RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

Bruce A. McGovern
Professor of Law and Director, Tax Clinic
South Texas College of Law Houston
Houston, Texas 77002
Tele: 713-646-2920
e-mail: bmcgovern@stcl.edu

State Bar of Texas Tax Section
First Wednesday Tax Update
May 4, 2022

Note: This outline was prepared jointly with Cassady V. ("Cass") Brewer, Associate Dean and Professor of Law, Georgia State University College of Law, Atlanta, GA, and James M. Delaney, Centennial Distinguished Professor of Law at the University of Wyoming College of Law, Laramie, WY.

I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

A. Income

B. Deductible Expenses versus Capitalization

C. Reasonable Compensation

D. Miscellaneous Deductions

E. Depreciation & Amortization

1. Section 280F 2022 depreciation tables for business autos, light trucks, and vans. Rev. Proc. 2022-17, 2022-13 I.R.B. 930 (3/16/22). Section 280F(a) limits the depreciation deduction for passenger automobiles. For this purpose, the term "passenger automobiles" includes trucks and vans with a gross vehicle weight of 6,000 pounds or less. The IRS has published depreciation tables with the 2022 depreciation limits for business use of passenger automobiles acquired after September 27, 2017, and placed in service during 2022:

2022 Passenger Automobiles with § 168(k) first year recovery:

1st Tax Year	$19,200
2nd Tax Year	$18,000
3rd Tax Year	$10,800
Each Succeeding Year	$ 6,460

2022 Passenger Automobiles (no § 168(k) first year recovery):

1st Tax Year	$11,200
2nd Tax Year	$18,000
3rd Tax Year	$10,800

Each Succeeding Year	$ 6,460

For leased vehicles used for business purposes, § 280F(c)(2) requires a reduction in the amount allowable as a deduction to the lessee of the vehicle. Under Reg. § 1.280F-7(a), this reduction in the lessee's deduction is expressed as an income inclusion amount. The revenue procedure provides a table with the income inclusion amounts for lessees of vehicles with a lease term beginning in 2022. For 2022, this income inclusion applies when the fair market value of the vehicle exceeds $56,000.

F. Credits

G. Natural Resources Deductions & Credits

H. Loss Transactions, Bad Debts, and NOLs

I. At-Risk and Passive Activity Losses

III. INVESTMENT GAIN AND INCOME

IV. COMPENSATION ISSUES

V. PERSONAL INCOME AND DEDUCTIONS

A. Rates

B. Miscellaneous Income

C. Hobby Losses and § 280A Home Office and Vacation Homes

D. Deductions and Credits for Personal Expenses

1. Home mortgage interest is deductible despite the fact that the taxpayers received a discharge in bankruptcy, which converted the debt to nonrecourse debt, and sold their home in a short sale. Milkovich v. United States, 28 F.4th 1 (9th Cir. 3/2/22). The taxpayers purchased their home in Renton, Washington, using the proceeds of a mortgage loan and subsequently refinanced the loan. They later filed for Chapter 7 bankruptcy. The taxpayers received a discharge in the bankruptcy proceeding. The taxpayers and the government agreed that the effect of the discharge was to change their home mortgage loan from recourse to nonrecourse because it eliminated the ability of the lender, CitiMortgage, to enforce the mortgage debt personally against the taxpayers. Instead, the lender was able to enforce only the value of its lien against the property. The taxpayers were unable to make the mortgage payments and the value of their home was significantly less than their outstanding mortgage debt. Given this situation, the lender agreed to a short sale of the property, i.e., a sale for less than the amount of mortgage debt owed. From the sale, CitiMortgage received just over $522,000, of which it credited approximately $115,000 towards accumulated unpaid interest on the loan. CitiMortgage issued Form 1098 reporting the amount of mortgage interest paid and the taxpayers claimed a deduction for the mortgage interest, presumably on Schedule A of their return. The IRS mailed a notice of deficiency to the taxpayers disallowing their deduction of mortgage interest. The taxpayers never received the notice of deficiency because the IRS mailed it to the address of the home they had sold. The taxpayers paid the tax allegedly due and brought this action seeking a refund. The IRS argued in this litigation that the taxpayers' deduction for the mortgage interest was disallowed by § 265(a)(1), which disallows deductions "allocable to one or more classes of income ... wholly exempt from the taxes imposed by [subtitle A of the Code]." The U.S. District Court dismissed the taxpayers' refund action not on the basis of § 265(a)(1), but instead on the basis that they had engaged in a transaction that lacked economic substance analogous to the transaction in *Estate of Franklin v. Commissioner*, 544 F.2d 1045 (9th Cir. 1976). In *Estate of Franklin*, the taxpayer acquired property using the proceeds of nonrecourse debt that significantly exceeded the value of the property acquired. Although the taxpayer's situation in this case did not acquire their property using nonrecourse debt that exceeded the value of the property, the District Court reasoned that their position was analogous to that of the taxpayer in *Estate of Franklin* and therefore disallowed their mortgage interest deductions. In an opinion by Judge Collins, the U.S. Court of Appeals for the Ninth Circuit reversed the District Court's decision. According to the Ninth Circuit, the District Court erred in extending the holding of *Estate of Franklin* to the taxpayers' situation. There was no suggestion, the court observed that the taxpayers had acquired their mortgage loan in a transaction that lacked economic substance. According to the court:

> Nothing in *Estate of Franklin* suggests that, without more, a subsequent collapse in real estate values means that the now-underwater mortgage should be considered a sham debt that cannot support a mortgage interest deduction.

The fact that the discharge the taxpayers received in bankruptcy changed the debt to nonrecourse debt, the court reasoned, does not alter the fact the debt is bona fide debt that supports an interest deduction.

The court also rejected the government's argument that § 265(a)(1) disallowed the taxpayers' deduction. The court reviewed basic principles under which a taxpayer experiences discharge of indebtedness income if the taxpayer engages in a short sale of property subject to recourse indebtedness. In contrast, if the debt is nonrecourse, the entire amount of the debt is included in the taxpayer's amount realized. When the debt is nonrecourse and fully included in amount realized, the taxpayer does not experience cancellation of indebtedness. Accordingly, the taxpayers did not have any cancellation of indebtedness that was excluded from their income and therefore it was inappropriate to disallow their mortgage interest deduction under § 265(a)(1).

Dissenting opinion by Judge Stearns. Judge Stearns dissented, primarily on the basis that the taxpayers had not actually "paid" the mortgage interest in question.

E. Divorce Tax Issues

F. Education

G. Alternative Minimum Tax

VI. CORPORATIONS

A. Entity and Formation

B. Distributions and Redemptions

1. Tax Court holds management fees paid by C corporation to its shareholders were constructive dividends. Aspro, Inc. v. Commissioner, T.C. Memo. 2021-8 (1/21/21). The issue in this case was whether Aspro, Inc. (Aspro) was entitled to deduct management fees paid to its shareholders. Aspro was an Iowa C corporation for federal tax purposes and was engaged in the asphalt paving business. The company had three shareholders: Jackson Enterprises, Corp. (40%) (Jackson), Mannatt's Enterprises, Ltd. (40%), and Mr. Dakovich, Aspro's president (20%). In each year relevant to this dispute, the shareholders received, among other forms of payment, substantial management fees that Aspro deducted. In examining whether the payments were in fact distributions of earnings rather than compensation for services rendered, the Tax Court (Judge Pugh) turned for guidance to Reg. § 162-7(b)(1), which governs the classification of such payments. This regulation provides:

> Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services and the excessive payments correspond or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock.

The Tax Court concluded that Aspro had failed to show the management fees were paid purely or wholly for services and agreed with the IRS that Aspro could not deduct the fees. The Tax Court came to this conclusion for numerous reasons. Aspro did not enter into any written agreement and did not agree on any management fee rate or billing structure with any one or more of its shareholders. Rather, the board of directors approved management fees each year. The minutes of the board of directors meetings did not reflect how the directors determined to approve the management fees paid to the shareholders. The board did not attempt to value or quantify any of the management services performed. The management fees paid to each shareholder were approximately the same each year even though the services provided by each shareholder varied from year to year. The percentage of management fees paid roughly corresponded to each of the three shareholders' respective ownership interests. Aspro paid the management fees as a lump sum at the end of each year even though services were rendered throughout the year. Another circumstance that influenced the Tax Court was the coincidence that Aspro had very little income after deducting management fees. Finally, it was unfortunate for Aspro that none of the witnesses that testified could explain how the company had determined the appropriate amount of management fees. The testimony regarding how management fees were valued was vague and contradictory. No expert testimony was introduced to aid the court in establishing the reasonableness of the amounts paid for the purported management services. For these reasons, Aspro failed to prove that the management fees it had paid to shareholders qualified as compensation for services rendered.

Whether management fees along with other compensation paid to Mr. Dakovich was reasonable compensation. Having found at every turn that Aspro had failed to provide any evidence to support its deduction for management fees as compensation for services rendered, the court then turned to whether the payments to Mr. Dakovich in his capacity as president of the company were deductible as reasonable compensation. With respect to shareholder-employees, one approach to determining reasonable compensation commonly used by courts is a multi-factor test. *See, e.g.,* Charles Schneider & Co. v. Commissioner, 500 F.2d 148, 152 (8th Cir. 1974). The Tax Court relied on these factors and on the analysis in the report of the IRS's expert, Mr. Nunes (the Nunes Report), which the court found persuasive. Mr. Dakovich had decades of experience as Aspro's top executive. He had wide ranging duties and worked long hours. Only this factor was found to weigh in favor of treating Mr. Dakovich's compensation as reasonable. On the other hand, under the prevailing economic conditions, which were found to be stable, Aspro's sales declined by 7 percent. Further, the Nunes Report supported a finding that individuals with positions similar to Mr. Dakovich within the same industry had an upper quartile compensation rate substantially less than Mr. Dakovich did. Because the management fees paid to Mr. Dakovich were in addition to his salary, and his salary was in excess of that paid to individuals in comparable positions, this factor weighed heavily against treating the management fees as reasonable compensation. In computing compensation paid to shareholders as a percentage of net income before shareholder compensation is paid, the Tax Court found that Aspro's shareholder compensation was 90 percent, over 100 percent, and 67 percent of net income for the years in issue. These high percentages were found to weigh against treating the amounts paid to Mr. Dakovich as reasonable compensation. Finally, the Tax Court observed that Aspro had never paid dividends. By paying such high shareholder compensation, Aspro was less profitable than its industry peers. Low profits led to low retained earnings which, in turn, led to low returns for Aspro shareholders. Needless to say, the Tax Court found Mr. Dakovich's compensation to be unreasonably high.

Aftermath and observations. Because the management fees that Aspro paid to its shareholders did not constitute reasonable compensation, the court upheld the IRS's disallowance of the corporation's deductions and treated the management fees as nondeductible distributions to shareholders. The decision presents a roadmap of how not approach compensation of shareholders who provide services to the corporation. In the inverse, this case provides an excellent menu of how a closely held C corporation can structure reasonable compensation and avoid or survive a challenge by the IRS. Given the court's heavy reliance on the Nunes Report, one of the most important steps that might be taken is to seek a qualified valuation expert who can support the compensation paid by the corporation to a employee-shareholders in high level positions.

a. The Eighth Circuit agrees: management fees paid by C corporation to its shareholders were constructive dividends. Aspro, Inc. v. Commissioner, __ F.4th ___ (8th Cir. 4/26/22). In an opinion by Judge Gruender, the U.S. Court of Appeals for the Eighth Circuit has affirmed the Tax Court's decision that disallowed the deductions taken by Aspro, Inc., a subchapter C corporation, for "management fees" paid to its shareholders. As previously discussed, the corporation had three shareholders: Jackson Enterprises, Corp. (40%) (Jackson), Mannatt's Enterprises, Ltd. (40%) (Mannatt's), and Mr. Dakovich, Aspro's president (20%). The court first considered the management fees paid to Jackson and Mannatt's. The court concluded that the Tax Court had not clearly erred in finding that Aspro had failed to meet its burden to show that these management fees were reasonable. Aspro, the court observed, had failed to quantify the value of services provided, failed to produce documentary evidence of a service relationship with Jackson and Mannatt's, and produced no evidence of how it had determined the amount of the management fees. Further, the court agreed with the Tax Court that the management fees paid to Jackson and Mannatt's were not purely for services rendered and instead were disguised distributions of profit. The court noted that Aspro had not paid dividends since the 1970s and that the management fees were roughly proportional to the ownership interests of these two shareholders. The court next considered the management fees that Aspro had paid to its president, Mr. Dakovich, and concluded, for similar reasons, that Aspro could not deduct the management fees. According to the court, Aspro had not quantified the value of the management services provided by Mr. Dakovich. The government's expert, the court observed, had concluded that the salary and bonus that Aspro paid to him exceeded the industry average and median by a substantial margin and that the management fees, which were paid in addition to his salary and bonus, were not reasonable. In addition, the court noted, the sum of the management fees plus the excess salary and bonus paid to Mr. Dakovich was roughly proportional to his ownership interest in the corporation. Finally, the court concluded, the management fees paid to Mr. Dakovich were not purely for services rendered and instead were disguised distributions of profit:

> Aspro paid the management fees as lump sums at the end of the tax year even though the purported services were performed throughout the year, had an unstructured process of setting the management fees that did not relate to the services performed, and had a relatively small amount of taxable income after deducting the management fees.

Accordingly, the court concluded, the Tax Court did not clearly err in finding that Aspro had failed to carry its burden of showing that the management fees were reasonable and purely for services actually performed.

C. Liquidations

D. S Corporations

E. Mergers, Acquisitions and Reorganizations

F. Corporate Divisions

G. Affiliated Corporations and Consolidated Returns

H. Miscellaneous Corporate Issues

VII. PARTNERSHIPS

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

1. Is the IRS ever going to learn that the § 6751(b) supervisory approval requirement is not met unless the required supervisory approval of a penalty occurs *before* the initial determination that formally communicates the penalty to the taxpayer? Laidlaw's Harley Davidson Sales, Inc. v. Commissioner, 154 T.C. 68 (1/16/20). The taxpayer, a C corporation, failed to disclose its participation in a listed transaction as required by § 6011 and Reg. § 1.6011-4(a). The IRS revenue agent examining the taxpayer's return issued a 30-day letter to the taxpayer offering the opportunity for the taxpayer to appeal the proposal to the IRS Office of Appeals (IRS Appeals). The 30-day letter proposed to assess a penalty under § 6707A for failing to disclose a reportable transaction. Approximately three months after the 30-day letter was issued, the revenue agent's supervisor approved the penalty by signing a Civil Penalty Approval Form. Following unsuccessful discussions with IRS Appeals, the IRS assessed the penalty and issued a notice of levy. The taxpayer requested a collection due process (CDP) hearing with Appeals, following which Appeals issued a notice of determination sustaining the proposed levy. In response to the notice of determination, the taxpayer filed a petition in the Tax Court. In the Tax Court, the taxpayer filed a motion for summary judgment on the basis that the IRS had failed to comply with the supervisory approval requirement of § 6751(b). Section 6751(b)(1) requires that the "initial determination" of the assessment of a penalty be "personally approved (in writing) by the immediate supervisor of the individual making such determination." The Tax Court (Judge Gustafson) granted the taxpayer's motion. The court first concluded that the supervisory approval requirement of § 6751(b) applies to the penalty imposed by § 6707A. Next the court concluded that the supervisory approval of the §6707A penalty in this case was not timely because it had not occurred before the IRS's initial determination of the penalty. The parties stipulated that the 30-day letter issued to the taxpayer reflected the IRS's initial determination of the penalty. The supervisory approval of the penalty occurred three months later and therefore, according to the court, was untimely. The IRS argued that the supervisory approval was timely because it occurred before the IRS's *assessment* of the penalty. In rejecting this argument, the court relied on its prior decisions interpreting § 6751(b), especially *Clay v. Commissioner*, 152 T.C. 23 (2019), in which the court held in a deficiency case "that when it is 'communicated to the taxpayer formally … that penalties will be proposed', section 6751(b)(1) is implicated." In *Clay*, the IRS had issued a 30-day letter when it did not have in hand the required supervisory approval of the relevant penalty. The IRS can assess the penalty imposed by § 6707A without issuing a notice of deficiency. Nevertheless, the court observed "[t]hough Clay was a deficiency case, we did not intimate that our holding was limited to the deficiency context." The court summarized its holding in the present case as follows:

> Accordingly, we now hold that in the case of the assessable penalty of section 6707A here at issue, section 6751(b)(1) requires the IRS to obtain written supervisory approval before it formally communicates to the taxpayer its determination that the taxpayer is liable for the penalty.

The court therefore concluded that it had been an abuse of discretion for the IRS Office of Appeals to determine that the IRS had complied with applicable laws and procedure in issuing the notice of levy. The court accordingly granted the taxpayer's motion for summary judgment.

a. "We are all textualists now," says the Ninth Circuit. When the IRS need not issue a notice of deficiency before assessing a penalty, the language of § 6751(b) contains no requirement that supervisory approval be obtained before the IRS formally communicates the penalty to the taxpayer. Laidlaw's Harley Davidson Sales, Inc. v. Commissioner, 29 F.4th 1066 (9th Cir. 3/25/22), *rev'g* 154 T.C. 68 (1/16/20). In an opinion by Judge Bea, the U.S. Court of Appeals for the Ninth Circuit has reversed the decision of the Tax Court and held that, when the IRS need not issue a notice of deficiency before assessing a penalty, the IRS can comply with the supervisory approval requirement of § 6751(b) by obtaining supervisory approval of the penalty before assesement of the penalty provided that approval occurs when the supervisor still has discretion whether to approve the penalty. As previouosly discussed, the taxpayer, a C corporation, failed to disclose its participation in a listed transaction as required by § 6011 and Reg. § 1.6011-4(a). The IRS revenue agent examining the taxpayer's return issued a 30-day letter to the taxpayer offering the opportunity for the taxpayer to appeal the proposal to the IRS Office of Appeals (IRS Appeals). The 30-day letter proposed to assess a penalty under § 6707A for failing to disclose a reportable transaction. After the taxpayer had submitted a letter protesting the proposed penalty and requedting a conference with IRS Appeals, and approximately three months after the revenue agent issued the 30-day letter, the revenue agent's supervisor approved the proposed penalty by signing Form 300, Civil Penalty Approval Form. The Tax Court held that § 6751(b)(1) required the IRS to obtain written supervisory approval before it formally communicated to the taxpayer its determination that the taxpayer was liable for the penalty, i.e., before the revenue agent issued the 30-day letter. On appeal, the government argued that § 6751(b) required only that the necessary supervisory approval be secured before the IRS's *assessment* of the penalty as long as the supervisory approval occurs at a time when the supervisor still has discretion whether to approve the penalty. The Ninth Circuit agreed. In agreeing with the government, the court rejected the Tax Court's holding that § 6751(b) requires supervisory approval of the *initial* *determination* of the assessent of the penalty and therefore requires supervisory approval before the IRS formally communicates the penalty to the taxpayer. According to the Ninth Circuit, "[t]he problem with Taxpayer's and the Tax Court's interpretation is that it has no basis in the text of the statute." The court acknowledged the legislative history of § 6751(b), which indicates that Congress enacted the provision to prevent IRS revenue agents from threatening penalties as a means of encouraging taxpyers to settle. But the text of the statute as written, concluded the Ninth Circuit, does not support the interpretation of the statute advanced by the Tax Court and the taxpayer. The court summarized its holding as follows:

> Accordingly, we hold that § 6751(b)(1) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment. Since, here, Supervisor Korzec gave written approval of the initial penalty determination before the penalty was assessed and while she had discretion to withhold approval, the IRS satisfied § 6751(b)(1).

The court was careful to acknowledge that supervisory approval might be required at an earlier time when the IRS must issue a notice of deficiency before assessing a penalty because, "once the notice is sent, the Commissioner begins to lose discretion over whether the penalty is assessed." The IRS can assess the penalty in this case, imposed by § 6707A, without issuing a notice of deficiency.

Dissenting opinion by Judge Berzon. In a dissenting opinion, Judge Berzon emphasized that the 30-day letter the revenue agent sent to the taxpayer was an operative determination. The letter indicated that, if the taxpayer took no action in response, the penalty would be assessed. Judge Berzon analyzed the text of the statute and its legislative history and concluded as follows:

> In my view, then, the statute means what it says: a supervisor must personally approve the "initial determination" of a penalty by a subordinate, or else no penalty can be assessed based on that determination, whether the proposed penalty is objected to or not. 26 U.S.C. §§ 6751(b)(1). That meaning is consistent with Congress's purpose of preventing threatened penalties never approved by supervisory personnel from being used as a "bargaining chip" by lower-level staff, S. Rep. No. 105-174, at 65 (1998); see *Chai v. Commissioner*, 851 F.3d 190, 219 (2d Cir. 2017), which is exactly what happened here.

Because the 30-day letter was an operative determination, according to the dissent, "supervisory approval was required at a time when it would be meaningful-before the letter was sent."

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

F. Liens and Collections

1. The 30-day period for requesting review in the Tax Court of a notice of determination following a CDP hearing is jurisdictional and not subject to equitable tolling. Boechler, P.C. v. Commissioner, 967 F.3d 760 (8th Cir. 7/24/20), *aff'g* Boechler, P.C. v. Commissioner, No. 18578-17L (U.S. Tax Court (2/15/19)). Following a collection due process hearing, the IRS issued a notice of determination upholding proposed collection action. The notice informed the taxpayer, a law firm in Fargo, North Dakota, that, if it wished to contest the determination, it could do so by filing a petition with the United States Tax Court within a 30-day period beginning the day after the date of the letter. The IRS mailed the notice on July 28, 2017. The 30-day period expired on August 27, 2017, but because this date fell on a Sunday, the taxpayer had until the following day, August 28, to file his petition. The taxpayer mailed its petition to the Tax Court on August 29, 2017, which was one day late. The Tax Court (Judge Carluzzo) granted the government's motion to dismiss for lack of subject matter jurisdiction. On appeal, the taxpayer argued that the 30-day period specified in § 6330(d)(1) for filing his Tax Court petition should be equitably tolled. In an opinion by Judge Erickson, the U.S. Court of Appeals for the Eighth Circuit affirmed the Tax Court's decision. The court held that the 30-day period specified in § 6330(d)(1) is jurisdictional and therefore is not subject to equitable tolling. In reaching this conclusion, the court relied on the plain language of § 6330(d)(1), which provides:

> The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

This provision, the court reasoned, "is a rare instance where Congress clearly expressed its intent to make the filing deadline jurisdictional." According to the court, the parenthetical expression regarding the Tax Court's jurisdiction "is clearly jurisdictional and renders the remainder of the sentence jurisdictional." Because the 30-day period specified in § 6330(d)(1) is jurisdictional, the court concluded, it is not subject to equitable tolling. In reaching this conclusion, the court found persuasive the reasoning of the U.S. Court of Appeals for the Ninth Circuit in *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), in which the Ninth Circuit similarly held that the 30-day period specified in § 6330(d)(1) is jurisdictional and therefore not subject to equitable tolling. *See also Cunningham v. Commissioner*, 716 Fed. Appx. 182 (4th Cir. 2018) (holding that, assuming without deciding that the 30-day period specified in § 6330(d)(1) is not jurisdictional and therefore is subject to equitable tolling, the taxpayer had not established circumstances warranting equitable tolling). The Eighth Circuit found unpersuasive the taxpayer's reliance on *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019), in which the D.C. Circuit held that a similarly worded 30-day limitations period in § 7623(b)(4) for filing a Tax Court petition to challenge an adverse IRS determination regarding entitlement to a whistleblower award was not jurisdictional and was subject to equitable tolling.

a. We are sure that Justice Barrett was thrilled to be assigned to write, as one of her first opinions, an opinion on a technical issue of tax procedure. The U.S. Supreme Court has reversed the Eighth Circuit and held that the 30-day period for requesting review in the Tax Court of a notice of determination following a CDP hearing is not jurisdictional and is subject to equitable tolling. Boechler, P.C. v. Commissioner, ___ S. Ct. ___, 129 A.F.T.R.2d 2022-1489 (4/21/22). In a unanimous opinion by Justice Barrett, the U.S. Supreme Court has reversed the Eighth Circuit and held that the 30-day period specified in § 6330(d)(1) for requesting review in the Tax Court of a notice of determination following a CDP hearing is not jurisdictional and is subject to equitable tolling. The Court began with the proposition that a procedural requirement is jurisdictional only if Congress clearly states that the provision is jurisdictional. The provision in question, § 6330(d)(1), provides:

> The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

Although the parenthetical expression at the end of the provision refers to the Tax Court having jurisdiction, the Court reasoned that whether the provision is jurisdictional depends on whether the phrase "such matter" at the end of the provision refers to the entire first clause of the sentence (as the government argued) or instead refers to the immediately preceding phrase that states "petition the Tax Court" (as the taxpayer argued). In other words, the question is whether the provision indicates that the Tax Court has jurisdiction over the taxpayer's petition, or instead indicates that the Tax Court has jurisdiction only if the taxpayer complies with the 30-day period for requesting review. The Court reasoned that the provision "does not clearly mandate the jurisdictional reading," but that the non-jurisdictional reading "is hardly a slam dunk for Boechler." Nevertheless, the Court concluded that "Boechler's interpretation has a small edge." According to the Court, there are multiple plausible interpretations of the phrase "such matter," and "[w]here multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear." Further, the Court reasoned, other tax provisions enacted around the same time as § 6330(d)(1) are much more clear that the filing deadlines they contain are jurisdictional. For example, § 6015(e)(1)(A), which governs the filing of petitions in the Tax Court by taxpayers seeking innocent spouse protection, provides:

> In addition to any other remedy provided by law, the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section *if such petition is filed* … [within a 90-day period]

(Emphasis added.) Such provisions "accentuate the lack of clarity in § 6330(d)(1)."

Having concluded that the 30-day period specified in § 6330(d)(1) is not jurisdictional, the Court turned to the issue of whether this 30-day period is subject to equitable tolling. The Court previously had held in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), that non-jurisdictional limitations periods are presumptively subject to equitable tolling, and the Court saw "nothing to rebut the presumption here." The Court rejected the government's argument that the 30-day limitations period set forth in § 6330(d)(1) is similar to the limitations periods for filing claims for refund in § 6511, which the Court had held were not subject to equitable tolling in *United States v. Brockamp*, 519 U.S. 347 (1997):[1]

> Section 6330(d)(1)'s deadline is a far cry from the one in *Brockamp*. This deadline is not written in "emphatic form" or with "detailed" and "technical" language, nor is it reiterated multiple times. The deadline admits of a single exception (as opposed to *Brockamp's* six), which applies if a taxpayer is prohibited from filing a petition with the Tax Court because of a bankruptcy proceeding. §6330(d)(2). That makes this case less like *Brockamp* and more like *Holland v. Florida*, 560 U. S. 631 (2010), in which we applied equitable tolling to a deadline with a single statutory exception.

Accordingly, the Court reversed the judgment of the Eighth Circuit and remanded for further proceedings, which will require a determination of whether the taxpayer's circumstances warrant equitable tolling of § 6330(d)(1)'s 30-day period.

G. Innocent Spouse

1. If you miss the deadline to file a petition in the Tax Court seeking review of the IRS's denial of the taxpayer's request for innocent spouse protection, you just might want to submit a second request. If the IRS responds with a final determination regarding the second request, you can seek review by filing a petition in the Tax Court. Vera v. Commissioner, 157 T.C. 78 (8/23/21). The taxpayer filed joint returns with her then-husband for 2010 and 2013. She later submitted to the IRS a claim on Form 8857 seeking innocent spouse relief for 2013. The IRS issued a final determination denying her request. The taxpayer filed a petition in the Tax Court seeking review of this determination, but the Tax Court dismissed the petition for lack of jurisdiction because, pursuant to § 6015(e)(1), petitions seeking review of innocent spouse determinations must be filed no later than the 90th day after the date the IRS mails the determination, and the taxpayer had filed her petition on the 91st day after the IRS mailed the determination. The taxpayer later submitted to the IRS on Form 8857 a request for innocent spouse relief for 2010, but she included with her request a number of documents related to 2013, including the previous request for innocent spouse relief she had submitted for 2013. The IRS issued a final determination denying her request. The determination, issued as Letter 3288, Final Appeals Determination, referred in the header only to 2010, but the substance of the determination addressed both 2010 and 2013. For example, the letter stated "For tax year 2013, you didn't comply with all income tax laws for the tax years that followed the years that are the subject of your claim." The taxpayer filed a timely petition in the Tax Court seeking review of this determination and specified in her petition that she was contesting the determination as to both 2010 and 2013. The IRS moved to dismiss as to 2013 on the basis that the IRS's determination was not a second

[1] *See generally* Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 Mo. L. Rev. 797 (2000) (discussing equitable tolling and the U.S. Supreme Court's decision in *Brockamp*).

determination for 2013. The Tax Court (Judge Buch) denied the motion and held that the court had jurisdiction as to both 2010 and 2013 because the IRS's determination was a final determination as to both years. Under § 6015(e)(1), the Tax Court has jurisdiction to review a "final determination" by the IRS regarding the taxpayer's eligibility for innocent spouse relief. The court noted that "[f]inal determinations in innocent spouse cases are typically singular, conclusive decisions." Nevertheless, the court observed, there is no prohibition on the issuance of more than one final determination and the regulations under § 6015 contemplate that the IRS will issue a second final determination in some circumstances. The court recognized the policy concern that taxpayers should not be able to defeat or extend the 90-day period for filing a petition in the Tax Court by submitting duplicative claims for innocent spouse relief. In this case, the court reasoned, the IRS could have avoided this policy concern by issuing something other than a final determination in response to the taxpayer's second request for innocent spouse relief for 2013. The IRS had done so in *Barnes v. Commissioner*, 130 T.C. 248 (2008). In that case, after the IRS issued a final determination denying the taxpayer's request for innocent spouse relief, the taxpayer submitted a second request for the same year. The IRS responded by issuing Letter 3657C, No Consideration Innocent Spouse, stating that the taxpayer had not met the basic eligibility requirements for relief because her claim had previously been considered and denied. The court in *Barnes* concluded that this letter was not a final determination and that the court therefore had no jurisdiction to consider the taxpayer's petition. In the same way, the IRS could have avoided issuing a second final determination in this case for 2013 by issuing Letter 3657C for that year. The IRS argued that its references to 2013 in the final determination were an error. "Error or not," the court responded, "the Commissioner's notice is unambiguous in its denial as to both 2010 and 2013." Accordingly, the court concluded, it had jurisdiction to consider the taxpayer's petition regarding both years.

H. Miscellaneous

1. Tax Court retains jurisdiction in a § 7345 passport revocation case to review IRS's certification of taxpayer's "seriously delinquent" tax liability, but finds case is moot. Ruesch v. Commissioner, 154 T.C. 289 (6/25/20). Section 7345, which addresses the revocation or denial of passports for seriously delinquent tax debts, was enacted in 2015 as section 32101(a) of the Fixing America's Surface Transportation Act, Pub. L. 114-94 (Dec. 4, 2015). It provides that, if the IRS certifies that an individual has a "seriously delinquent tax debt," the Secretary of the Treasury must notify the Secretary of State "for action with respect to denial, revocation, or limitation of a passport." § 7345(a). In general, a seriously delinquent tax debt is an unpaid tax liability in excess of $50,000 for which a lien or levy has been imposed. § 7345(b)(1). A taxpayer who seeks to challenge such certification may petition the Tax Court to determine if it was made erroneously. § 7345(e)(1). If the Tax Court finds the certification was either made in error or that the IRS has since reversed its certification, the court may then notify the State Department that the revocation of the taxpayer's passport should be cancelled. § 7345(c). This is a case of first impression in which the Tax Court interprets the requirements of § 7345. The Tax Court (Judge Lauber) held that, while the Tax Court had jurisdiction to review Ms. Ruesch's challenge to the IRS's certification of her tax liabilities as being a "seriously delinquent tax debt," the controversy was moot because the IRS had reversed its certification as being erroneous. Further, the IRS had properly notified the Secretary of State of its reversal. The IRS had assessed $160,000 in penalties for failing to file proper information returns for a period of years. *See* § 6038. Thereafter, the IRS sent a final notice of intent to levy and Ms. Ruesch properly appealed the penalty amounts with the IRS's Collection Appeals Program (CAP). In a series of errors, the IRS mistakenly misclassified the CAP appeal as a Collection Due Process (CDP) hearing. Committing yet further errors, the IRS failed to properly record Ms. Ruesch's later request for a CDP hearing and never offered Ms. Ruesch her CDP hearing. The IRS then certified Ms. Ruesch's liability to the Secretary of State as a "seriously delinquent tax debt" under § 7345(b). Discovering their many errors as well as the oversight of Ms. Ruesch's timely requested a CDP hearing, the IRS determined her tax debt was not "seriously delinquent" and reversed the certification. Because, under § 7345, the Tax Court's jurisdiction in passport revocation cases is limited to reviewing the IRS's certification of the taxpayer's liabilities as "seriously delinquent," the only relief the Tax Court may grant is to issue an order to the IRS to notify the Secretary of State that the IRS's certification was in error. Since the IRS had already notified the Secretary of State of the error, the Tax Court could not offer any additional relief. Judge Lauber, therefore, found the controversy was not ripe to be heard and the issues were moot.

a. The Second Circuit has agreed with the Tax Court that the taxpayer's challenge to the IRS's certification that she had a serioulsy delinquent tax debt was moot, but has reminded the Tax Court that determinations of mootness must precede determinations of subject matter jurisdiction. Ruesch v. Commissioner, 129 A.F.T.R.2d 2022-509 (2d Cir. 1/27/22), *aff'g in part, vacating and remandin in part* 154 T.C. 289 (6/25/20). In a per curiam opinion, the U.S. Court of Appeals for the Second Circuit has affirmed the Tax Court's decision to the extent that the Tax Court's decision dismissed as moot the taxpayer's challenge to the IRS's certification pursuant to § 7345(a) that she had a seriously delinquent tax debt. The Second Circuit agreed with the Tax Court that, because the IRS had reversed its certification, her challenge to the certification in the Tax Court was moot. In reaching this conclusion, the Second Circuit rejected the taxpayer's argument that an exception to mootness, the voluntary cessation doctrine, allowed the taxpayer to continue to pursue her challeneg in the Tax Court. The vluntary cessation doctrine applies when a defendant voluntarily ceases the offending conduct and is intended to prevent defendants from avoiding judicial review temporarly changing their behavior. According to the Second Circuit, however, the voluntary cessation doctrine is not absolute and a case can still be moot if two requiremetns are met: (1) the defendant demonstrates that interim relief or events have irrevocably and completely eradicated the effects of the alleged violation, and (2) there is no reasonable expectation that the allegedly offending conduct will recur. In this case, the court reasoned, both requirements were satisfied. The IRS's reversal of its certification completely eradicated the effect of the erroneous certification and there was no reasonable expectation that the alleged offending conduct will recur because the IRS was barred by statute from certifying her as having a seriously delinquent tax debt while her collection due process hearing with IRS Appeals was pending.

The taxpayer also had sought in the Tax Court to contest the underlying penalties the IRS had imposed and that led to certification of a seriously delinquent tax debt. The Tax Court had dismissed these claims for lack of subject matter jurisdiction because § 7345 does not confer jurisdiction on the Tax Court to consider challenges to the underlying liabilities that lead to certification. The Second Circuit, however, held that the Tax Court should instead have dismissed those claims as moot. The taxpayer, the court reasoned, had already received all the relief to which she was entitled under § 7345, i.e., reversal of the IRS's certification, which rendered moot any challenges to the underlying liability for penalties. According to the court:

> questions relating to Article III jurisdiction, including those concerning the doctrine of mootness, … are antecedent to and should ordinarily be decided before other issues such as statutory jurisdiction or the merits ….

2. Taxpayers did not duly file their refund claim because their attorney, rather than the taxpayers, signed their amended returns claiming refunds. Brown v. United States, 22 F 4th 1008 (Fed. Cir. 1/5/22). The taxpayers were U.S. citizens living and working in Australia for Raytheon Corporation. They filed amended returns for 2015 and 2016 claiming refunds on the basis that they were entitled to the foreign earned income exclusion of § 911. The amended returns were signed by their attorney but no power of attorney accompanied the returns. In this litigation, the government moved to dismiss for lack of subject matter jurisdiction on the ground that the returns were not duly filed as required by § 7422, which provides:

> No suit or proceeding shall be maintained ... until a claim for refund ... has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

The U.S. Court of Appeals for the Federal Circuit held that the "duly filed" requirement of § 7422 is not jurisdictional, but rather more akin to a claims processing rule. Nevertheless, the court agreed with the government that the taxpayer's refund claims were not duly filed because the taxpayers had not personally signed the returns or signed them in a manner that complied with applicable regulations. Accordingly, the court affirmed on the basis that the taxpayers had failed to state a claim on which relief could be granted.

XI. WITHHOLDING AND EXCISE TAXES

XII. TAX LEGISLATION

A. <u>Enacted</u>