive. That's another personality trait. He and Ava and my wife and I had talked about taking a trip to Europe. And so we got a call from John, and he said, are you still interested in going to Europe? And my wife and I said, yes. He said, okay, I'll get back to you. Didn't hear anything from him for two days. He called the second day and he said,

Ava and I are booked. He said, here's the itinerary for the trip. He said, here's the cost. Here's the name of my agent. Your name has been given to the agent. All you have to do is call him. So we called him, paid our money, and that's all we had to do. John took care of everything else.

John Colvin loved the outdoors. He loved to hike. One summer, when I was working from my home in Montana, I got a call, and he said that he and Ava wanted to go to Glacier National Park. And we were on a vacation ourselves, my wife and I, at Flathead Lake, which is about 50 miles south of the park. And John called up and he said, we're flying into Missoula. How do we get up there? How do we get to your place? And so he said, just a minute. And he went and got a piece of paper and a pen.

And I said, John, are you ready for the instructions to get to the lake? Yes. So I said, what you do, John, is you get a rental car and you drive to the exit of the airport and turn left. And he said, what? I said, you turn left. And where we're going to meet is the Diamond Horseshoe Bar in Polson, Montana. And he said, well, what else now? There must be an interstate. No, I said, you turn left. There's only one road going up to the Diamond Bar. He and Ava went up there, and they were going through towns that were less than 100 years old.

Montana is a very young state compared to Virginia. But anyway, they met us at the Diamond Horseshoe Bar and then stayed with us for two days, and we had a habit of going out at night because there was no light from town, and we could look up at the stars and watch the satellites go by. Really, really fun. He always wanted directions, and he also wanted to get it more complicated than it was.

This next section deals with his youth, and this is where I have to rely upon hearsay. But I want to tell you the Colvin family had two precocious children. The oldest was Robert, who is sitting here, and the younger was John. John was a little bit active. They moved to Henderson, Kentucky, and John's mother was looking for a place to put him, specifically in a kindergarten. And I want the grandchildren to know this, because this is the first time your grandfather skipped a grade.

There was no kindergarten in Henderson, so the mother put John in first grade and he skipped kindergarten. But he was so well adjusted that it was no problem. He got through grade school well. But then he got into high school and they transferred again to Saint Charles, Missouri. And in Saint Charles, Missouri, he was in high school. And his mother said, well, there's a 13th grade in high school. Remember the old fashioned 13 years in high school? John said, I don't think so. And he went into the University of Missouri. I just wanted the grandchildren to know that your granddad skipped two grades.

He was very studious. He persevered. When he was in college, he took Air Force ROTC with the idea of being a second lieutenant. He went to law school. He went to the JAG school in Charlottesville. Went in to get his commission. He was in the Air Force, and the Air Force had too many lawyers. He couldn't find a position. So John, in his normal way, did a huge amount of research and found out that he could switch services if the service he switched into was a higher grade than what he was in before. And he found the Coast Guard could do that.

So he switched to the Coast Guard. He was commissioned, and he served here in the chief counsel's office of the Coast Guard for four years, which was perfect for him in DC because he was politically inclined as well. After that he served as tax counsel for Bob Packwood, but later he was chief counsel/majority counsel for the Senate Finance Committee. And then he was chief minority counsel for the Senate Finance Committee. He loved being the majority counsel rather than the minority counsel.

I can only say to the family he's been married to Ava for 53 years. He loved his family. He loved all of you guys. He admired his older brother, who was an MIT graduate and a graduate of the Harvard Medical School. But John, when he did open up to me, it was generally about the family and how well they were doing and how he was concerned for them.

I have only known John Colvin for 20 years. Had I known him before, he would have had to skip about four more grades to reach my age. But I know that if he had been there, and we had been there before, we would have been very good

friends. And in addition to his friendship, Judge Colvin was an exceptional colleague. Thank you.

CHIEF JUDGE KERRIGAN: Thank you for those remarks. And I learned something. I never knew about the grade skipping before. So now I would like to turn it over to Judge Panuthos, who started in 1983 as a special trial judge, and he served as Chief Special Trial Judge from 1992 to 2017. And he and Judge Colvin, I think the two of them are responsible for how the Court has been transformed and how we treat self-represented taxpayers.

JUDGE PANUTHOS: Thank you, Chief Judge Kerrigan. It's a personal honor to say a few words about Judge John Colvin. Soon after his arrival at the Court, Judge Colvin showed an interest in how the Court responded or failed to respond to the large number of self-represented litigants. Judge Colvin asked the same question at least weekly, what more can we do as a court to assist self-represented taxpayers? This question was his theme for the next 30 years. I found this sometimes repetitive question compelling and unsettling.

Next to my telephone, I had a notepad with a few responses, knowing that Judge Colvin would be calling, and he always did, to talk about the plight of self-represented taxpayers. When Judge Colvin became Chief Judge Colvin in 2006, his question was repeated again; what can we do? But now it was really a rhetorical question. The truth is that Judge Colvin had answers, many answers.

So when I told Judge Colvin that the Court sent a letter to self-represented taxpayers, what we call a stuffer letter, to let them know that there's pro bono and free counsel available, his response was, why do we only send one letter? He suggested, how about two or three letters timed at various points from the filing of a petition? Again, he answered his own rhetorical question. Soon the Court implemented sending three stuffer letters.

By 2007, Chief Judge Colvin was insisting that there was a better way to have the clinics and calendar call programs work with the Court. Sending a letter through the U.S. Postal Service seemed like a tedious, old-world idea. So with the staff, including Betty Scott-Boom and Dan Guy and Jen Siegel before they were special trial judges, I had the honor of working with Judge Colvin to create a process on the Court's website,

enabling clinics and lawyers to sign up to provide free legal service and advice for petitioners. Other projects followed, like frequently asked questions, a disc with a mock trial that could be distributed to all self-represented petitioners.

At Judge Colvin's urging, we began to look at every aspect of how the Court deals with the large number of pro se petitioners. With a list too long for this memorial service, our institution emerged as a different and better place than it was before Chief Judge Colvin arrived. Judge Colvin's legacy for me will always be, what more can we do?

I said I wouldn't talk about more on the list, but I'm going to. As a side note, the terms "self-represented petitioner" rather than "unrepresented petitioner" was considered. Where did this term come from? Chief Judge Colvin sent me to a meeting in Toronto, where the Tax Court of Canada was holding a CLE for its judges. The Canadian judges wanted to hear about the United States Tax Court clinical program. The Canadians wanted to know how our Court interacted with law schools and legal service organizations to assist taxpayers. We learned something from the Canadians. The Canadians, we found, used the terms "self-represented" to reflect a more positive view that petitioners were being given a choice and making a decision: free representation offered by clinics and calendar call programs or self-representation. We continue to use that term today.

Another example of Chief Judge Colvin's constancy of thinking about improvements on the Court was in 2010, when we were stuck together in a small airport with a three-hour delay, returning from a tax section meeting, with a white plastic table and stiff, uncomfortable chairs, my first instinct was to pick up a John Grisham novel at the local airport bookstore. John's instinct was to take out paper and pen and ask me what is on our list to better assist self-represented petitioners? We filled up that list. True story.

After years as chief judge, John continued to work with the pro se committee. His concern for self-represented taxpayers never waned. The Court was considering a proposal by the American Bar Association Tax Section for limited entry of appearances. The proposal would allow lawyers to enter an appearance for a petitioner for a limited time or purpose, without committing to long term, if the representation was

pro bono, particularly. We have a lot to learn. At Judge Colvin's suggestion, we, along with Judge Leyden and staff, met with the chief judge administrators of the DC Superior Court, to learn how their system worked. Soon thereafter, the Tax Court issued an administrative order to permit limited entry of appearances in the United States Tax Court.

While Judge Colvin was 98 percent business, at least with me, he always supported his staff. Fig and Glen, his longtime law clerks, Betty Scott-Boom, his chambers administrator, as well as the Court's clinic and calendar call administrator. This job is now in the competent hands of Amber Golz, who's acting as our trial clerk today. John supported his staff with patience, care, and generosity.

For the past few years, his chambers hosted a Halloween party. I don't know for sure how Judge Colvin really felt about Halloween, but he knew that Amber loved Halloween. I did not expect to see Judge Colvin dressed with an inflatable leprechaun riding on his shoulders. If you're really interested in that, ask Amber. I think she's got pictures on her phone.

He also sometimes sent little reminders to me, which included a list of accomplishments of Betty and later Amber. There was this two percent of the time when I could get John to talk about his family. He would reflect a warm smile when talking about Ava, the children, and the grandchildren. I'll miss this two percent.

Despite illness that sometimes kept him away, he always came back with enthusiasm. He never complained. The rhetorical question, what more can we do for the taxpayer who cannot afford legal assistance, was always present. Because of John Colvin, I better understood my duty to this Court, and indeed my career as a judge changed. His legacy lives with this institution and will always be in my heart and mind. Thank you.

CHIEF JUDGE KERRIGAN: Thank you for those remarks. And now I'm going to turn it over to Judge Thornton, who joined the Court in 1998, and he was reappointed in 2013. And he served immediately after Judge Colvin as chief judge from 2012 to 2016.

JUDGE THORNTON: It's a great honor to join my colleagues today commemorating Judge John Colvin. We mourn the loss of a great friend and colleague, but we also celebrate his life

as a paragon of integrity and public service accomplishment. He was truly one of the pillars of the Tax Court.

As Chief Judge Kerrigan has noted, during his nearly 36 years on the bench, Judge Colvin served as chief judge for three two-year terms and part of another, making him the longest serving chief judge in the Court's 100 year history. He flourished in the position of chief judge, not only handling the dispatch, the usual wide ranging duties of that office, but also successfully completing dozens of special projects to improve the Court's operations and status.

This is not the time or place to attempt to enumerate all of Judge Colvin's many accomplishments as chief judge. Some examples will have to do. Foremost on the list is the work that Judge Panuthos has already described. To expand the assistance to self-represented taxpayers and their cases before the Court. Judge Panuthos worked closely with Judge Colvin on this important work, and what they achieved together may well be the work with which Judge Colvin was most proud.

Chief Judge Colvin was also instrumental in greatly expanding the Court's technology services for parties and the public, including electronic filing and service of court papers and electronic access to case files free of charge. He helped bring the Court's judges and employees under the protection of the United States Marshals Service, and helped secure funding from Congress to improve this building's public entrance and perimeter security. He helped improve this Court's emergency response measures, including with the adoption of a Continuity of Operations Plan.

He helped the Court achieve legislative authority to establish its own personnel system, and then to establish programs to implement it and to encourage improved employee performance and recognition. For instance, under his watch, the Court instituted the Dawson Award, named after one of Judge Colvin's heroes, former Chief Judge Howard Dawson, to honor exceptional contributions by the Court staff.

Under his watch, the Court also adopted the Code of Conduct for Judicial Employees. Chief Judge Colvin helped maintain and preserve this Court's historical record by commissioning an updated and expanded 1,000-page historical treatise that you can still find on the Court's website, and by arranging for

the historic displays that you can still find in two cabinets outside this courtroom.

Even after his terms as chief judge ended, Judge Colvin continued to be active in the work of multiple Court committees and special projects. He was a valued advisor to other chief judges, a mentor to newly confirmed judges, and a walking encyclopedia of the Court's history and traditions. He served as an effective ambassador and spokesperson for the Court for legislative, executive, and judicial branches, including as the Tax Court's first representative on the committee on the judicial branch of the Judicial Conference of the United States. He was a great champion of J. Edgar Murdock Inns of Court, which grew substantially in membership while he was chief judge.

But to enumerate such accomplishments and activities does not begin to capture Judge Colvin's largeness of spirit, character, and intensity of purpose. He was self-effacing, polite, courteous, kind, witty, pragmatic, and down to earth. He was the soul of integrity and discretion. He promoted, by example and encouragement, collegiality, which has long been a hallmark of this Court.

He had a spring in his step that seemed to correspond to some extra sparkle in his thinking. He did not like to waste time or words, and did not like to see others waste them. Often, he could be seen lugging about his old brown leather satchel, just in case an opportunity arose to get some work done while he was out and about. And sure enough, if the conversation flagged in the lunchroom or the committee meeting, he might be seen to reach down into a satchel and pull out a sheaf of papers to start marking them up to make good use of the time.

Judge Colvin had a profound regard for tradition and formal courtesies and personal privacies. Perhaps owing to his prior service as chief tax counsel of the Senate Finance Committee, he understood the compromise as the way you get things done in Government. He appreciated the value of working across the aisle, as it were, and following regular order. He was a scholar of Robert's Rules of Order, and showed courtesy and respect, not only to his colleagues, but also to everyone else. He wrote hundreds of legal opinions that not only demonstrate legal expertise presented simply from few wasted words,

but that also reflect empathy and concern for the practical consequences of his legal decisions.

Although Judge Colvin was a private person, he made no secret of his love and devotion to his family. Ava, his beloved wife of many years. His son Tim, of his accomplishments. He was so proud. And his grandchildren, who were a constant joy to him. He liked to reminisce about trekking down the Grand Canyon with Tim many years ago, and spending the night at the Phantom Ranch at the bottom of the Canyon. He loved obscure old-time American music, as Judge Haines alluded to, string bands, jug bands, early bluegrass and gospel like that found on old recordings that could be heard on obscure radio shows at ungodly hours.

Perhaps what drew Judge Colvin to this music was its authenticity, liveliness, laughter, creakiness, and uniquely American quality. All qualities that characterized Judge Colvin himself, led him eventually to take up the clawhammer banjo. Though I regret to say, unlike Judge Haines, I never got to hear the fruits of those musical pursuits.

Judge Colvin didn't like to sit on his hands, and no issue was too many or too large or complicated to escape his full attention. An email to Judge Colvin, alluding to some issue needing attention, might well elicit a quick but elaborate response from him laying out some history, suggesting a five-point solution he often helped implement.

As I look up at his portrait on the wall there, it's easy to imagine him already busy at work on a five-point plan to improve the administration of Paradise, growing slightly impatient with this memorial service to be over so he can get on with it. So although there is much more that could be said, we'll conclude with a final thank you to Judge Colvin. We'll miss terribly his friendship, and while his counsel (indiscernible), but his legacy will live on. He left us a better place than we found it. May we honor his memory by starting to do the same.

CHIEF JUDGE KERRIGAN: Thank you, Judge Thornton, for those remarks. Our final speaker is Judge Jones. And some of you may know, and some of you may not know that for some reason, in our statute, we have divisions of the Court and there's 19 divisions. And so when a judge is appointed, they

are appointed by division. And Judge Colvin was Division 6, and his successor in Division 6 was Judge Jones.

JUDGE JONES: Thank you, Chief. I do have the honor of sitting in Division 6. I wanted to share three things about my relationship with Judge Colvin as his successor that I carry with me. His kindness, his mentorship, and his love for this institution. Let me first talk about his kindness.

I was nominated to this Court in January of 2018, and at that time I was, I think, five-ish months pregnant. I had not previously much litigated in Tax Court, and so I made it my business to attend as many calendar calls as I could to see what to do. One of the very first calendar calls I attended was his February 2018 Richmond session. And so I show up, five-plus months pregnant, and he greeted me so warmly and brought me back into the side room that the Fourth Circuit had reserved for our chambers. He said, this is how the calendar call goes. This is what I'm going to do. This is what I'm trying to achieve and this is how the morning will proceed.

So I went back into the gallery and it proceeded exactly as he had said. And one of the things that I remember the most, and this is why I was so struck by his kindness. One of the petitioners that morning was self-represented. She was a single mom. The case was about whether or not she had had custody of her child for the requisite amount of time.

And so when she stepped forward to the podium and the Respondent's lawyer stepped forward to the podium, Respondent's counsel said, Your Honor, we concede the case, and the self-represented single mom just stood there. And Judge Colvin looked at her in the eye, and he said, do you know what it means when the Government says they've conceded the case? And she shook her head no, and he looked at her again in the eye, and he smiled at her, and he said, it means you win. And I thought to myself, that is the kind of judge I want to be. That's who I want to be. Knowledgeable, thoughtful, and kind.

Later on in the nomination process, we're moving up to about seven months pregnant now, we're in Chicago for the Tax Court's first judicial conference. First one I had attended. Also, first for my in-utero child. And so we were at the judicial conference, and Judge Colvin and I, now, having been acquainted at the Richmond session, talked about how

we would like to ride back to the airport from the conference at the end of the conference together. Now, I was hoping he wasn't worried about riding with the seven and a half months pregnant me. But I also had with me for assistance my mom, and I had brought along my then eight-year-old daughter. And so we got a taxi van.

And so it was Judge Colvin, mom, Audrey, and me riding back to the airport and we had a lovely ride. He was so kind to my daughter, so kind to my mother. Forever after that, my mom would always ask, how is Judge Colvin? I remember him from our taxi ride then. And do you remember how friendly you were? And it was a wonderful ride. And he would ask about my mom and check in on her.

The last point I'll say about kindness was the day that I was sworn in, August 9, 2019, on a Friday, and I brought my family, my husband, my other two children. Oh, this is post-pregnancy now. And so I had a baby, but I also had two other children, and my mom was with us, and I have a picture—and I'm happy to show it or send it to anyone who would like to see it—of Judge Colvin standing with me, holding my then four-year-old son's hand right after I had taken the oath of office.

You heard earlier from Judge Thornton what an interest he took in newly appointed judges. And I don't know if it was because we shared Division 6, but he took a tremendous interest in me getting off to a good start and doing well. He told me from the beginning, and it was true, that I could call him and ask him about anything, and I did. I called him, I asked him about orders and what about this opinion? And I would send him drafts of opinions, when I thought that they were good enough for him to read. And he would give me very honest feedback, very thoughtful feedback, and he saved me, "saved me" from future, just, debacles. And I was so grateful for his honest feedback. It was direct but gentle when he thought I might want to go in a different path. And I really appreciated the candor. I really appreciated his candor.

I got ready late last year to take my first case to conference, and I was—I'm sure he got tired of how much I was calling him at that point. But in one of our conversations, he made it really clear to me that the work that I had done was sound and that he believed in me, and it was profound.

And so one other thing about the mentorship. I remember him, similar to Judge Haines' experience. By the time I came along, Judge Colvin was more sophisticated. He had a binder by the time I came, for all of the Court noncase-conference procedures and handed me the binder. And for a lover of organization like me, that is a work of art. That binder is a thing of beauty. It is indexed and tagged. And he had memorized the index. And so whenever I would call him with various questions, he would say, well, it's at tab such-and-such, it's at tab so-and-so. And he was right. It was fantastic. And so I thoroughly appreciated that.

The last thing I wanted to share is about his love for this institution. Now, anyone who has spent five minutes with me, and John Colvin spent many more than that, knows how I feel about my undergraduate alma mater. I went to a black college and found the experience transformative. And what it inculcated in me was a deep appreciation for a well cared-for institution, and the impact that a well cared-for institution can have on the lives of those who are connected to it.

And I think this is one of the reasons that we were kindred spirits, because I recognized immediately that the way I felt about my alma mater, having sat on its board of trustees, and always the question was, how can we lead this institution to the next generation better than it was handed to us, was the question he was always asking about the Tax Court. How can we hand it to the next generation better than it was handed to us?

And so when I would come to him with questions about administration and what about this policy? Well, what is best for the Court? What is the best thing for the Court? What do you think is the best thing for the Court? He would come to judges' lunch long after he needed to be there. He would come to judges' lunch to be a benefit and a resource to us. I once said to him, I feel like some of the questions I ask at judges' lunch are really elementary. And he said, no, no, this is the reason to come, to ask these questions. And the vast majority of what I learned, I learned at judges' lunch. And I thought, well, I'm doing all right then.

And I so appreciated his love and his devotion to this institution. I am endlessly grateful for his kindness to self-represented petitioners, to me, and to my family during a

time when I was vulnerable and going through a tremendous experience with the nomination. I'm endlessly grateful for his mentorship, for his love for this institution, and I seek to follow in his footsteps. Thank you.

CHIEF JUDGE KERRIGAN: Thank you. I want to echo some of Judge Jones' remarks. I couldn't tell, when I got nominated, who was more excited, me or Judge Colvin. He was chief judge at the time, and when I was nominated, they were down five judges. So as soon as I got nominated, he called me every couple of weeks and he'd be like, when are you coming? When's your hearing going to happen? And I'm like, I don't know. And he says, do you want to come over and have lunch with the judges? And I'm like, no. He's like, why not? And I said, I'm a little superstitious. And as you know, Judge Colvin's persistent.

So he'd still call me every couple of weeks. So he called me in August and I was working for Senator Kerry, a member of the Finance Committee at the time, and he said, it's August. You can't be that busy. Can't you just walk over and meet me at the Tax Court? And he's like, nobody's there. So finally I was like, oh, I better say yes or he's going to keep calling.

So I walked over and he was right. It was very quiet, and he gave me a tour of the building. And I could tell from that very moment, there was no one who could be more proud of the Tax Court. And he was so excited that I had the opportunity to be a judge.

So as time went on—and I was not pregnant during the process—as time went on, I finally got a hearing scheduled and then he called and said, how about you come and have lunch in the judges' dining room afterwards and have your parents come? And I said, well, I'm still a little superstitious. And finally I said to him, I'm a diehard Red Sox fan. I am superstitious. Let's make sure it's done. And I said, plus, unfortunately, my parents aren't going to be able to come to my hearing.

And so I noticed when I walked out from my hearing, sitting in the corner, there was Judge Colvin, and I just thought, oh, he made such an effort. And I thought part of the reason he was there, because he wanted to know I had somebody there besides my husband, since I told him my parents weren't going to be there. And when I got to the Court, Judge Colvin

was in the hospital, but I still—and then he was gradually coming back to work.

But I constantly was getting notes from him or whenever he came to the building, tracking my career and saying, oh, you got your first opinion out. And he was like, oh, that was your first really long trial. And he was always complimentary. And then one day we were having lunch and I almost choked on my sandwich. He said, I think you're going to be chief judge someday. And like, as I said, I choked. He's like, no, I really mean it.

And I never thought he was right, but as Courtney says, we should listen to what he tells us. And I just will never forget the kindness and the warmth that he showed me. And my parents were able to come to my investiture, and one of the comments my mom made was like, you're really going to be at some place where everyone's happy to be there. And that's what I feel like. No one showed that more than Judge Colvin did.

And I have a couple colleagues who just wanted to make a short remark. Judge Vasquez.

JUDGE VASQUEZ: At this time, I would like to thank Judge John Colvin and his wife, Ava, for the many things that they did for my wife, Terry, and I, and our transition from San Antonio, Texas to Washington, D.C., in May of 1995, including a welcome party at their home, recommending that we stay in Bragg Towers while we waited to move into our house that had been purchased in Washington, D.C., taking us to climb Rag Mountain in the Shenandoah National Park. Ava, that was very hard for us, and (indiscernible), but he was insistent we go.

Also inviting us to attend their son Tim's and Alexis' wedding. Thank you. And introducing us to their beloved pet, Augie. And they loved that dog Augie. And he had his own personality and was truly part of the Colvin family. And above all, for their friendship. Thank you.

CHIEF JUDGE KERRIGAN: Judge Copeland.

JUDGE COPELAND: Thank you. I'm deeply grateful to have known Judge Colvin and to call him a friend as well as a colleague. I will always remember him as a tax legend. And I appreciate Judge Kerrigan let me say that he was instrumental in my transition to the Court as well. I have further

remarks that I'm going to submit my marks in writing for the record so you can read them there. Thank you.

CHIEF JUDGE KERRIGAN: I want to thank you all for joining us today to celebrate the wonderful legacy of Judge Colvin. At the conclusion of the ceremony, please join us in the foyer. And as I feel like I've been sitting up here, I've been able to see the portrait out of the corner of my eye the whole time. So I feel like he's been here with us, and I can't think of a better way to end this. As you've heard two things today about Judge Colvin, about the impromptu ukulele sessions in his chambers and his love of music.

So when I mentioned there's a dispute over the whole first clerk. So the other first clerk, Glen Hirabayashi, is here for us, and I can't think of a better way to end the ceremony with music.

MR. HIRABAYASHI: Thank you, Judge. Here's a little tribute to one of the most amazing men that I've ever had the pleasure of coming across.

Somewhere over the rainbow, way up high. There's a land that I heard of, once in a lullaby. La la la. Somewhere over the rainbow, bluebirds fly. The dream that you dream of, dreams really do come true-ooh-ooh. Oh, oh, oh, oh. Aloha oh, oh, oh, oh. He's the only one I know. He's coming home, one fine and (indiscernible), until we meet again. Until we meet again.

Thank you.

THE CLERK: All rise.

(Whereupon, at 3:00 p.m., the above-entitled matter was concluded.)

APRIL TABLE OF CASES

REPORTS

OF THE

UNITED STATES TAX COURT

MOHAMED K. ABDO AND FARDOWSA J. FARAH, PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 5514-20. Filed April 2, 2024.

R issued Ps a notice of deficiency dated December 2, 2019. The notice specified March 2, 2020, as the last day to petition the Court. That date was not a Saturday, Sunday, or legal holiday in the District of Columbia. Ps mailed the Petition on March 17, 2020. Ps resided in Ohio at all relevant times. On March 31, 2020, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207, with respect to Ohio as a result of the COVID–19 pandemic. The declaration identified the disaster conditions as "beginning on January 20, 2020, and continuing." On September 2, 2020, R filed a Motion to Dismiss for Lack of Jurisdiction on the ground that the Petition was not filed within the time prescribed by I.R.C. § 6213(a) or I.R.C. § 7502. Ps contend that I.R.C. § 7508A(d), which provides for a mandatory 60-day extension of certain tax-related deadlines by reason of a federally declared disaster, operated in conjunction with the President's declaration to automatically extend the filing deadline. On June 11, 2021, final regulations were issued with respect to I.R.C. § 7508A(d). *See* Treas. Reg. § 301.7508A-1(g). R contends that the regulations apply to this case, that they are entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and that the Petition was untimely filed under their provisions. Ps agree that *Chevron* provides the proper framework for the Court to review the regulations and that the deadline to file their Petition was not extended under the regulations. Ps contend, however, that the Petition was timely under all reasonable constructions of I.R.C.

§ 7508A(d) and that Treas. Reg. § 301.7508A-1(g)(1) and (2) is invalid. *Held*: I.R.C. § 7508A(d) provides for an unambiguously self-executing postponement period for the filing of a petition with the Court for a redetermination of a deficiency. *Held, further*, Treas. Reg. § 301.7508A-1(g)(1) and (2) is invalid to the extent it limits the non-pension-related "time-sensitive acts that are postponed for the mandatory 60-day postponement period . . . [to] the acts determined to be postponed by the Secretary's exercise of authority under [I.R.C. §] 7508A(a)." *Held, further*, Ps were entitled to an automatic, mandatory 60-day postponement period from January 20, 2020, to at least March 20, 2020, to file their Petition. Ps' Petition was filed timely, and we have jurisdiction. R's Motion will be denied.

Megan L. Sullivan and *David L. Meenach*, for petitioners.
Louis H. Hill and *Eric O. Young*, for respondent.

OPINION

MARSHALL, *Judge*: This deficiency case is before the Court on respondent's Motion to Dismiss for Lack of Jurisdiction (Motion) on the ground that the petition was not filed within the time prescribed by section 6213(a)[1] or section 7502. To decide the Motion, we must interpret for the first time section 7508A(d), which provides for the mandatory 60-day extension of certain tax-related deadlines by reason of a federally declared disaster.[2] We will deny respondent's Motion for the reasons set forth below.

Background

The following facts are derived from the pleadings, the parties' Motion papers, and the Exhibits attached thereto. These facts are stated solely for the purpose of ruling on the Motion and not as findings of fact in this case. *See* Rule 1(b);

[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, regulation references are to the *Code of Federal Regulations*, Title 26 (Treas. Reg.), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

[2] Section 7508A(d) has the heading "Mandatory 60-day extension." Although 60 days is a minimum duration, *see* § 7508A(d)(1) and (2), in keeping with the parties' arguments and for ease of discussion throughout, we will generally refer to a section 7508A(d) extension as lasting 60 days.

Fed. R. Civ. P. 52(a); *Pearson v. Commissioner*, 149 T.C. 424, 425 (2017). Petitioners resided in Ohio at all relevant times.[3]

Respondent issued petitioners a notice of deficiency dated December 2, 2019, in which respondent determined a $9,634 income tax deficiency and a $166 accuracy-related penalty under section 6662(a) for petitioners' taxable year 2018. The 90th day after December 2, 2019, was Sunday, March 1, 2020. The notice of deficiency specified the following day, March 2, 2020, as the last day to petition the Court. That date was not a Saturday, Sunday, or legal holiday in the District of Columbia. The parties agree that petitioners mailed their Petition to the Court on March 17, 2020.

Between March 19 and July 9, 2020, the Court did not receive mail because of the Court's closure in response to the Coronavirus Disease 2019 (COVID–19) pandemic. On July 10, 2020, the Court received and filed the Petition.

On March 13, 2020, the President of the United States declared a nationwide emergency under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207, as a result of the COVID-19 pandemic (Nationwide Emergency Declaration). *See* Letter to Federal Agencies on an Emergency Determination for the Coronavirus Disease 2019 (COVID–19) Pandemic Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 2020 Daily Comp. Pres. Doc. 159 (Mar. 13, 2020). The President also approved major disaster declarations for each of the 50 states pursuant to section 401 of the Stafford Act. On March 31, 2020, Pete Gaynor, the administrator of the Federal Emergency Management Agency (FEMA), at the direction of the President, signed DR–4507–OH (Ohio Disaster Declaration), which declared the State of Ohio a major disaster area. *See* Ohio; Major Disaster and Related Determinations, 85 Fed. Reg. 26,702 (May 5, 2020). As with each other state disaster declaration, the Ohio Disaster Declaration identified the pandemic conditions warranting

[3] Absent stipulation to the contrary, any appeal of this case would lie to the U.S. Court of Appeals for the Sixth Circuit. *See* § 7482(b)(1)(A), (2). Where relevant to the discussion, we note that court's precedent. *See Bontrager v. Commissioner*, 151 T.C. 213, 215 n.2 (2018); *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

the declaration as "beginning on January 20, 2020, and continuing." *See id.* at 26,703.

The Internal Revenue Service (IRS) subsequently issued a series of notices in which the stated purpose was to provide relief under section 7508A(a) pursuant to the Nationwide Emergency Declaration. Section 7508A(a) generally gives the Secretary of the Treasury (Secretary) or his delegate (i.e., the IRS) the discretion to postpone certain tax-related deadlines for up to one year for those taxpayers he or it determines to be affected by a federally declared disaster.[4] Included in this series of IRS notices was I.R.S. Notice 2020-23, 2020-18 I.R.B. 742, which was issued on April 11, 2020.[5] Among other specified deadline extensions, Notice 2020-23 extended the deadline for filing a Tax Court petition to July 15, 2020, for those taxpayers who had a petition due to be filed on or after April 1, 2020, and before July 15, 2020. *Id.* at 743–44. Notice 2020-23 specified, however, that it did not provide relief for the period for filing a petition if that period expired before April 1, 2020. *Id.* at 744.

On September 2, 2020, respondent filed the Motion on the ground that the Petition was not filed within the time prescribed by section 6213(a) or section 7502. Section 6213(a) provides, in pertinent part, that a taxpayer may file a petition with the Court for a redetermination of a deficiency within 90 days after the notice of deficiency is mailed, not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day. Section 7502 generally allows a timely mailed petition to be treated as timely filed.

On October 8, 2020, petitioners filed a Response to respondent's Motion. Proceeding pro se, petitioners stated in the Response that they did not receive a copy of respondent's Motion and requested a copy. Thereafter, on October 19,

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[4] When discussing the conferee of discretion in section 7508A(a), we hereinafter refer to the Secretary and IRS interchangeably. *See* § 7701(a)(11)(B), (12)(A)(i).

[5] Also included in this series were, e.g., I.R.S. Notice 2020-17, 2020-15 I.R.B. 590 (postponing the due date for making federal income tax payments), I.R.S. Notice 2020-18, 2020-15 I.R.B. 590 (postponing the due date for filing federal income tax returns), and I.R.S. Notice 2020-20, 2020-16 I.R.B. 660 (postponing the due date for filing federal gift and generation-skipping transfer tax returns and making federal gift and generation-skipping transfer tax payments).

2020, petitioners filed a First Supplement to their Response to respondent's Motion. In the First Supplement, petitioners stated: "We suggest the Tax Court has jurisdiction to hear our case, and to mitigate to 'zero' the IRS assessment and return the withheld refunds. We request the Tax Court to set a trial date in Columbus, OH."

On November 19, 2020, counsel entered an appearance on petitioners' behalf and filed petitioners' Supplemental Objection to respondent's Motion. In that filing, petitioners contended that section 7508A(d) operated in conjunction with the Ohio Disaster Declaration to extend the deadline to file their Petition. Subsection (d) was added to section 7508A on December 20, 2019, and made effective with respect to federally declared disasters declared after that date. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. Q, § 205, 133 Stat. 2534, 3245–46 (2019). On January 13, 2021, the Treasury Department and the IRS proposed regulations with respect to section 7508A(d). *See* Prop. Treas. Reg. § 301.7508A-1(g), 86 Fed. Reg. 2607, 2613 (Jan. 13, 2021). On February 12, 2021, respondent filed a reply to petitioners' supplemental objection, disputing that section 7508A(d) applies in this case. On June 11, 2021, the Treasury Department and the IRS issued final regulations with respect to section 7508A(d). *See* Treas. Reg. § 301.7508A-1(g); T.D. 9950, 86 Fed. Reg. 31,146, 31,150 (June 11, 2021). The final regulations were issued following notice and comment procedures. *See* T.D. 9950, 86 Fed. Reg. at 31,147; Prop. Treas. Reg. § 301.7508A-1, 86 Fed. Reg. at 2607–08. In correspondence with subsection (d), the final regulations were made effective with respect to disasters declared on or after December 21, 2019. *See* T.D. 9950, 86 Fed. Reg. at 31,149–50.

On August 29, 2023, the Court ordered the parties to address the applicability of the final regulations to this case and the deference, if any, to be given to the regulations. On October 31, 2023, the parties filed their respective simultaneous briefs. On November 6, 2023, the Court permitted the parties to file simultaneous answering briefs, which were filed by respondent and petitioners on November 30, 2023, and December 1, 2023, respectively.

Respondent contends that the final regulations apply to this case, they are entitled to deference under *Chevron, U.S.A.,*

Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and petitioners did not timely file their Petition under their provisions. Petitioners agree that *Chevron* provides the proper framework for the Court to review the regulations and that the deadline to file their Petition was not extended under the regulations. They contend, however, that the Petition was timely filed under all reasonable constructions of section 7508A(d) and that Treasury Regulation § 301.7508A-1(g)(1) and (2) is invalid.

Discussion

I. *The Statutory and Regulatory Text*

We first set forth the relevant statutory and regulatory text.

A. *Section 7508A*

Section 7508A, as in effect when petitioners' Petition was filed, provided as follows:

> Sec. 7508A. Authority to postpone certain deadlines by reason of Presidentially declared disaster or terroristic or military actions
>
> (a) In general.—In the case of a taxpayer determined by the Secretary to be affected by a federally declared disaster (as defined by section 165(i)(5)(A)) or a terroristic or military action (as defined in section 692(c)(2)), the Secretary may specify a period of up to 1 year that may be disregarded in determining, under the internal revenue laws, in respect of any tax liability of such taxpayer—
>
> (1) whether any of the acts described in paragraph (1) of section 7508(a) were performed within the time prescribed therefor (determined without regard to extension under any other provision of this subtitle for periods after the date (determined by the Secretary) of such disaster or action),
>
> (2) the amount of any interest, penalty, additional amount, or addition to the tax for periods after such date, and
>
> (3) the amount of any credit or refund.
>
> (b) Special rules regarding pensions, etc.—In the case of a pension or other employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by a disaster or action described in subsection (a), the Secretary may specify a period of up to 1 year which may be disregarded in determining the date by which any action is required or permitted to be completed under this title. No plan shall be treated as failing to be operated in accordance with the terms of the plan solely as the result of disregarding any period by reason of the preceding sentence.
>
> (c) Special rules for overpayments.—The rules of section 7508(b) shall apply for purposes of this section.

(d) Mandatory 60-day extension.—

(1) In general.—In the case of any qualified taxpayer, the period—

(A) beginning on the earliest incident date specified in the declaration to which the disaster area referred to in paragraph (2) relates, and

(B) ending on the date which is 60 days after the latest incident date so specified, shall be disregarded in the same manner as a period specified under subsection (a).

(2) Qualified taxpayer.—For purposes of this subsection, the term "qualified taxpayer" means—

(A) any individual whose principal residence (for purposes of section 1033(h)(4)) is located in a disaster area,

(B) any taxpayer if the taxpayer's principal place of business (other than the business of performing services as an employee) is located in a disaster area,

(C) any individual who is a relief worker affiliated with a recognized government or philanthropic organization and who is assisting in a disaster area,

(D) any taxpayer whose records necessary to meet a deadline for an act described in section 7508(a)(1) are maintained in a disaster area,

(E) any individual visiting a disaster area who was killed or injured as a result of the disaster, and

(F) solely with respect to a joint return, any spouse of an individual described in any preceding subparagraph of this paragraph.

(3) Disaster area.—For purposes of this subsection, the term "disaster area" has the meaning given such term under subparagraph (B) of section 165(i)(5) with respect to a Federally declared disaster (as defined in subparagraph (A) of such section).

(4) Application to rules regarding pensions.—In the case of any person described in subsection (b), a rule similar to the rule of paragraph (1) shall apply for purposes of subsection (b) with respect to—

(A) making contributions to a qualified retirement plan (within the meaning of section 4974(c)) under section 219(f)(3), 404(a)(6), 404(h)(1)(B), or 404(m)(2),

(B) making distributions under section 408(d)(4),

(C) recharacterizing contributions under section 408A(d)(6), and

(D) making a rollover under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3).

(5) Coordination with periods specified by the Secretary.—Any period described in paragraph (1) with respect to any person (including by reason of the application of paragraph (4)) shall be in addition to (or concurrent with, as the case may be) any period specified under subsection (a) or (b) with respect to such person.

B. *Treasury Regulation § 301.7508A-1(g)*

The final regulations issued with respect to section 7508A(d) set forth, in pertinent part, the following rules as to its operation:

> Treas. Reg. § 301.7508A-1(g) Mandatory 60-day postponement—
>
> (1) In general. In addition to (or concurrent with) the postponement period specified by the Secretary in an exercise of the authority under section 7508A(a) to postpone time-sensitive acts by reason of a federally declared disaster, qualified taxpayers (as defined in section 7508A(d)(2)) are entitled to a mandatory 60-day postponement period during which the time to perform those time-sensitive acts is disregarded in the same manner as under section 7508A(a). The rules of this paragraph (g)(1) apply with respect to a postponement period specified by the Secretary under section 7508A(b), to postpone acts as provided in section 7508A(d)(4). Except for the acts set forth in paragraph (g)(2) of this section, section 7508A(d) does not apply to postpone any acts.
>
> (2) Acts postponed. The time-sensitive acts that are postponed for the mandatory 60-day postponement period are the acts determined to be postponed by the Secretary's exercise of authority under section 7508A(a) or (b). In addition, in the case of any person described in section 7508A(b), the time-sensitive acts postponed for the mandatory 60-day postponement period include those described in section 7508A(d)(4):
>
> (i) Making contributions to a qualified retirement plan (within the meaning of section 4974(c)) under section 219(f)(3), 404(a)(6), 404(h)(1)(B), or 404(m)(2);
>
> (ii) Making distributions under section 408(d)(4);
>
> (iii) Recharacterizing contributions under section 408A(d)(6); and
>
> (iv) Making a rollover under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3).

II. *The Parties' Contentions, In General*

Respondent contends that, because they did not mail their Petition until March 17, 2020, petitioners failed to file their Petition within the time prescribed by sections 6213(a) and 7502 and the Court therefore lacks jurisdiction to redetermine the income tax deficiency determined for their taxable year 2018. *See Hallmark Rsch. Collective v. Commissioner*, 159 T.C. 126 (2022) (reaffirming that a timely filed petition is a prerequisite to the Court's exercise of jurisdiction in a deficiency case); *see also Sanders v. Commissioner*, 161 T.C. 112 (2023) (reaffirming the Court's holding in *Hallmark Rsch. Collective*). Petitioners contend that section 7508A(d) entitled them to an automatic, mandatory postponement of time to file

until March 21, 2020, and that their Petition was therefore timely. The parties' dispute centers on the proper interpretation of section 7508A(d) and whether Treasury Regulation § 301.7508A-1(g)(1) and (2) provides a valid construction of the statute.

Section 7508A(d)(1) provides that, in the case of any "qualified taxpayer," the period beginning on the earliest incident date specified in the declaration to which the relevant disaster area relates and ending on the date which is 60 days after the latest incident date so specified "shall be disregarded in the same manner as a period specified under [section 7508A(a)]." Section 7508A(d)(2)(A) defines a "qualified taxpayer" to include an individual whose principal residence is located in a disaster area. Section 7508A(d)(3), by cross-reference to section 165(i)(5)(A) and (B), defines a disaster area as an area determined by the President to warrant federal assistance under the Stafford Act. Petitioners contend that they are qualified taxpayers because they resided in Ohio at all relevant times.

Petitioners argue that Congress clearly intended section 7508A(d) to operate in a mandatory and automatic manner and, therefore, the Secretary's interpretation of section 7508A(d) fails under *Chevron* step 1. Specifically, petitioners contend that section 7508A(d) provides a mandatory extension of the deadlines and gives no discretion to the Secretary. In effect, petitioners argue that section 7508A(d)(1) provides an unambiguously self-executing postponement period that, by virtue of its "shall be disregarded in the same manner as a period specified under [section 7508A(a)]" language, incorporates all of the acts referenced by section 7508A(a). Section 7508A(a) references "any of the acts described in paragraph (1) of section 7508(a)." Section 7508(a)(1) generally postpones the time for performing certain tax-related acts, including the filing of a petition with the Court for a redetermination of a deficiency, for individuals serving in a combat zone for the U.S. Armed Forces.[6] *See* § 7508(a)(1)(C). Petitioners therefore conclude that they were entitled to

[6] As in effect when petitioners' Petition was filed, section 7508(a)(1) provided 11 categories of acts as follows:

(A) Filing any return of income, estate, gift, employment, or excise tax;

an automatic, mandatory 60-day postponement period from January 20, 2020, the earliest incident date specified in the Ohio Disaster Declaration,[7] to March 21, 2020, to file their Petition.[8]

In reaching this conclusion, petitioners interpret section 7508A(d) to provide for "a mandatory postponement period for taxpayers affected by federally declared disasters, separate from but complementing the discretionary postponement provision in section 7508A(a)." And, because Treasury Regulation § 301.7508A-1(g)(1) and (2) limits the acts subject to the mandatory postponement period of section 7508A(d) to "the

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(B) Payment of any income, estate, gift, employment, or excise tax or any installment thereof or of any other liability to the United States in respect thereof;

(C) Filing a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by the Tax Court;

(D) Allowance of a credit or refund of any tax;

(E) Filing a claim for credit or refund of any tax;

(F) Bringing suit upon any such claim for credit or refund;

(G) Assessment of any tax;

(H) Giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax;

(I) Collection, by the Secretary, by levy or otherwise, of the amount of any liability in respect of any tax;

(J) Bringing suit by the United States, or any officer on its behalf, in respect of any liability in respect of any tax; and

(K) Any other act required or permitted under the internal revenue laws specified by the Secretary . . . .

[7] Petitioners suggest that section 7508A(d)(1) does not require that the earliest and latest specified incident dates be different dates and that, because January 20, 2020, is the only incident date specified in the Ohio Disaster Declaration, it is both the earliest and latest specified date. Respondent raises no dispute in this regard.

[8] Petitioners calculate March 21, 2020, as the 60th day after January 20, 2020. Because 2020 was a leap year, however, we note that March 20, 2020, is in fact the 60th day after January 20, 2020.

We further note that on February 10, 2023, FEMA and the Department of Homeland Security amended the "notices of major disaster declarations and related determinations resulting from the . . . pandemic beginning on January 20, 2020." Major Disaster Declarations and Related Determinations: Expiration of COVID-19-Related Measures, 88 Fed. Reg. 8884 (Feb. 10, 2023). The amendments provided that "the incident period for all COVID-19 major disaster declarations and the nationwide emergency declaration will close effective May 11, 2023." *Id*. Because these amendments have no impact on the outcome of this case, we address them no further.

acts determined to be postponed by the Secretary's exercise of authority under section 7508A(a) or (b)," petitioners construe the regulations as "nullify[ing] subsection (d), in its entirety, and convert[ing] a mandatory provision to a permissive provision." Contending that the regulations thereby conflict with the statutory scheme and its legislative purpose, petitioners stake their position that the regulations are invalid under the *Chevron* standard.

Respondent contends that the "shall be disregarded in the same manner as a period specified under [section 7508A(a)]" language of section 7508A(d)(1) does not clearly provide a self-executing postponement period for the acts referenced by section 7508A(a) but that it is instead silent and ambiguous as to the acts to which the mandatory postponement period applies. To that end, respondent further contends that the statute is ambiguous in two ways: First, Congress did not address what specific time-sensitive acts are postponed pursuant to section 7508A(d), and second, Congress did not directly address federally declared disasters without an incident date under section 7508A. In respondent's view, the regulations are necessary to resolve these ambiguities.

Respondent contends that the regulations provide a permissible and reasonable construction of the statute that builds upon the "statutory nexus between the time-sensitive acts in I.R.C. § 7508A(a) and (d)." Consequently, he concludes that the regulations are entitled to *Chevron* deference. Respondent notes that the Secretary did not use his discretion under section 7508A(a) in response to the Ohio Disaster Declaration to postpone the time for petitioners to file a petition with the Court. Instead, he points us to the Nationwide Emergency Declaration on which the Secretary relied to issue Notice 2020-23. Because the Secretary relied on the Nationwide Emergency Declaration rather than the Ohio Disaster Declaration to extend certain timeframes pursuant to section 7508A(a), respondent argues that the Ohio Disaster Declaration does not trigger section 7508A(d). In his view, the regulations implement respondent's reading of section 7508A(d) and dictate that the Ohio Disaster Declaration did not extend the time for petitioners to file their Petition. We disagree.

III. *Chevron Analysis*

To interpret section 7508A(d) and consider whether Treasury Regulation § 301.7508A-1(g)(1) and (2) provides a valid construction of the statute, we turn to *Chevron* and its familiar two-step analysis. In *Chevron*, the Supreme Court provided the following framework for court review of an agency's authoritative construction of a statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842–43 (footnotes omitted).

At step 1 of the *Chevron* analysis, we must therefore ask whether Congress has directly spoken to the precise question at issue. *Id*. at 842. And, if we determine the statute is silent or ambiguous on the point, we proceed to *Chevron* step 2 where we ask whether the agency's answer is based on a permissible construction of the statute. *Id*. at 843. Consequently, we do not ask whether the agency's statutory interpretation is the best one possible. *See Atl. Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1998). Instead, we inquire only whether the agency made a reasonable policy choice in reaching its interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005); *see also Ohio Periodical Distribs., Inc. v. Commissioner*, 105 F.3d 322, 326 (6th Cir. 1997), *aff'g* T.C. Memo. 1995-496. And we defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44; *see also Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44 (2011) (confirming that *Chevron* deference applies to both specific authority and general authority Treasury regulations).

Turning here to *Chevron* step 1, we identify the precise question at issue as whether section 7508A(d) automatically

entitles a qualified taxpayer to a mandatory extension to file a petition with the Tax Court in the context of a federal disaster declaration containing an incident date. To determine whether Congress has spoken to this question, we consider the "plain" and "literal" language of the statute itself, the specific context in which the language is used, and the broader context of the statute as a whole. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Allen v. United States*, 83 F.4th 564, 569 (6th Cir. 2023). In so doing, we employ the traditional tools of statutory construction, including the canons of construction.[9] *See Chevron*, 467 U.S. at 843 n.9; *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 904 (6th Cir. 2021); *Sunrise Coop., Inc.*, 891 F.3d at 656.

Petitioners argue that section 7508A(d) unambiguously provides a self-executing postponement period for all of the tax-related acts included in section 7508(a)(1) by cross-reference to section 7508A(a). In their view, the contrast of the discretionary language of section 7508A(a) with the mandatory language of section 7508A(d) demonstrates that Congress intended these tax deadlines to be automatically extended when it added subsection (d). In support of this view, petitioners provide on brief the following table to illustrate the distinctions between the language of subsection (a) and subsection (d)(1):[10]

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[9] The Sixth Circuit has explained that "[w]hen a statute is unambiguous, resort to legislative history and policy considerations is improper." *Sunrise Coop., Inc. v. USDA*, 891 F.3d 652, 658 (6th Cir. 2018) (quoting *Koenig Sporting Goods, Inc. v. Morse Rd. Co. (In re Koenig)*, 203 F.3d 986, 988 (6th Cir. 2000)). As we conclude *infra* that the statute at issue is unambiguous, we do not consider legislative history in our application of the canons of construction. *See Square D Co. & Subs. v. Commissioner*, 118 T.C. 299, 310 n.6 (2002) ("The extent to which extrinsic factors (i.e., factors outside the statutory language itself) may be considered in step 1 of a *Chevron* analysis may not be entirely clear . . . . In light of the position of the Court of Appeals, we do not consider legislative history as part of our analysis of step 1 of *Chevron* in the instant case."), *aff'd*, 438 F.3d 739 (7th Cir. 2006).

[10] Petitioners reproduced this table from a comment submitted with respect to the proposed regulations. *See* Jonathan L. Holbrook & Spencer F. Walters, Comment on Mandatory 60-Day Postponement of Certain Tax-Related Deadlines by Reason of a Federally Declared Disaster, at 5 (Mar. 14, 2021), https://www.regulations.gov/comment/IRS-2021-0002-0008 (choose "Download").

Aspect	***Subsection (a)***	**[*Subsection*] *(d)(1)***
Whether to disregard	Discretionary: "the Secretary **may** specify a period"	Automatic: "the period . . . **shall** be disregarded"
How long to disregard	Discretionary: "**up to** 1 year"	Automatic: "**beginning on** the earliest incident [date*] . . . and **ending on** the date which is 60 days after the latest incident date"
For whom to disregard	Discretionary: "a taxpayer **determined by the Secretary** to be affected"	Automatic: "**any** qualified taxpayer"
For what purposes to disregard	Discretionary: "a period . . . that **may** be disregarded in determining . . . any of the acts described in paragraph (1) of section 7508(a)[**] . . . the amount of any interest, penalty, additional amount, or addition to tax . . . and the amount of any credit or refund"	Automatic: "the period. . . *shall*[***] be disregarded in the same manner as a period specified under subsection (a)"

*Petitioners' brief incorrectly omitted this word.
**Petitioners' brief incorrectly refers to section 7508A(a) here.
***Emphasis added.

According to petitioners, respondent disregards "this clear difference in language between subsections (a) and (d)."

Respondent, in turn, contends that section 7508A(d) is silent and ambiguous "in at least two ways . . . . First, Congress did not identify the time sensitive acts subject to I.R.C. § 7508A(d). Second, Congress did not specify how the mandatory postponement in I.R.C. § 7508A(d) applies to a Federal disaster declaration without an incident date." Respondent first argues that the statute is ambiguous regarding whether a taxpayer has an automatic, mandatory postponement period for filing a Tax Court petition. Respondent contends this is so because, except for the rules regarding pensions described in section 7508A(d)(4), subsection (d) does not

specify the time-sensitive acts to be postponed during the mandatory postponement period but only that the period is to be disregarded "in the same manner as a period specified under subsection (a)." § 7508A(d)(1). Respondent disagrees with petitioners' reading of the statute to state that section 7508A(d) requires every act that the Secretary has discretion to postpone under section 7508A(a) to be independently postponed for a mandatory period under section 7508A(d), regardless of whether the Secretary actually postponed any acts under section 7508A(a). According to respondent, this approach "clearly was not required by the language" of the statute. Respondent also argues that the statute is ambiguous because Congress did not specify how the mandatory postponement period in section 7508A(d) applies to a federal disaster declaration without an incident date. Concluding that the statute is ambiguous for these two reasons, respondent urges us to move on to *Chevron* step 2.

A provision will be considered ambiguous where the disputed language is "reasonably susceptible of different interpretations." *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n.27 (1985); *see also Gun Owners of Am., Inc.*, 19 F.4th at 904–05 ("[B]oth terms admit of more than one interpretation—that is, they are ambiguous."); *All. for Cmty. Media v. FCC*, 529 F.3d 763, 778 (6th Cir. 2008); *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1351 (6th Cir. 1994). We conclude that, in the context of a federal disaster declaration containing an incident date, subsection (d) is not reasonably susceptible of different interpretations with respect to whether a qualified taxpayer is automatically entitled to a mandatory extension to file a petition with the Tax Court. We agree with petitioners that the natural reading of subsection (d) is that a qualified taxpayer is so entitled.

We first consider the mandatory nature of subsection (d). As the foregoing chart demonstrates, the mandatory language of subsection (d) stands in stark contrast to the discretionary language of subsection (a). Under the discretionary language of section 7508A(a), the Secretary may specify (1) whether a period is disregarded, (2) how long a period is disregarded, (3) for whom a period is disregarded, and (4) for what purposes a period is disregarded. The mandatory language of subsection (d), however, provides the Secretary no discretion

whatsoever regarding any of these four aspects of the extension. Instead, subsection (d) provides that, for a defined person, a defined period "shall be disregarded" in a defined manner. On the basis of the plain and literal language of the statute, we thus read Congress to have clearly intended to provide for a postponement period that is mandatory. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) (describing the "Mandatory/Permissive Canon").

The heading of subsection (d)—"Mandatory 60-day extension"—further confirms this reading. As has been established, "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *See Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947); *see also* § 7806(b) (providing that no "descriptive matter relating to the content of this title [shall] be given any legal effect"). They are, however, "'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Bhd. of R.R. Trainmen*, 331 U.S. at 529); *United States v. Nakhleh*, 895 F.3d 838, 841 (6th Cir. 2018) (quoting *Almendarez-Torres*, 523 U.S. at 234). In the case of section 7508A(d), the heading is not at any variance with the text. The language of subsection (d) speaks of the defined postponement period in mandatory terms, and the heading uses the term "mandatory" itself. Consequently, this is an instance in which the heading is of some use for interpretative purposes, and it supports our reading of the statute. *See Caltex Oil Venture v. Commissioner*, 138 T.C. 18, 28 (2012); *see also* Scalia & Garner, *supra*, at 221 (describing the "Title-and-Headings Canon").

Having established our general understanding that section 7508A(d) creates a mandatory postponement period, we next consider whether the statute requires that this period automatically extend the date for filing a Tax Court petition by at least 60 days. Respondent argues that the statute is silent and hence ambiguous in this regard. Petitioners, meanwhile, contend that section 7508A(d)(1) provides an unambiguously self-executing postponement period that, by virtue of the requirement

that the period "shall be disregarded in the same manner as a period specified under [section 7508A(a)]," incorporates all of the acts referenced by section 7508A(a), including the deadline to file a petition with the Tax Court.

Petitioners allow that "[a]t first glance it seems possible" the "in the same manner" language of subsection (d)(1) could be construed as ambiguous, referring either to the specific time-sensitive acts which may be postponed by operation of section 7508A(a) or to the process by which the Secretary grants a postponement under subsection (a). They argue, however, that full consideration of the statute makes clear that respondent's interpretation conflicts with both the plain wording and the mandatory and specific nature of subsection (d). Petitioners query: "Why would Congress provide qualified taxpayers with an automatic 60-day extension, only to have it limited, or even nullified if the Secretary doesn't act? That makes no sense."

We acknowledge that, in other statutory contexts, the phrase "in the same manner" has been construed as meaning "to use the same 'methodology and procedures.'" *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 545 (2012) (interpreting the section 5000A(g)(1) requirement that a "[s]hared responsibility payment" made with respect to minimum essential healthcare coverage "be assessed and collected in the same manner" as tax penalties); *Michigan v. DeVos*, 481 F. Supp. 3d 984, 992 (N.D. Cal. 2020) (interpreting the requirement of Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 18005, 134 Stat. 281, 568 (2020), that local educational agencies receiving certain funds "provide equitable services in the same manner" as provided under section 1117 of the Elementary and Secondary Education Act of 1965). We further acknowledge that the phrase has also been interpreted as ambiguous. *See Ass'n of Irritated Residents v. EPA*, 790 F.3d 934, 948 (9th Cir. 2015) (construing the 42 U.S.C. § 7410(k)(6) provision for the correction of an erroneous approval, disapproval, or promulgation by the Environmental Protection Agency "in the same manner as" such approval, disapproval, or promulgation as ambiguous with respect to whether the phrase imposed a procedural or substantive requirement); *see also Swallows Holding, Ltd. v. Commissioner*, 515 F.3d 162, 171 (3d Cir. 2008) (construing

the section 882(c)(2) requirement that certain returns be filed "in the manner prescribed in subtitle F" as ambiguous with respect to whether the term "manner" included an element of timeliness), *vacating and remanding* 126 T.C. 96 (2006). Upon conducting the required consideration of the plain and literal language of section 7508A(d), the specific context in which the language is used, and the broader context of the statute as a whole, however, we conclude that the "in the same manner" language of this statute is not "reasonably susceptible" of being interpreted to refer to the process or procedure by which the Secretary grants a postponement under subsection (a) or of demonstrating any ambiguity; instead, it provides for an unambiguously self-executing postponement period that incorporates all of the acts referenced by section 7508A(a).

To understand the requirement that the subsection (d) postponement period "shall be disregarded in the same manner as a period specified under subsection (a)," we necessarily look to section 7508A(a). Section 7508A(a) provides, in pertinent part: "In the case of a taxpayer determined by the Secretary to be affected by a federally declared disaster . . . , the Secretary may specify a period of up to 1 year that may be disregarded in determining . . . whether any of the acts described in paragraph (1) of section 7508(a) were performed within the time prescribed therefor." When we read the "shall be disregarded" language of subsection (d) in this context, the manner in which the subsection (d) postponement period must be treated becomes readily apparent. More specifically, the mandatory postponement period "shall be disregarded" "in determining, . . . whether any of the acts described in paragraph (1) of section 7508(a) were performed within the time prescribed therefor."

The plain and literal language of subsections (a) and (d) read together demonstrates that the deadlines for "any of the acts" described in section 7508(a)(1) "may" be disregarded under section 7508A(a) but that those deadlines "shall be disregarded" under section 7508A(d). Petitioners and respondent appear to agree that the "may" language of section 7508A(a) provides the Secretary with the discretion to postpone deadlines for any or all of the categories of acts identified by section 7508(a)(1). They dispute only whether

the "in the same manner" language carries this discretion over to the mandatory postponement period set forth by subsection (d) (or is simply silent on the matter). But, we see neither ambiguity nor silence in subsection (d) on the point. Instead, we see a near mirror image of section 7508(a).

Section 7508(a) provides that, for a defined person, a defined period "shall be disregarded" in a defined manner, i.e., in determining whether "any of the . . . acts [described in its paragraph (1)] was performed within the time prescribed therefor." We have readily construed that provision as requiring an extension of the time that includes a postponement of the period to file a petition with this Court. *See Stone v. Commissioner*, 73 T.C. 617, 620–21 (1980) ("Section 7508(a)(1)(C) excludes the period during which a member of the Armed Forces is present in a 'combat zone' in determining the time allowable for the filing of a petition with the Tax Court for a redetermination of a deficiency."); *Munoz v. Commissioner*, T.C. Memo. 2000-18, 79 T.C.M. (CCH) 1366, 1367 ("Section 7508(a)(1)(C) serves to extend the normal 90-day . . . period within which a petition must generally be filed by disregarding the time when a member of the Armed Forces is present in a combat zone . . . ."); *see also, e.g.*, *Hampton v. United States*, 513 F.2d 1234, 1246 (Ct. Cl. 1975) ("A Serviceman in combat is also given an automatic extension of time to perform certain acts under the revenue laws by virtue of § 7508 of the Code. . . . The postponement authorized under § 7508 generally applies to the filing of returns, the payment of any tax, the assessment of any tax, and the commencement of any suit."). We read the language and context of section 7508A(d) to lend itself just as readily to the same interpretation.

We also view the coordination provision of section 7508A(d)(5) as further bolstering this interpretation. Subsection (d)(5) provides that "[a]ny period described in [subsection (d)](1) with respect to any person (including by reason of the application of [subsection (d)](4)) shall be in addition to (or concurrent with, as the case may be) any period specified under subsection (a) . . . with respect to such person." We read the broad and inclusive language of this subsection to allow a mandatory extension described under section 7508A(d) to operate independently from any discretionary extension specified under section 7508A(a).

Having given full consideration to section 7508A(d) and its context, we must agree with petitioners that respondent's interpretation conflicts with both the plain wording and the mandatory and specific nature of subsection (d). Postponement of any section 7508(a)(1) act would not be mandatory if it needed to be triggered by a discretionary act of the Secretary, who could use his discretion not to act at all. Instead, we think Congress's intent is clear. For a defined person (a "qualified taxpayer"), a defined period ("beginning on the earliest incident date . . . and . . . ending on the date which is 60 days after the latest incident date") "shall be disregarded in the same manner as a period specified under subsection (a)" of section 7508A, that is by mandatorily and automatically disregarding "whether any of the acts described in paragraph (1) of section 7508(a)," including the act of filing a petition with the Court, "were performed within the time prescribed therefor."[11]

Respondent also contends that the statute is ambiguous because it does not address federally declared disasters without an incident date. In support of this contention, respondent points to the Nationwide Emergency Declaration that did not specify an incident date. Respondent contends that "Congress did not address whether the mandatory 60-day postponement in subsection (d) applies to Federal disaster declarations that do not have an incident date. Therefore, I.R.C. § 7508A(d) is ambiguous with respect to Federal disaster declarations without an incident date, which satisfies the first step in the Chevron framework."

Petitioners, however, do not argue that they are entitled to a 60-day postponement with respect to the Nationwide Emergency Declaration. Instead, petitioners focus on the Ohio Disaster Declaration, which determined "that the emergency conditions in the State of Ohio resulting from the [COVID–19] pandemic beginning on January 20, 2020, and continuing, are of sufficient severity and magnitude to warrant a major disaster declaration under the [Stafford Act]." The precise

[11] Recall that a qualified taxpayer, in addition to one who principally resides in a disaster area, is defined to include, inter alia, "any taxpayer whose records necessary to meet a deadline for an act described in section 7508(a)(1) are maintained in a disaster area." § 7508A(d)(2)(D). This definition, which appears to sweep in records with respect to all of the categories described by section 7508(a)(1), offers additional and noteworthy context.

question at issue here addresses the context of a federal disaster declaration containing an incident date, and we conclude that Congress has directly spoken to that precise question. *See Chevron*, 467 U.S. at 842.

Petitioners' situation demonstrates that the Court's reading of section 7508A(d) does not render section 7508A(a) a nullity. Instead, by giving effect to every word that Congress used in the statute, it protects taxpayers like them with the required "mandatory 60-day extension" while the Secretary considers whether and how to exercise his discretion under subsection (a). *See Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985); *see also* Scalia & Garner, *supra*, at 174 (describing the "Surplusage Canon"). Having concluded that section 7508A(d) unambiguously provides for a mandatory, automatic extension of at least 60 days for the time to file a petition with the Tax Court, we conclude that deference to Treasury Regulation § 301.7508A-1(g)(1) and (2) is unwarranted, and we hold Treasury Regulation § 301.7508A-1(g)(1) and (2) invalid to the extent it limits the nonpension-related "time-sensitive acts that are postponed for the mandatory 60-day postponement period . . . [to] the acts determined to be postponed by the Secretary's exercise of authority under section 7508A(a)."[12] *See Chevron*, 467 U.S. at 842–43.

Respondent's regulation, promulgated after the petition in this case was filed, cannot change the result dictated by an unambiguous statute. *See, e.g.*, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021) ("[A]s this Court has long made plain, pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'" (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2118 (2018)); *Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). We do not reach *Chevron* step 2.

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[12] The parties do not address the validity of Treasury Regulation § 301.7508A-1(g)(1) and (2) as to section 7508A(b) and (d)(4), and their pension-related provisions; accordingly, in reaching this holding, neither do we.

IV. *Conclusion*

As in effect when petitioners' Petition was filed, section 7508A(d)(1) provided that, in the case of any "qualified taxpayer," the period beginning on the earliest incident date specified in the declaration to which the relevant disaster area relates, and ending on the date which is 60 days after the latest incident date so specified, "shall be disregarded in the same manner as a period specified under [section 7508A(a)]." We have determined this language provides for an automatic and mandatory postponement period that incorporates all of the acts referenced by section 7508A(a), including the filing of a Tax Court petition for the redetermination of a deficiency, and interpret it to do so. The parties do not dispute that petitioners resided in Ohio at all relevant times. *See* § 7508A(d)(2). Petitioners are therefore qualified taxpayers entitled to an automatic 60-day postponement period starting from January 20, 2020, the earliest incident date specified in the Ohio Disaster Declaration, to at least March 20, 2020, to file their Petition.[13] The parties agree that petitioners mailed their petition to the Court on March 17, 2020. As petitioners' Petition was mailed on March 17, 2020, their Petition was timely and we have jurisdiction in this case. *See* § 7502. We will therefore deny respondent's Motion.

We have considered the parties' other arguments and, to the extent they are not discussed herein, find them to be irrelevant, moot, or without merit.

To reflect the foregoing,

An appropriate order will be issued.

Reviewed by the Court.

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[13] *See supra* notes 7 and 8. We need not, and therefore do not, express a view on what the outer limits of the extension period may be where a declaration omits an ending date or is extended. *See Stromme v. Commissioner*, 138 T.C. 213, 218 n.8 (2012). We note, however, that effective with respect to federally declared disasters declared after November 15, 2021, the extension period has been redefined to end "on the date which is 60 days after the later of . . . [the] earliest incident date . . . or the date such declaration was issued." *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 80501, 135 Stat. 429, 1335 (2021).

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

BUCH, *J.*, concurring.
JONES, *J.*, concurring.

BUCH, *J.*, concurring: I join the opinion of the Court with only a few additional observations. Following the parties' lead, the opinion of the Court reviews the issue before us under the familiar *Chevron* two-step framework, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and correctly concludes under that framework that Treasury Regulation § 301.7508A-1(g) is invalid to the extent it limits the acts subject to the mandatory postponement period of section 7508A(d). I note, however, that the continued viability of *Chevron* is under review. *See Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 325 (2023) (granting certiorari for the question of whether the Supreme Court should overrule *Chevron*). And we could reach the same conclusion without our heavy reliance on *Chevron*.

Over a century of precedent supports the unremarkable proposition that "[a] regulation to be valid must be reasonable and must be consistent with law." *Int'l Ry. Co. v. Davidson*, 257 U.S. 506, 514 (1922). Before *Chevron*, it was clear that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977). In recent years, the Supreme Court has held regulations to be inapplicable with only a fleeting reference to *Chevron*, *see, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066, 1080 n.3 (2019), or without referencing *Chevron* at all, *see, e.g.*, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021). And the Supreme Court has specifically stated that it "need not resort to *Chevron* deference . . . [when] Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018).

Regardless of whether the Supreme Court continues to adhere to or overrules *Chevron*, we would reach the same conclusion here. The Petition is timely under the mandatory

postponement period of section 7508A(d), and Treasury Regulation § 301.7508A-1(g) cannot change that result.

NEGA, ASHFORD, URDA, COPELAND, TORO, and GREAVES, *JJ.*, agree with this concurring opinion.

JONES, *J.*, concurring: I join the opinion of the Court in full. I write separately to underscore the consistency of the Court's analysis in *Hallmark Research Collective v. Commissioner*, 159 T.C. 126 (2022), and *Sanders v. Commissioner*, 161 T.C. 112 (2023), with our holding here as well as the overall statutory scheme, particularly the Anti-Injunction Act (AIA).

I. *Section 6213(a): Deficiency Jurisdiction*

The debate over the nature of the procedural requirement in section 6213(a) has intensified in the wake of the Supreme Court's decision in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022). Therein, the Supreme Court held that section 6330(d)(1)—the statute that imposes the procedural requirement for filing a petition with the Tax Court in a collection due process case—is a nonjurisdictional deadline subject to equitable tolling. *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1501. In doing so, the Supreme Court rejected the Commissioner's argument that the express jurisdictional text of section 6330(e)(1) suggested that the deadline under section 6330(d)(1) was also jurisdictional. *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1499–1500. The Supreme Court stated that while there were indicia that the Commissioner's interpretation may have been the better one, there was not a clear expression from Congress and the arguments highlighted the lack of clarity in the statute. *Id.* at 1499. Because section 6330(d)(1) was susceptible to multiple plausible interpretations, there was not a clear expression from Congress to imbue jurisdictional consequences. *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1498. Thus, the Supreme Court held that the statute is not jurisdictional. *Id.* at 1501.

Section 6213 is arguably similar to section 6330. Accordingly, in *Hallmark*, this Court was asked to consider the jurisdictional nature of section 6213(a) in light of the Supreme Court's decision in *Boechler*. *See Hallmark Rsch. Collective*,

159 T.C. at 126. We held that the 90-day deficiency deadline under section 6213(a) is jurisdictional, and therefore not subject to equitable tolling. *Hallmark Rsch. Collective*, 159 T.C. at 166–67. In doing so, the Court principally relied on the prior-construction canon and the lengthy "history of reenactments of and amendments to section 6213(a) [that] demonstrate[d] that Congress's intention [was] to provide an adequate but strict timeframe within which a taxpayer may file a deficiency petition in the Tax Court." *Id.* at 161; *see Sanders*, 161 T.C. at 118–19 (describing the prior-construction canon as the principal ground of our decision in *Hallmark*).

However, in *Culp v. Commissioner*, 75 F.4th 196, 205 (3d Cir. 2023), *petition for cert. filed*, No. 23-1037 (U.S. Mar. 19, 2024), the U.S. Court of Appeals for the Third Circuit held that the 90-day deadline to petition for redetermination of a tax deficiency is a nonjurisdictional deadline subject to equitable tolling. The Third Circuit relied significantly on the Supreme Court's analysis in *Boechler*. *See Culp v. Commissioner*, 75 F.4th at 200–04 (citing *Boechler* throughout the opinion). Highlighting the similarities between section 6330(d)(1) and section 6213(a), the Third Circuit reasoned that "[i]f the § 6330(d)(1) deadline in *Boechler* fell short of being jurisdictional, § 6213(a)'s limit must as well." *Culp v. Commissioner*, 75 F.4th at 201. The Court stated that there is no "clear tie between the deadline and the jurisdictional grant," *id.* at 201–02 (quoting *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1499), and that the remote possibility of a dismissal for untimeliness having preclusive effect in a section 7422 refund suit "does little to bolster the IRS's case for the deadline being jurisdictional," *Culp v. Commissioner*, 75 F.4th at 202; *see also* § 7459(d).

Thereafter, in *Sanders*, this Court was tasked with "thoroughly reconsider[ing] the problem in the light of the reasoning of the reversing appellate court and, if convinced thereby, . . . follow[ing] the higher court." *Sanders*, 161 T.C. at 118 (quoting *Lawrence v. Commissioner*, 27 T.C. 713, 716–17 (1957), *rev'd on other grounds*, 258 F.2d 562 (9th Cir. 1958)). In doing so, we declined to follow the Third Circuit's interpretation and reaffirmed our decision in *Hallmark* to conclude that section 6213(a) imposes a jurisdictional deadline in all

cases except those appealable to the Third Circuit. *Sanders*, 161 T.C. at 119–20.[1]

Today, the opinion of the Court holds that section 7508A(d) provides for an unambiguously self-executing postponement period for certain acts set forth in section 7508(a), including the filing of a petition for redetermination with the Tax Court. § 7508(a)(1)(C); *see* op. Ct. p. 165. This position is consistent with the Court's prior decisions in *Hallmark* and *Sanders* that the deadline under section 6213(a) is jurisdictional, because unlike equitable exceptions, statutory exceptions to jurisdictional deadlines are of course permissible. Moreover, our prior decisions in *Hallmark* and *Sanders* are further undergirded by the jurisdictional nature of the AIA, codified under section 7421(a), as I explain below.

II. *Section 7421(a): The Anti-Injunction Act*

The AIA was first enacted in 1867, and it has remained continuously in effect and largely unamended since then. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 731 n.6 (1974) (comparing text of Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475, with section 7421(a)). Now codified in section 7421(a), the statute provides:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

For those who consider legislative history relevant, *Warger v. Shauers*, 574 U.S. 40, 48 (2014), the AIA has no recorded legislative history, "but its language could scarcely be more explicit," *Bob Jones Univ.*, 416 U.S. at 736. The Supreme Court has interpreted the principal purpose of the AIA as the "protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Id.*

[1] The Solicitor General recently filed a petition for a writ of certiorari in *Culp*, asking the Supreme Court to review and reverse the Third Circuit's decision. Petition for Writ of Certiorari at 10, *Commissioner v. Culp*, No. 23-1037 (U.S. Mar. 19, 2024). As of this writing, a response is due on April 18, 2024.

at 736–37 (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)). In short, "[t]he object of [section] 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes."[2] *Williams Packing & Navigation Co.*, 370 U.S. at 5.

Historically, the government has had broad power to collect taxes, and the AIA has served as a critical component of the statutory scheme by limiting the power of taxpayers to seek pre-enforcement judicial review. *See* § 7421(a). "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund," *NFIB*, 567 U.S. at 543 (citing *Williams Packing & Navigation Co.*, 370 U.S. at 7–8), and several courts have characterized the constraints of the AIA as jurisdictional, *see Bob Jones Univ.*, 416 U.S. at 749. The AIA has "almost literal effect," thereby depriving courts of jurisdiction over any suit for the purpose of restraining the assessment or collection of any tax. *Id.* at 737, 749; *see also Maze v. IRS*, 862 F.3d 1087, 1091 (D.C. Cir. 2017); *Cohen v. United States*, 650 F.3d 717, 729 (D.C. Cir. 2011). In *Williams Packing & Navigation Co.*, 370 U.S. at 7, the Supreme Court stated that if the judicial exception to the AIA did not apply then "the District Court is without jurisdiction, and the complaint must be dismissed." And more recently, at least two courts of appeals have stated that the AIA is jurisdictional. *See Rocky Branch Timberlands LLC v. United States*, No. 22-12646, 2023 WL 5746600, at *1 (11th Cir. Sept. 6, 2023) ("When the Anti-Injunction Act applies, it deprives federal courts of jurisdiction." (quoting *United Mine Workers of Am. Combined Benefit Fund v. Toffel (In re Walter Energy, Inc.)*, 911 F.3d 1121, 1136 (11th Cir. 2018)), *cert. denied*, No. 23-614, 2024 WL 674784 (U.S. Feb. 20, 2024); *Optimal Wireless LLC v. IRS*, 77 F.4th 1069, 1073

[2] The AIA does not apply in every situation, but rather the AIA "kicks in when the target of a requested injunction is a tax obligation—or stated in the Act's language, when that injunction runs against the 'collection or assessment of [a] tax.'" *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1590 (2021). Where a suit does not run against a tax at all, the AIA has no applicability. *Id.* at 1593. A suit seeking relief from a separate legal mandate that is only backed up by a tax provision is not a dispute over taxes. *Id.*; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 543–44 (2012) (distinguishing between a "tax" and a "penalty").

(D.C. Cir. 2023) (stating that the AIA "'deprive[s] the District Court of jurisdiction' when it applies" (alteration in original) (quoting *Bob Jones Univ.*, 416 U.S. at 749)).

III. *The Relationship Between Sections 6213(a) and 7421(a)*

When considering the procedural requirement imposed by section 6213(a), we must consider the "text, context, and relevant historical treatment" of the provision. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). While Congress must make a clear statement evidencing the procedural requirement's jurisdictional effect, *see id.*, Congress need not "make its clear statement in a single section or in statutory provisions enacted at the same time," *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 144 S. Ct. 457, 466 (2024) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000)). The relationship between sections 6213(a) and 7421(a) provides important context when considering the jurisdictional nature of section 6213(a) and reveals Congress's clear expression of the statute's jurisdictional effect.

To better protect taxpayers' rights, Congress established what is now section 6213(a) as a limited exception to the AIA. Revenue Act of 1924, ch. 234, § 274, 43 Stat. 253, 297. Thus, 57 years after enacting the AIA, Congress amended the statutory scheme to create a limited exception to the default rule, which permits a taxpayer to sustain a challenge to taxes only after the amounts are paid and the taxpayer sues for a refund. *Compare* Act of Mar. 2, 1867, § 10, 14 Stat. at 475, *with* Revenue Act of 1924, § 274, 43 Stat. at 297. *See also* § 7422; *Williams Packing & Navigation Co.*, 370 U.S. at 7–8; *Hallmark Rsch. Collective*, 159 T.C. at 134. In a deficiency proceeding before this Court, taxpayers are afforded the opportunity to seek prepayment de novo review of the IRS's deficiency determination. *Hallmark Rsch. Collective*, 159 T.C. at 134, 165. But review under section 6213 occurs within the broader statutory scheme that is framed by the jurisdictional constraints of the AIA, codified under section 7421(a).

Specifically, section 7421(a) provides: "Except as provided in section[] . . . 6213(a), . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." And section 6213(a) provides: "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 . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency."

If a "taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a) [of section 6213, i.e., within the 90 or 150-day deadline], 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." § 6213(c). A taxpayer's failure to file suit within the prescribed period triggers the Government's duty to assess and collect the tax. *See id.*; *see also Hallmark Rsch. Collective*, 159 T.C. at 161–62 n.29. Thus, any suit subsequently filed with the Tax Court (such as one sustained through the application of equitable tolling) would restrain the government's ability to assess a tax that it had the right to assess when the taxpayer failed to timely petition the Court.[3] Such a suit would therefore exceed the jurisdictional limits imposed by section 6213(a) and the AIA and violate the restrictions imposed by the AIA. *See* § 7421(a); *Bob Jones Univ.*, 416 U.S. at 736–37 (citing *Williams Packing & Navigation Co.*, 370 U.S. at 7).

IV. *Conclusion*

But for the limited exceptions provided therein, section 7421 provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The foregoing demonstrates that the opinion of the Court is consistent with the Court's analysis in *Hallmark* and *Sanders*, as well as the context of the statutory framework established by the AIA.

BUCH, NEGA, URDA, COPELAND, and TORO, *JJ.*, agree with this concurring opinion.

GREAVES, *J.*, agrees with Part I of this concurring opinion.

[3] By contrast, the Court's holding here does not raise such a concern, because section 7508A(d) provides a statutory extension to the section 6213(a) deadline. Suits filed timely under section 7508A(d) are therefore filed "as provided in section[] . . . 6213(a)" for purposes of the AIA. § 7421.

RAJU J. MUKHI, PETITIONER *v*. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 4329-22L. Filed April 8, 2024.

P filed a petition with this Court challenging R's notice of determination related to approximately $11 million of foreign reporting penalties under I.R.C. §§ 6038(b) and 6677. The parties filed cross-motions for summary judgment on the issues of whether the settlement officer violated P's right to due process under the Fifth Amendment to the U.S. Constitution, whether the settlement officer abused his discretion in rejecting collection alternatives, and whether the penalties violated the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution. *Held*: The settlement officer did not violate P's Fifth Amendment due process rights or his rights under I.R.C. § 6320 or 6330. *Held, further*, the settlement officer did not abuse his discretion in rejecting P's collection alternatives that were significantly below his reasonable collection potential. *Held, further*, R lacked authority to assess the penalties under I.R.C. § 6038(b) and therefore cannot proceed with collection actions as they relate to these penalties. *Held, further*, penalties imposed under I.R.C. § 6677 are not fines and therefore do not implicate the Excessive Fines Clause.

Sanford J. Boxerman and *Michelle F. Schwerin*, for petitioner.

Randall L. Eager, *Alicia H. Eyler*, and *William Benjamin McClendon*, for respondent.

OPINION

GREAVES, *Judge*: This collection due process (CDP) case is before the Court on petitioner's Motion for Summary Judgment, filed December 29, 2022, and respondent's Motion for Partial Summary Judgment, filed January 4, 2023. The parties seek summary adjudication of the following issues: (1) whether the settlement officer violated petitioner's right to due process under the Fifth Amendment, (2) whether the settlement officer abused his discretion in rejecting petitioner's offers-in-compromise, and (3) whether the section 6038(b) and 6677 penalties violated the Excessive Fines Clause of the Eighth Amendment.[1] For the reasons set forth below, we answer the first two questions and the third question as it

[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (Code), in effect at all relevant times, regulation references are to the *Code of Federal Regulations*, Title 26 (Treas. Reg.), in

relates to the section 6677 penalties in the negative. We do not reach the Excessive Fines Clause analysis as it relates to the section 6038(b) penalties.

Background

The following facts are based on the parties' pleadings and motion papers, the attached declarations and exhibits, and the administrative record. *See* Rule 121(c). They are stated solely for purposes of deciding the parties' motions and not as findings of fact in this case. *See Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). Petitioner resided in Missouri when he timely filed the petition. The parties have stipulated that this case is appealable to the U.S. Court of Appeals for the Eighth Circuit.

On May 20, 2022, respondent filed a Motion to Consolidate this case with petitioner's related deficiency case at Docket No. 15315-19. On July 21, 2022, we granted the motion and consolidated the cases for trial, briefing, and opinion. Petitioner's Motion for Summary Judgment and respondent's Motion for Partial Summary Judgment relate exclusively to the collection due process case.

I. *Penalty Determination*

Between November 2001 and September 2005 petitioner created three entities: Sukhmani Partners II Ltd., a foreign corporation for U.S. tax purposes; Sukhmani Gurkukh Nivas Foundation, a foreign trust for U.S. tax purposes; and Gurdas International Ltd., a foreign trust for U.S. tax purposes. Through these entities, petitioner opened several foreign brokerage accounts. From 2005 through 2007 petitioner personally and through foreign entities transferred at least $9,729,249 to Gurdas International Ltd. From 2006 through 2008 petitioner withdrew at least $4,763,464 from Gurdas International Ltd.[2]

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effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

[2] The facts in this paragraph have been alleged by respondent and challenged by petitioner. The issues in this opinion do not implicate the veracity of transactions leading to the civil tax penalties. These alleged facts are stated solely for explanatory purposes.

On June 5, 2014, petitioner was indicted on two counts of subscribing to false U.S. individual income tax returns and four counts of willful failure to file reports of foreign bank and financial accounts (FBAR) related to the above-described transactions. Petitioner entered a guilty plea, admitting to one count of subscribing to false U.S. individual income tax returns and one count of failure to file an FBAR. The plea agreement expressly stated that it did not limit the rights of the U.S. Government to take any civil or administrative actions against petitioner, except as agreed regarding civil liability for failure to file an FBAR.

After the guilty plea, respondent began an examination of petitioner's liability for civil tax penalties related to the foreign entities. During the examination, petitioner filed under protest various international information returns related to his foreign investments. Between July 21, 2015, and January 13, 2016, petitioner filed Forms 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, related to his interest in Sukhmani Partners II Ltd. for tax years 2005 through 2013. On September 29, 2016, petitioner filed Forms 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, related to contributions petitioner made and distributions he received from Sukhmani Gurkukh Nivas Foundation for tax years 2005 through 2013. On the same day, petitioner filed Forms 3520–A, Annual Information Return of Foreign Trust With a U.S. Owner, disclosing his interest in Sukhmani Gurkukh Nivas Foundation for tax years 2005 through 2013.

At the conclusion of the examination, respondent issued a notice letter, dated September 6, 2017, informing petitioner that respondent assessed $5,072,449 in penalties under section 6677 for failure to timely file Form 3520 for tax years 2005 through 2008.[3] Respondent also assessed $5,920,419 in penalties under section 6677 for failure to timely file Form 3520–A for tax years 2005 through 2010. The next day respondent issued an additional letter informing petitioner that he assessed $120,000 in penalties under section 6038(b) for failure to timely file Form 5471 for tax years 2002 through 2013. This opinion will refer to the penalties under sections 6038(b) and 6677 collectively as foreign reporting penalties.

[3] All dollar amounts are rounded to the nearest dollar.

Both letters informed petitioner of his right to a postassessment conference. Petitioner filed a protest with the IRS Office of Appeals (Appeals Office).[4]

II. *Postassessment Conference*

The case was assigned to an Appeals officer (AO) in the Appeals Office, Area 11 (International Operations). AO verified that he had no prior involvement with petitioner. Between April 4, 2018, and March 25, 2019, AO reviewed petitioner's challenge to the foreign reporting penalties. His review included correspondence with petitioner and research related to petitioner's underlying liability challenge.

AO concluded his review and on May 9, 2019, issued two Letters 1277, Penalty Appeal Decision, which stated that there were no grounds for penalty abatement and that petitioner's case with the Appeals Office was closed. Respondent attached to the letters a copy of the Appeals Case Memorandum, detailing AO's determinations regarding each of petitioner's arguments.

III. *CDP Notices and Hearing*

During the postassessment conference, respondent began taking collection actions related to the foreign reporting penalties. Respondent issued CP90, Final Notice–Notice of Intent to Levy and Notice of Your Right to a Collection Due Process Hearing, dated July 9, 2018. Petitioner timely filed Form 12153, Request for a Collection Due Process or Equivalent Hearing, requesting a CDP hearing related to this notice. Petitioner checked the boxes on Form 12153 indicating that he was interested in an installment agreement and that he could not pay the balance. Petitioner also indicated that he wanted to challenge the underlying liability.

Respondent issued Letter 3172, Notice of Federal Tax Lien Filing and Your Rights to a Hearing under IRC 6320, dated November 27, 2018, related to the foreign reporting penalties. Petitioner timely filed Form 12153, requesting a CDP hearing based on this notice. On his request, petitioner indicated

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4 On July 1, 2019, the Internal Revenue Service Office of Appeals was renamed the IRS Independent Office of Appeals. *See* Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019).

that he was interested in an installment agreement and withdrawal of the lien. Petitioner also sought to challenge his underlying liability for the foreign reporting penalties. The two CDP requests were consolidated into one CDP hearing and assigned to a settlement officer (SO1). SO1 reviewed petitioner's requests and determined that he had no prior involvement with petitioner.

On June 6, 2019, SO1 issued Letter 4837, Appeals Received Your Request for Collection Due Process Hearing, confirming receipt of petitioner's CDP hearing request and scheduling a telephone conference for July 8, 2019. The letter also requested that petitioner submit financial information related to the requested collection alternatives. At the request of petitioner, the CDP hearing was rescheduled for August 14, 2019.

Before the CDP hearing, SO1 determined that the underlying liability challenge would need to be referred to International Operations for technical advice because the penalties related to foreign information reporting. At the CDP hearing, SO1 informed petitioner of this referral and delayed discussion of the underlying liability until he received International Operations' recommendation. The parties agreed to defer consideration of collection alternatives until the receipt of this recommendation. After the conference, petitioner submitted a completed Form 433–A, Collection Information Statement for Wage Earners and Self-Employed Individuals.

Before International Operations' recommendation was received, the case was reassigned to another settlement officer (SO2). SO2 received a message from International Operations that it had already considered petitioner's underlying liability and would not consider the arguments again. SO2 attempted to schedule an additional conference for November 7, 2019, but petitioner did not appear. On November 13, 2019, SO2 held a conference with petitioner. SO2 explained the International Operations message and requested financial information that would allow him to consider collection alternatives.

After this meeting, petitioner offered an installment agreement of $2,000 per month, which SO2 rejected because he was not aware of the submission of any financial information. SO2 later discovered that petitioner had provided financial information to SO1 and reviewed the submitted information in the light of petitioner's installment agreement offer. On

Form 433–A, petitioner reported that his individual equity in his assets, adjusted down to 80% of the value for potential tax consequences and withdrawal penalties, was $3,860,533. Petitioner reported that his total household income was $22,761 and his total monthly household expenses were $20,479. Thus, petitioner reported a net difference between his income and expenses of $2,282. After considering this financial information and petitioner's substantial assets, SO2 rejected petitioner's installment offer. Petitioner did not offer an alternative installment offer. Rather, petitioner informed SO2 that he would like to be considered for an offer-in-compromise (OIC), and SO2 agreed to consider such an offer.

Petitioner submitted two alternative OICs. On Form 656, Offer in Compromise, petitioner proposed a one-time payment of $1,000,000 and withdrawal of 22 refund lawsuits. In a letter to SO2, petitioner submitted an alternative OIC, which sought a global settlement of all outstanding tax issues by offering to liquidate specific assets and transfer the proceeds to the IRS, valued at approximately $2,672,717, and to withdraw 22 refund lawsuits. As part of the alternative OIC, petitioner also sought to be absolved from any income tax generated from the liquidation of these assets. The OICs were sent to the Centralized Offer in Compromise Unit (COICU) for review.

After petitioner sent his OICs, the CDP hearing was assigned to a new settlement officer (SO3). SO3 determined that he had no prior involvement and reviewed the casefile. After receiving the entire administrative file, SO3 determined that there were outstanding issues relating to the underlying liability. SO3 referred the case to International Operations, and it was assigned to AO to review the case. AO contacted SO3 and explained that he had already considered the issues and directed SO3 to the Appeals Case Memorandum. SO3 reviewed the Appeals Case Memorandum and conducted independent research of the cited sources and petitioner's file to determine whether he agreed with AO's determinations on the liabilities. SO3 determined that he agreed with AO's determinations regarding the underlying liability.

After this determination and the receipt of updated financial information, SO3 considered petitioner's OICs. SO3 reviewed COICU's recommendation on the OICs. COICU determined that petitioner's reasonable collection potential (RCP) was

$4,266,334. COICU also determined that petitioner's monthly income was $23,166. On the basis of this information, COICU recommended rejecting petitioner's OICs.

Considering the new financial information, SO3 determined that petitioner's RCP was $4,682,596. SO3 considered arguments petitioner raised to reduce the equity in the assets, including current inability to withdraw funds, but rejected these arguments because the discount applied to the Form 433–A accounted for these arguments. Averaging petitioner's last three years of income, SO3 determined that petitioner's monthly income was $20,214. Using the lower COICU RCP, SO3 determined that the OICs were insufficient because of the large equity petitioner had in assets.

SO3 scheduled a conference for November 11, 2021, which was rescheduled to November 17, 2021, in observation of Veterans Day. SO3 explained to petitioner his analysis regarding the adequacy of the OICs and the merits of the underlying liability challenges. After providing petitioner additional time to submit other financial documents, SO3 sustained the collection actions. SO3 issued a notice of determination, dated February 9, 2022.

Petitioner timely filed a petition in this Court asking for review of the notice of determination. In his petition he alleged a jurisdictional defect in that the notice of determination he received failed to include two attachments referenced in the notice: the Appeals Case Memorandum, detailing the resolution of the underlying liability challenges; and the calculations of his RCP. Additionally, petitioner contended that SO3 violated his Fifth Amendment due process rights by engaging with AO during the CDP hearing, that SO3 erred in concluding that he was liable for the foreign reporting penalties and the calculation of such penalties, that SO3 erred in denying his proposed collection alternatives, and that the foreign reporting penalties violated the Excessive Fines Clause.

On December 29, 2022, petitioner filed a Motion for Summary Judgment, asking this Court to decide as a matter of law that respondent violated his right to due process under the Fifth Amendment because SO3 was not independent. On January 4, 2023, respondent filed a Motion for Partial Summary Judgment. Respondent asked this Court to find as a matter of law that (1) the notice of determination was valid,

(2) SO3 did not violate petitioner's Fifth Amendment due process rights, (3) SO3 did not abuse his discretion in rejecting petitioner's OICs, and (4) the foreign reporting penalties do not violate the Excessive Fines Clause.[5] On February 7, 2023, respondent filed a Response to Motion for Summary Judgment. After an extension of time, petitioner submitted a Response to Motion for Partial Summary Judgment. Therein, he conceded that the notice of determination was valid but reserved the right to later challenge whether the attachments were included.

After the parties filed their respective motions, we held in a separate case that the IRS lacks the authority to assess the section 6038(b) penalty. *See Farhy v. Commissioner*, 160 T.C. 399, 403–13 (2023). The IRS later appealed *Farhy* to the U.S. Court of Appeals for the District of Columbia Circuit. *See Farhy v. Commissioner*, No. 23-1179 (D.C. Cir. filed July 24, 2023). Respondent filed a Notice of Judicial Ruling acknowledging the *Farhy* decision; however, neither party sought to supplement its respective motion.

On December 14, 2023, we ordered the parties to file briefs on the implication of *Farhy* for the current case and the necessity to reach the Excessive Fines Clause issue as it relates to the section 6038(b) penalty. In his brief, respondent argued that we should overrule *Farhy* and hold that he has the authority to assess penalties under section 6038(b). Following that approach, respondent argues we should resolve the Excessive Fines Clause issue. In contrast, petitioner argues that, if affirmed, *Farhy* resolves this case with respect to the section 6038(b) penalties. Petitioner has indicated his intent to request the Court to determine that respondent cannot proceed with the collection actions as they relate to the section 6038(b) penalties if *Farhy* is affirmed by the D.C. Circuit. Both parties agree that *Farhy* does not prevent this Court from determining whether the penalties under section 6677 violate the Excessive Fines Clause.

[5] Because both parties ask for summary adjudication on the Fifth Amendment claim, we will consider the motions together on this issue.

Discussion

I. *Jurisdiction to Review the Notice of Determination*

We are a court of limited jurisdiction, and we may exercise our jurisdiction only to the extent authorized by Congress. *See* § 7442; *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). In a CDP case our jurisdiction is predicated upon the issuance of a valid notice of determination. *See LG Kendrick, LLC v. Commissioner*, 146 T.C. 17, 28 (2016), *aff'd*, 684 F. App'x 744 (10th Cir. 2017). A valid notice of determination is "a written notice that embodies a determination to proceed with the collection of the taxes in issue." *Lunsford v. Commissioner*, 117 T.C. 159, 164 (2001). The notice of determination must specify the taxable period, liability, and collection action to which the notice relates. *See LG Kendrick, LLC*, 146 T.C. at 28. The notice must also include the settlement officer's determination as to whether the collection actions may proceed. *See Lunsford*, 117 T.C. at 165. A technical error in the notice of determination will not render it invalid unless the taxpayer is prejudiced or misled by the error. *See LG Kendrick, LLC*, 146 T.C. at 29; *John C. Hom & Assocs., Inc. v. Commissioner*, 140 T.C. 210, 213 (2013) ("Mistakes in a notice will not invalidate it if there is no prejudice to the taxpayer.").

Although petitioner conceded that the notice of determination was valid for purposes of these motions, we have an independent obligation to consider whether the notice of determination is valid because the parties may not confer jurisdiction on this Court by agreement or concession. *See LG Kendrick, LLC*, 146 T.C. at 27. The notice of determination specifies that the determination relates to the foreign reporting penalties, properly lists the years at issue, and specifies the lien and levy actions considered. The notice of determination expressly sets out that SO3 sustained the collection actions. These details alone make the notice of determination valid, regardless of whether the notice mailed to petitioner included the attachments. *See id.* at 28. Further, petitioner timely filed his petition with this Court and therefore was not prejudiced by any alleged error. *See Blue Lake Rancheria Econ. Dev. Corp. v. Commissioner*, 152 T.C. 90, 102 (2019) (holding that addressing a notice of determination to only one taxpayer did not prejudice the other taxpayers covered by the notice because

they timely filed a petition for review). Thus, the notice of determination is valid, and we have jurisdiction to review respondent's determination to sustain collection actions.

II. *Motion for Summary Judgment and Motion for Partial Summary Judgment*

A. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, unnecessary, and time-consuming trials. *See FPL Grp., Inc. & Subs. v. Commissioner*, 116 T.C. 73, 74 (2001). We may grant summary judgment where there is no genuine dispute of material fact and a decision may be rendered as a matter of law. *See* Rule 121(a)(2); *Elec. Arts, Inc. v. Commissioner*, 118 T.C. 226, 238 (2002). Furthermore, we construe the facts and draw all inferences in the light most favorable to the nonmoving party to decide whether summary judgment is appropriate. *See Bond v. Commissioner*, 100 T.C. 32, 36 (1993). The nonmoving party may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine dispute for trial. *See* Rule 121(d); *Bond*, 100 T.C. at 36.

Our decision in this case is appealable to the Eighth Circuit. *See* § 7482(b)(1)(G)(i), (2). That court has held that, where de novo review is not applicable, the scope of review in a CDP case is confined to the administrative record. *See Robinette v. Commissioner*, 439 F.3d 455, 459–62 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004). To the extent that our consideration is limited to the administrative record, as discussed below, "summary judgment serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Belair v. Commissioner*, 157 T.C. 10, 17 (2021) (quoting *Van Bemmelen v. Commissioner*, 155 T.C. 64, 79 (2020)).

B. *Standard of Review*

Section 6320(b) permits a taxpayer to challenge an IRS lien filing before the Appeals Office, and section 6320(c) (incorporating section 6330(d)) provides for Tax Court review of an Appeals Office determination. Section 6330(b) permits

a taxpayer to challenge a proposed levy before the Appeals Office, and section 6330(d) provides for Tax Court review of an Appeals Office determination. The Code does not prescribe the standard of review that this Court should apply in reviewing an IRS administrative determination in a CDP case; rather, we are guided by our precedents.

Where the validity of a taxpayer's underlying tax liability is properly at issue, we review the determination regarding the underlying liability de novo. *See Sego v. Commissioner*, 114 T.C. 604, 609–10 (2000). We review all other determinations for abuse of discretion. *See id.* at 610. Abuse of discretion exists when a determination is "arbitrary, capricious, or without sound basis in fact or law." *Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006). Section 6330(c)(2) permits a taxpayer to challenge "the existence or amount of the underlying tax liability" in a CDP hearing if he did not previously receive a notice of deficiency and did not have a prior opportunity to challenge the tax liability.

Neither the Code nor the regulations define "underlying tax liability." *See Montgomery v. Commissioner*, 122 T.C. 1, 7 (2004). Underlying tax liabilities include any amounts owed by the taxpayer pursuant to the tax laws, including the tax deficiency, additions to tax, and statutory interest. *See Katz v. Commissioner*, 115 T.C. 329, 339 (2000).

There is no dispute that petitioner was entitled to challenge his underlying liability because his postassessment conference had not concluded before his request for a CDP hearing. *See Perkins v. Commissioner*, 129 T.C. 58, 66–67 (2007). To determine whether to apply a de novo or an abuse of discretion standard of review to each issue, we must determine which, if any, of the issues relate to his underlying tax liability.

Petitioner's Fifth Amendment challenge to SO3's independence is not a challenge to his underlying tax liability. *See id.* at 69–71. Similarly, petitioner's challenge to SO3's rejection of his collection alternatives does not relate to his underlying tax liability. *See Robinette v. Commissioner*, 439 F.3d at 462–63; *Pough v. Commissioner*, 135 T.C. 344, 350 (2010). We will review these determinations for abuse of discretion and our review is limited to the administrative record. *See*

Robinette v. Commissioner, 439 F.3d at 459–62; *Sego*, 114 T.C. at 610.

As for petitioner's Excessive Fines Clause argument, it is not necessary to determine the standard of review. "Where, as here, we are faced with a question of law . . . , our holding does not depend on the standard of review we apply. We must reject erroneous views of the law." *Manko v. Commissioner*, 126 T.C. 195, 199 (2006); *see also Farhy*, 160 T.C. at 403; *Freije v. Commissioner*, 125 T.C. 14, 32–37 (2005) (setting aside a determination to proceed with collection because the Appeals officer's verification that the requirements of applicable law were met was "incorrect" because of an "error as a matter of law," specifically an assessment that was "simply invalid," and holding that a taxpayer's ability to dispute his underlying tax liability pursuant to section 6330(c)(2)(B) does not cure an invalid assessment).

C. *Due Process Rights Under the Fifth Amendment*

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Petitioner alleges that respondent violated his Fifth Amendment due process rights by (1) failing to provide a hearing in front of an impartial settlement officer as required by sections 6320(b)(3) and 6330(b)(3) and (2) taking a position in this litigation inconsistent with prior criminal proceedings.

As a preliminary matter, it should be noted that the Due Process Clause does not require respondent to conduct a hearing before his collection actions where there is an adequate opportunity for later judicial review. *See Phillips v. Commissioner*, 283 U.S. 589, 595–99 (1931); *Robinette v. Commissioner*, 439 F.3d at 458. However, with the enactment in 1998 of sections 6320 and 6330, Congress created certain pre-collection rights and privileges. Therefore, petitioner's Fifth Amendment challenges are more properly characterized as challenges to respondent's compliance with sections 6320 and 6330.

Sections 6320(b)(3) and 6330(b)(3) provide that a CDP hearing "shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified . . . before the first hearing." The Code does not define "no prior involvement." *See Harrell v. Commissioner*,

T.C. Memo. 2003-271, slip op. at 16, *supplemented by* T.C. Memo. 2003-312. However, the regulations provide that prior involvement includes "participation or involvement in a matter (other than a CDP hearing held under either section 6320 or section 6330) that the taxpayer may have had with respect to the tax and tax period shown on the CDP notice." *See* Treas. Reg. §§ 301.6320-1(d)(2), Q&A-D4, 301.6330-1(d)(2), Q&A-D4.

It is undisputed that SO3 had no prior involvement related to the tax liabilities for the years at issue. Further, the parties do not dispute that SO3 was required to refer this matter to International Operations because petitioner's challenge to his underlying liability involved international reporting penalties. *See Internal Revenue Manual* (IRM) 8.7.3.7 (Oct. 1, 2012). Rather, the parties dispute whether AO's communication with SO3 during the CDP hearing violated sections 6320(b)(3) and 6330(b)(3). AO clearly had prior involvement in the dispute of the foreign reporting penalties via his participation in the postassessment conference. AO was the Appeals officer assigned to petitioner's postassessment conference and rendered the final decision not to abate the foreign reporting penalties. We must determine whether AO is deemed to have "conducted" the CDP hearing as contemplated by sections 6320(b)(3) and 6330(b)(3).

We have considered a similar situation in which an OIC was reviewed by an attorney who had prior involvement. *See Isley v. Commissioner*, 141 T.C. 349, 367 (2013). In that case a settlement officer referred a proposed OIC to the IRS Office of Chief Counsel as required by policy. *Id.* The attorney in the IRS Office of Chief Counsel who received the proposed OIC had previously worked on tax issues related to the taxpayer's prior bankruptcy. *Id.* After reviewing the OIC, the attorney recommended denying the OIC in a memorandum to the settlement officer. *Id.* We determined that the attorney's involvement did not cause him to become "the de facto Appeals officer" conducting the hearing, and thus section 6330(b)(3) did not apply to him. *Id.* We went on to hold that even if the attorney was the de facto Appeals officer, he did not have prior involvement with the specific tax years at issue. *Id.*

The rationale in *Isley* is equally compelling in this case. AO was not present during any of the conferences with petitioner, and the record does not indicate that he had extensive

conversations with SO3. After SO3 was informed that AO was assigned to the underlying liability issue, communication between the two appears limited to AO informing SO3 that he had previously considered the issues and directing SO3 to the memorandum he had previously drafted. AO logged a mere 45 minutes in his case activity report once he was assigned to the CDP hearing. As with the attorney in *Isley*, we do not find that this limited involvement with the CDP hearing made AO the "de facto Appeals officer" conducting the hearing. Rather, SO3 was the settlement officer to which section 6330(b)(3) applies.

Furthermore, there is no evidence that AO's involvement impeded SO3's impartiality. After SO3 received the memorandum, he compared the issues in the memorandum to those raised by petitioner and determined that they were identical. SO3 then reviewed AO's analysis and researched the law AO had relied upon and consulted the record. Only after this research, SO3 determined that he agreed with AO's findings on the underlying liability. SO3 exercised his independent authority to determine whether the foreign reporting penalties were properly assessed. Therefore, any involvement by AO did not bear on SO3's impartiality.

Petitioner asserts that SO3 could not have performed a complete review of the underlying liability challenges because he logged three hours on the issue. In addition to the three hours that petitioner highlights, SO3 made other entries into his case report indicating he worked on the underlying liability issue but reported the time as zero. SO3's consideration of the issues, rather than the time spent, is the focus of our analysis. SO3's case report details how he considered each issue raised by petitioner and made a determination based on his research confirming AO's determination. Thus, petitioner's Fifth Amendment and CDP rights were not violated because of AO's limited involvement.

Petitioner raises one additional Fifth Amendment argument in his petition. Petitioner vaguely asserts: "Respondent's assertion of the Penalties was improperly inconsistent with its position in a prior proceeding involving Petitioner." Petitioner had an opportunity to further expand on this allegation in either his Motion for Summary Judgment or his Response to Motion for Partial Summary Judgment but failed to do

so. Assuming petitioner is arguing that his plea agreement precludes respondent's assertion of the foreign reporting penalties, we reject this argument because petitioner's guilty plea specifically stated that it did not limit the rights of the Government to pursue civil action against petitioner. Accordingly, respondent did not violate petitioner's Fifth Amendment due process rights or his rights under sections 6320 and 6330.

D. *Collection Alternatives: OICs*

Section 7122(a) authorizes the IRS to compromise an outstanding tax liability, and the regulations set forth three grounds for such a compromise: (1) doubt as to liability; (2) doubt as to collectibility; or (3) promotion of effective tax administration. *See* Treas. Reg. § 301.7122-1(b). Petitioner proposed to compromise his liability based on doubt as to collectibility. The Secretary may compromise a tax liability based on doubt as to collectibility where the taxpayer's assets and income render full collection unlikely. *See id.* para. (b)(2). Conversely, the IRS may reject an OIC where the taxpayer's RCP is greater than the amount he proposes to pay. *See Johnson v. Commissioner*, 136 T.C. 475, 486 (2011), *aff'd*, 502 F. App'x 1 (D.C. Cir. 2013). RCP is generally calculated by multiplying a taxpayer's monthly income available to pay taxes by the number of months remaining in the statutory period for collection and adding to that product the realizable net equity in the taxpayer's assets. *See id.* at 485.

A settlement officer is generally directed to reject offers substantially below the taxpayer's RCP. *See* Rev. Proc. 2003-71, § 4.02(2), 2003-2 C.B. 517, 517. In some cases, the Secretary will accept an offer of less than the RCP of the case if there are special circumstances. *See id.* Special circumstances are (1) circumstances demonstrating that the taxpayer would suffer economic hardship if the IRS were to collect from him an amount equal to the RCP of the case or (2) if no demonstration of such suffering can be made, circumstances justifying acceptance of an amount less than the reasonable collection potential of the case based on public policy or equity considerations. *See Murphy*, 125 T.C. at 309; IRM 5.8.11.3.1 (Oct. 4, 2019), 5.8.11.3.2.1 (Oct. 4, 2019).

SO3 did not abuse his discretion in rejecting petitioner's OICs because petitioner's offers were significantly less than

his RCP as determined by COICU and SO3.[6] COICU determined petitioner had an RCP of $4,266,334. SO3 reviewed this calculation, and based on updated financial information, increased petitioner's RCP to $4,682,596. SO3 determined that even using the lower COICU RCP, petitioner's OICs, valued at $1,000,000 and $2,672,717 respectively, were significantly lower than his RCP.

Petitioner argues that SO3 did not meaningfully review the OICs; however, the administrative record does not support this argument. SO3 performed an in-depth review of petitioner's financial documentation to determine his RCP. In reviewing petitioner's offers, SO3 adopted the RCP proposed by the COICU, which allotted petitioner $416,263 of net equity in assets from which to pay living expenses. SO3 communicated to petitioner his intent to reject the OICs and allowed petitioner additional time to submit a revised OIC or additional supporting documents. Petitioner did not provide either. SO3 also considered petitioner's arguments that he could not liquidate certain assets and needed to retain assets for his support but determined that liquidity issues were already factored into the RCP calculation by Form 433–A. Although petitioner takes issue with this "mechanical" review of his OICs, this review is not arbitrary or capricious as it complies with the applicable IRS guidance relevant to analyzing an OIC. *See* Rev. Proc. 2003-71, § 4.02(2), 2003-2 C.B. at 517. Therefore, SO3 did not abuse his discretion in rejecting petitioner's OICs because petitioner's RCP greatly exceeded his OICs.

E. *Eighth Amendment Excessive Fines*

Section 6038(b)(1) imposes a penalty of $10,000 for each tax year for which a United States person does not file an information return disclosing ownership of a foreign corporation. Section 6677 imposes penalties for failure to file information returns related to foreign trusts. Section 6677 imposes a penalty for failure to file an information return disclosing ownership[7] of a foreign trust as required by section 6048(b).

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[6] Respondent also alleges that SO3 did not have to consider the alternative OIC because it was not submitted on the proper form. However, we could find no basis for this argument in SO3's case activity report.

[7] A person may be deemed the owner of a trust under the grantor trust rules of sections 671 through 679. *See* § 6048(b)(1).

See § 6677(a) and (b). For returns required to be filed by December 31, 2009, the penalty is equal to 5% of the gross value of the portion of the trust assets that a United States person is treated as owning. For returns required to be filed after December 31, 2009, the penalty is equal to the greater of $10,000 or 5% of the gross value of the portion of the trust assets that a United States person is treated as owning.

Section 6677 also imposes a penalty for failure to file an information return disclosing the transfer of money to a foreign trust as required by section 6048(a). *See* § 6677(a). For returns required to be filed by December 31, 2009, the penalty is equal to 35% of the gross value of property transferred. For returns required to be filed after that date, the penalty is equal to the greater of $10,000 or 35% of the gross value of property transferred.

Petitioner contends that the penalties imposed under sections 6038(b) and 6677 violate the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution. We consider the challenge to each penalty in turn.

1. *Section 6038(b) Penalties*

Petitioner asks that we find section 6038(b) unconstitutional; however, it is a well-established principle of constitutional law that we should "avoid[] unnecessary adjudication of constitutional issues." *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995); *see also Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) ("Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."); *United States v. Allen*, 406 F.3d 940, 946 (8th Cir. 2005) ("When we are confronted with several possible grounds for deciding a case, any of which would lead to the same result, we choose the narrowest ground in order to avoid unnecessary adjudication of constitutional issues."). While a court need not contort the law to find a nonconstitutional ground for deciding a case, we also cannot ignore a clear statutory ground for resolving the issue when it is looking us right in the face. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010) ("It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument

with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling."); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982) ("[T]his self-imposed limitation on the exercise of this Court's jurisdiction has an importance to the institution that transcends the significance of particular controversies.").

Here, there is an independent, nonconstitutional basis to resolve the issue of whether respondent's determination to sustain collection actions related to section 6038(b) was an abuse of discretion: Respondent lacks the authority to assess penalties under section 6038(b). *See Farhy*, 160 T.C. at 403–13. Respondent assessed penalties under section 6038(b) against petitioner without the authority to do so, which consequently means that respondent may not proceed with the collection of the section 6038(b) penalties from petitioner via the proposed levy or lien. *See Farhy*, 160 T.C. at 413. Therefore, there is no need to reach the constitutional issue of whether the penalties under section 6038(b) violate the Excessive Fines Clause.

Respondent argues that we should revisit and overrule our holding in *Farhy* because he believes it was decided incorrectly. We adhere to the doctrine of stare decisis and thus afford precedential weight to our prior reviewed and division opinions. *See Sanders v. Commissioner*, 161 T.C. 112, 118 (2023). Respondent's argument that *Farhy* was decided incorrectly is not sufficient justification alone to warrant reconsideration of its holding. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

Moreover, the mere fact that *Farhy* is currently on appeal at the D.C. Circuit is insufficient. This case is appealable to the Eighth Circuit, and therefore any ruling from the D.C. Circuit would not be binding on this proceeding. *See Golsen v. Commissioner*, 54 T.C. 742, 757 (1970) (stating that when a "squarely [o]n point" decision of the appellate court to which an appeal would lie contradicts our own precedent, we will follow the appellate court's decision), *aff'd*, 445 F.2d 985 (10th Cir. 1971). The Eighth Circuit has not spoken as to the question of whether the IRS has the authority to assess section 6038(b) penalties. Where we are not constrained by precedent of the pertinent court of appeals, we follow stare decisis and apply

our own precedent.[8] *See Lawrence v. Commissioner*, 27 T.C. 713, 716–17 (1957), *rev'd per curiam on other grounds*, 258 F.2d 562 (9th Cir. 1958).

We further see no reason to delay resolution of this issue until the resolution of the appeal in *Farhy* by the D.C. Circuit. Rule 121(g)(2) permits the Court to grant a motion for summary judgment on grounds not raised by the parties after notice and a reasonable time to respond. Our order to brief the implications of *Farhy* gave adequate notice of the possibility that we may grant partial summary judgment for petitioner on this issue, and both parties had reasonable time to respond in the form of their briefs. Respondent could not assess the penalties under section 6038(b), and therefore as a matter of law respondent may not proceed with the collection of the section 6038(b) penalties from petitioner via the proposed levy or lien. We will grant partial summary judgment on this issue in favor of petitioner.

2. *Section 6677 Penalties*

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). The touchstone of whether a fine violates the Excessive Fines Clause is the "principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Therefore, we must first determine whether the section 6677 penalties are fines and then if they are fines, whether they are excessive.

To determine whether a penalty is a fine, we must examine whether the penalty serves the purpose of punishing the offense. *See Austin*, 509 U.S. at 610. This Court has consistently found that the purpose of civil tax penalties and additions to

[8] To the extent the IRS had the authority to assess penalties under section 6038(b), the analysis on the Excessive Fines Clause issue would be identical to the section 6677 penalties analysis *infra*.

tax is to encourage voluntary compliance, and therefore they are not punitive. *See Thompson v. Commissioner*, 148 T.C. 59, 66 (2017) (holding that the civil fraud penalty under section 6662A is not punitive); *Ianniello v. Commissioner*, 98 T.C. 165, 187 (1992) (holding that the addition to tax under section 6653 is not punitive); *Bell Cap. Mgmt., Inc. v. Commissioner*, T.C. Memo. 2021-74, at *18 (holding that the civil fraud penalty under section 6663(a) is not punitive); *Gorra v. Commissioner*, T.C. Memo. 2013-254, at *63–64 (holding that gross valuation misstatement penalty under section 6662 is not punitive); *Mason v. Commissioner*, T.C. Memo. 2001-58, slip op. at 8 (holding that additions to tax under section 6651(a)(1) and (2) are not punitive).

Various other courts have agreed. In *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938), the Supreme Court analyzed whether a civil fraud penalty under the Revenue Act of 1928 was punishment or purely remedial in character. The Court found the penalty to be remedial, stating:

> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.

Id.; *see also Little v. Commissioner*, 106 F.3d 1445, 1454 (9th Cir. 1997) (declining to find that negligence and substantial understatement additions to tax under former sections 6653(a) and 6661 were fines because "[t]he additions to tax . . . are purely revenue raising because they serve only to deter noncompliance with the tax laws by imposing a financial risk on those who fail to do so"), *aff'g* T.C. Memo. 1993-281. In considering penalties under sections 6038(b) and 6677, other trial courts have found that the penalties serve a remedial purpose and are not fines. *See Dewees v. United States*, 272 F. Supp. 3d 96, 100–01 (D.D.C. 2017) (holding that penalties under section 6038(b) are not fines), *aff'd*, 767 F. App'x 4 (D.C. Cir. 2019); *In re Wyly*, 552 B.R. 338, 613 (Bankr. N.D. Tex. 2016) (determining that penalties under sections 6038(b) and 6677 are not fines).

Similarly, the U.S. Court of Appeals for the First Circuit has found that penalties related to failure to file an FBAR with the IRS are not fines. *See United States v. Toth*, 33 F.4th 1, 19

(1st Cir. 2022). The First Circuit reasoned that the FBAR penalties are not related to any criminal sanction but rather are imposed after the IRS determines that a taxpayer has failed to report a foreign bank account. *Id.* at 16. Additionally, FBAR penalties are related to fraud on the United States and loss to the public fisc. *Id.* at 17. The loss to the public fisc is caused not only by the lost tax revenue when these secret accounts are used for transactions but also by the great difficulty of law enforcement investigations into these accounts. *Id.* Finally, the fact that the penalty may be higher than the amount of tax owed on the concealed activity did not make the penalty a punishment. *Id.* at 18; *see also Mitchell*, 303 U.S. at 401 (finding that the Government could require an individual who had failed to pay his taxes to both pay the amount owed in taxes that had not been paid as well as impose a 50% penalty for willfully failing to pay those taxes).

Petitioner does not cite any relevant cases in support of his assertion that the section 6677 penalties violate the Excessive Fines Clause. Nothing in the text of the statute indicates that we should treat the section 6677 penalties differently from the other civil penalties. Like the civil penalties discussed above, the section 6677 penalties clearly serve the purposes of protecting revenue and reimbursing the Government for the heavy expense of investigation and fraud. The section 6677 penalties are primarily a method to safeguard the collection of revenue as without such reporting many foreign entities having U.S. tax effects would be difficult to find and monitor. The purposes of these penalties are clear in petitioner's case. As evident from the consolidated deficiency case related to the tax years and transactions that form respondent's basis for the penalties, petitioner's failure to comply with his reporting obligations allegedly allowed him to avoid his federal income tax liabilities for years.

Finally, petitioner attempts to stave off summary judgment by arguing that we should allow a trial on this issue to fully develop the record because the Eighth Circuit has not ruled whether the section 6677 penalties are fines and the law is unclear on the issue. While the Eighth Circuit has yet to rule on this precise issue, it has continued to apply *Mitchell* to determine that civil tax penalties are not punitive. *See, e.g.*, *Morse v. Commissioner*, 419 F.3d 829, 835 (8th Cir. 2005)

(determining in a Double Jeopardy case that section 6663 civil fraud penalties serve a remedial purpose), *aff'g* T.C. Memo. 2003-332. Additionally, we find the overwhelming volume of precedent holding that civil tax penalties are not fines compels our determination that the section 6677 penalties are not fines. Further, petitioner has not indicated what relevant facts he wishes to further develop for appeal.

Assuming arguendo that the Excessive Fines Clause is implicated, the section 6677 penalties are not so grossly disproportionate as to violate the Eighth Amendment. To pass the constitutional proportionality inquiry under the Excessive Fines Clause, the amount of the forfeiture or fine must bear some relationship to the gravity of the offense that it is designed to punish. *See Bajakajian*, 524 U.S. at 334. A fine violates the Excessive Fines Clause if "the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense." *Id.* at 337.

We have consistently held that similar penalties are not disproportionate to the fraud on the government and harm caused on the public fisc. *See Thompson*, 148 T.C. at 67–68 (holding that penalties under section 6662A were not fines and in the alternative that the 30% penalty was not grossly disproportionate); *Gorra*, T.C. Memo. 2013-254, at *62–63 (determining that the 40% gross misstatement penalties under section 6662(h) were not fines and in the alternative that the penalty was not grossly disproportionate); *see also United States v. Bussell*, 699 F. App'x 695, 696 (9th Cir. 2017) (holding without analysis that even if penalties for failure to report foreign bank accounts were fines, $1.2 million of penalties that represented 50% of the value of the undisclosed bank account were not grossly disproportionate to the fraud on the Government and harm to the public fisc). Accordingly, even if the section 6677 penalties are fines, they do not violate the Excessive Fines Clause.

We conclude that the notice of determination is valid, and therefore we have jurisdiction to review the notice of determination. SO3 did not violate petitioner's Fifth Amendment due process rights or CDP rights through his interactions with AO. SO3 also did not abuse his discretion in rejecting petitioner's OIC proposals. Further, the IRS lacks assessment authority related to the section 6038(b) penalties and therefore cannot

proceed with the collection actions as they relate to these penalties. Finally, the section 6677 penalties do not violate the Excessive Fines Clause.

Accordingly, we will grant respondent's Motion for Partial Summary Judgment, filed January 4, 2023, in part. We will deny petitioner's Motion for Summary Judgment, filed December 29, 2022. Independent of the motions, we will grant partial summary judgment in favor of petitioner on the issue of whether respondent may proceed with the collection actions as they relate to the section 6038(b) penalties.

To reflect the foregoing,

An appropriate order will be issued.