

Reading Tea Leaves: Experts Predict Equitable CDP Case Tolling

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By Mary Katherine Browne

Tax practitioners are optimistic that the Supreme Court will overturn an Eighth Circuit ruling that the 30-day time limit to file a petition for review of a collection due process hearing is a jurisdictional requirement.

Two lawyers close to the litigation in *Boechler PC v. Commissioner*, No. 20-1472 (S. Ct. 2021), expressed cautious hope at a February 2 American Bar Association Section of Taxation virtual meeting that the Supreme Court will rule in favor of the taxpayer.

Boechler PC, a North Dakota law firm, mailed a petition to the Tax Court one day late, after the IRS denied a request for relief in an administrative CDP hearing. The petition was dismissed as untimely, and the Tax Court held that [section 6330\(d\)\(1\)](#) filing deadlines are jurisdictional. The Eighth Circuit [upheld that decision](#). The Supreme Court granted certiorari to Boechler's petition to appeal, and [oral arguments](#) were held on January 12.

Amy Feinberg of Latham & Watkins LLP, who was part of the Boechler litigation team, said she believed it was a good sign that the government seemed willing to concede that it had made less headway than it thought and seemed to be looking to preserve the fact that filing deadlines under [section 6213](#) are jurisdictional.

T. Keith Fogg, director of the Harvard Law School Federal Tax Clinic, was also hopeful that the Supreme Court would rule for the taxpayer, noting Justice Neil M. Gorsuch's questioning on the clarity of the section and assertion that it could be read three or four different ways. Fogg was one of several authors who wrote [amicus briefs](#) to the Supreme Court on behalf of the taxpayer.

"The question of whether there is a clear statement is really critical here, because the only way this statute is jurisdictional is if there is a clear statement or there is prior Supreme Court law on this, and there is no Supreme Court law on this. So unless it's a clear statement, then it will not be a jurisdictional requirement," Fogg said.

Peripheral Effects

While *Boechler* focuses strictly on the time limits for CDP cases, some practitioners wonder

what a Supreme Court ruling in favor of equitable tolling would mean for other statutes of limitations in Tax Court.

Not much, according to Kandyce Korotky of Covington & Burling LLP.

"I don't see the court doing a wholesale revamp on the way it views its jurisdiction," Korotky said, noting that Boechler's argument rests mainly on the wording of the statute. "The CDP statute is written in such a way that its plain language cannot just be imported into other statutes of limitations and statutes that deal with Tax Court jurisdiction . . . it just doesn't have that same language."

Korotky also noted that since the Tax Court is an Article I court, there would be constitutional concern about an expansion of its equitable powers without some "explicit nod from Congress or the Supreme Court."

And "imagine the chaos if every late petition could be considered based on the equities, whether or not it could be tolled. It could easily overwhelm the resources of the court," Korotky said. "This isn't so much an issue when people have representation, because representatives tend to be careful . . . but Tax Court is full of pro se petitioners — upwards of 70 percent of the petitions — so if every petition could make an equitable argument, then that would be overwhelming for the court."