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March 22, 2024

Clerk of the Court
United States Tax Court
400 Second Street, N.W., Room 116
Washington, D.C. 20217

RE: Comment Request for Proposed Amendments to the Tax Court Rules of Practice and Procedure and Conforming Amendments

Thank you for the opportunity to submit comments on the Proposed Amendment to the Tax Court Rules of Practice and Procedure (“Proposed Amendment”) announced by the Chief Judge Kathleen Kerrigan on January 22, 2024, which address deleting Rule 13(c) and changes related to the Tax Court’s (“the Court’s”) jurisdiction.¹ The Tax Clinic at the Legal Services Center of Harvard Law School submits the following comments on behalf of our Clinic and the communities we serve.

We welcome the Court’s rule changes as reflecting the updated understanding of Tax Court jurisdiction articulated in *Boechler v. Commissioner*.² In response to the Chief Judge’s call for comments, we support the Court’s proposed rule changes and recommend a few additions to holistically reflect the current state of Tax Court jurisdiction.

Clinic Background

The Tax Litigation Clinic at Harvard Law School (“the Clinic”) was founded in 2015 by Professor Keith Fogg, who spent over thirty years at the Internal Revenue Service (“IRS”) in the Office of Chief Counsel. The Clinic is currently directed by Audrey Patten, who has over a decade of experience providing legal services to underserved communities. Clinic staff work with low- and moderate-income taxpayers from the Greater Boston area and nationwide to provide legal services related to issues before the IRS and Tax Court.³

Our clients regularly face systemic challenges that are interconnected with, and expand beyond, their tax concerns. Many speak English only as a second language, and some are recent immigrants with a limited understanding of the U.S. judicial structure. Poverty, homelessness,

¹ United States Tax Court, Press Release Announcing Proposed Amendments (Jan. 22, 2024), <https://www.ustaxcourt.gov/resources/press/01222024.pdf>.

² *Boechler v. Commissioner*, 596 U.S. 199 (2022). See also *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019); *Culp v. Commissioner*, 75 F.4th 196 (3rd Cir. 2023).

³ Tax Litigation Clinic, *Legal Services Center of Harvard Law School* (last accessed Mar. 15, 2024), <http://www.legalservicescenter.org/students-clinics/federal-tax-clinic/>.

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domestic violence, food insecurity, and physical and mental disabilities are just a few of the other challenges our clients face while dealing with their tax cases.

In our advocacy, we regularly represent individuals in a variety of Tax Court disputes, including petitions regarding notices of deficiency, innocent spouse claims, and reviews of collection due process determinations. While the Clinic assists its clients in navigating the unique procedural requirements of the Tax Court, many individuals arrive confused about the scope of their rights, the reality of Court deadlines, and the posture of their case.

This knowledge gap is made starker when considering that most petitioners in Tax Court do not have legal support in their cases. In FY 2022, 90% of petitioners acted *pro se* in Tax Court, according to the IRS Taxpayer Advocate Services.⁴ FY 2022 was by no means an anomaly: over the preceding 10 years, *pro se* representation accounted for 83.5% of cases heard by the Court.⁵ Given the high rate of *pro se* litigation and our clients' difficulties understanding Tax Court rules, the Clinic has an interest in providing taxpayers the reasonable procedural latitude required to avail themselves of the Tax Court's due process.

The Clinic also shares an interest with both taxpayers and the Tax Court in advocating for consistent and statutorily accurate procedure. As such, we commend the Court for its Proposed Amendment pursuant to recent decisions on Tax Court jurisdiction, as exemplified in *Boechler*. The comments below suggest moderate additions to the proposed rule to better align Tax Court procedure with the current scope of its authority.

Comment 1: Suggested Addition to Tax Court Rule 39

As discussed above, taxpayers are often confused about their rights when entering Tax Court. The Proposed Amendment makes laudable strides towards reducing confusion in the Rules of Practice and Procedure by removing the misleading jurisdictional language that "the Tax Court shall not have jurisdiction unless" enumerated statutory requirements are met.⁶ However, petitioners unfamiliar with the *Boechler* holding that permits equitable tolling in certain Tax Court disputes may still be unable to ascertain their right to equitable tolling under the Proposed Amendment.⁷

The Tax Court's mission includes being "committed to providing taxpayers, most of whom are self-represented, with a reasonable opportunity to appear before the Court, with as little inconvenience and expense as is practicable," and the Court seeks to minimize the confusion and

⁴ I.R.S., Taxpayer Advocate Service, 2022 Annual Report to Congress 184-85.

⁵ *Id.*

⁶ *See, e.g.*, T.C. R. P. 210.

⁷ *See Boechler*, 596 U.S. at 199.

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judicial delays presented by any procedural opacity.⁸ As such, we suggest the Proposed Amendment include an addition to Rule 39, underlined and in bold below, outlining petitioners' rights, when relevant, to equitable tolling:

“A party shall set forth in the party’s pleading any matter constituting an avoidance or affirmative defense, including *res judicata*, collateral estoppel, estoppel, waiver, duress, fraud, the statute of limitations, **and equitable tolling**. A mere denial in a responsive pleading will not be sufficient to raise any such issue.”⁹

Rule 39 already puts respondents on notice of their responsibility to raise “statute of limitations” claims as affirmative defenses to petitioners. It is therefore a matter of equity to give petitioners notice of their right to raise equitable tolling claims in response to statute of limitations claims. This addition is no mere formality. In *Culp v. Commissioner*, the Third Circuit Court of Appeals stated:

“True, they [petitioners] never argued equitable tolling in the Tax Court. But they had no occasion to do so. The statute of limitations defense is an affirmative defense that respondents must raise. *See Day v. McDonough*, 547 U.S. 198, 207–08 (2006). In the Tax Court, the Commissioner never argued that, if §6213(a) is not jurisdictional, the Court should still dismiss the Culp’s petition because the limitation period ran. Thus, because the parties’ squabble in the Tax Court was limited to whether the deadline is jurisdictional, the Culp’s had no logical reason to assert their claims may be tolled. As such, they neither forfeited nor waived this argument.”¹⁰

In its current form, neither Rule 39 nor the Proposed Amendment provide petitioners “logical reason to assert their claims may be tolled.” An addition to Rule 39 specifying the petitioners’ right to equitable tolling reduces the likelihood of the question encountered in *Culp*. There, the court appeared to conclude that equitable tolling was preserved principally because the Commissioner failed to argue that “the Court should still dismiss the Culp’s petition because the limitation period ran.” By inference, if the preservation of equitable tolling can be challenged given a respondent’s statute of limitations affirmative defense, then petitioners should be procedurally notified of the need to raise equitable tolling in response to statute of limitations claims.

Comment 2: Suggested Change to Tax Court Rule 330

Rule 330(b) of the Rules of Practice and Procedure addresses the Tax Court’s jurisdiction over lien and levy actions. The Proposed Amendment leaves Rule 330 untouched: “The Court shall

⁸ United States Tax Court, Mission Statement, (last accessed Mar. 15, 2024), <https://www.ustaxcourt.gov/mission.html>.

⁹ *See* T.C. R. P. 39.

¹⁰ *Culp*, 75 F.4th at 202.

have jurisdiction of a lien or levy action under this Title when the conditions of Code section 6320(c) or 6330(d), as applicable, have been satisfied.”¹¹ Section 6330(d)(1) concerns the Tax Court’s jurisdiction to hear collections due process petitions related to IRS levies.¹² The current Rule 330 mirrors the improved phrasing in the Proposed Amendment for other rules by identifying positive instances where Tax Court jurisdiction exists rather than using an exclusionary “only if” identifier for jurisdiction. However, the Court’s jurisdiction in disputes governed by the other rules addressed in the Proposed Amendment remains under review.¹³

By contrast, the Supreme Court made clear, even on the narrowest reading of *Boechler*, that “Section 6330(d)(1)’s 30-day time limit to file a petition for review of a collection due process determination is an ordinary, nonjurisdictional deadline subject to equitable tolling.”¹⁴ The Supreme Court’s intent to introduce equitable tolling in levy cases governed by Section 6330(d)(1) is made clearer by the opinion’s narrow focus on statutory language as the deciding factor for determining jurisdictional authority: “Whether this provision limits the Tax Court’s jurisdiction to petitions filed within the 30-day timeframe depends on the meaning of “such matter” as found in the statutory language of 6330(d)(1).”¹⁵ The Tax Court’s jurisdiction over lien cases, referenced in Rule 330 by pointing to 6320(c), also relies on the same narrow language: “For purposes of this section, subsections (c), (d) (other than paragraph (3)(B) thereof), (e), and (g) of section 6330 shall apply.”¹⁶

It is therefore apparent that the decision in *Boechler* extends equitable tolling to Tax Court cases governed by Section 6320(c) and Section 6330(d)(1). The Proposed Amendment should put both petitioners and respondents on notice of the decision to allow equitable tolling in levy and lien cases. We suggest the Proposed Amendment make the following addition, underlined and in bold below, to Rule 330(b):

“The Court shall have jurisdiction of a lien or levy action under this Title when the conditions of Code section 6320(c) or 6330(d), as applicable, have been satisfied. **The Court may consider equitable tolling principles in lien or levy actions under this Title.**”¹⁷

On a practical level, clarifying access to equitable tolling under Rule 330 will help petitioners avail themselves of rights in Tax Court. Indeed, an isolated statutory reading of Section 6330(d)(1) provides little clarity as to Tax Court jurisdiction. The Supreme Court in *Boechler* regularly referenced this lack of clarity in Section 6330(d)(1)’s language: “Where multiple

¹¹ T.C. R. P. 330.

¹² 26 U.S.C. § 6330(d)(1)

¹³ See, e.g., *Island Shoals Henry 430, LLC v. Comm’r of Internal Revenue*, No. 31759-21 (U.S.T.C. Feb. 6, 2023).

¹⁴ *Boechler*, 596 U.S. at 199.

¹⁵ *Id.*

¹⁶ 26 U.S.C. § 6320(c)

¹⁷ See T.C. R. P. 330.

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plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear.”¹⁸ If the Supreme Court finds Section 6330(d)(1) opaque, then it is likely that a large portion of the Tax Court’s majority *pro se* petitioners will as well. The proposed addition to Rule 330 above reduces this lack of clarity without extending Tax Court jurisdiction beyond the bounds articulated in *Boechler*.

Conclusion

We reiterate our thanks for the opportunity to submit comments on the Tax Court’s Proposed Amendment to its jurisdictional rules. We hope you will consider our recommendations considering a desire to ensure taxpayers have access to the resources required to justly pursue their Tax Court disputes.

Respectfully Submitted,

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¹⁸ *Boechler*, 596 U.S. at 200.