After The Shutdown: Dealing with Time Limitations, Part II

January 23, 2019 by Guest Blogger Leave a Comment

In the second post of the series “After the Shutdown” Professor Bryan Camp connects the shutdown with the thorny issue of when a time limit is jurisdictional. Les Part I discussed how a reopened Tax Court might apply the Guralnik case to ostensibly late-filed petitions. I explained how it might apply the case narrowly or broadly. This post moves beyond Guralnik and starts exploring the correctness of the Court’s underlying assumption: that time limits in the Tax Code for taxpayers to petition the Tax Court to hear their disputes with the IRS are jurisdictional. A possible silver lining to the shutdown may be that it gives the Court an opportunity to revisit that assumption.

Guralnik is essentially a work-around to equitable tolling. The Tax Court says it cannot apply equitable principles to most statutes of limitation in the Tax Code because those statutes are, in its view, part and parcel of the Congressional grant of subject matter jurisdiction to the Tax Court. I believe that view is based on an outdated understanding of the law. I have posted a paper on SSRN that goes into great detail on what the current law is and how it should apply to three limitation periods in the Code: §6213, §6330(d), and §6015(e). Today’s post is a summary of what I call the “new thinking” about jurisdictional time periods that the Supreme Court has been wrestling with for the past 10-15 years. For fuller treatment, please see my paper on SSRN. For the Cliff Notes version, read on.

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Starting in Kondrick v. Ryan, 540 U.S. 443 (2004), the Supreme Court became obsessed with distinguishing between jurisdictional time periods and “mere” claims processing rules. At that time, courts routinely presumed that all time limits were jurisdictional in nature. By 2013, however, the Court had totally flipped the traditional presumption. The new thinking is that time limits are presumed non-jurisdictional unless Congress had done something special to indicate otherwise. Here is how the Court summed it up in Sebelius v. Auburn Regional Medical Center, 568 U.S. 145 (2013). Be sure to empty your mouth of liquid before you read on.
To ward off profligate use of the term jurisdiction, we have adopted a readily administrable bright line for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has clearly stated that the rule is jurisdictional; absent such a clear statement, we have cautioned, courts should treat the restriction as nonjurisdictional in character. This is not to say that Congress must incant magic words in order to speak clearly. We consider context, including this Court’s interpretations of similar provisions in many years past, as probative of whether Congress intended a particular provision to rank as jurisdictional. 568 U.S. at 153.

The spit-take is on the phrase “readily administrable bright line.” It makes you wonder what planet the Justices had just visited. Folks, there is no bright line. There are, by my count, five indeterminate factors that the Court instructs lower courts to consider. But fear not! The task is not hopeless; it is merely very difficult.

Please note that all my case cites are to Supreme Court cases after 2000. I’ve read what I think are all the relevant ones in order to synthesize these factors. Note further that you simply cannot trust any court case before then. And you cannot really trust many lower court cases before the Supreme Court’s “we-really-mean-it” decisions in 2013 (Auburn Regional) and 2015 (Kwai Fun Wong). If someone cites a case to you, go look at the date to see if it is even attempting to reflect the Supreme Court’s new thinking. Here is my summary of that thinking, divided into five factors.

1. Mandatory Language

The first factor any court will consider is the text of the relevant statute. If the text expressly refers to subject-matter jurisdiction or speaks in jurisdictional terms, then that will generally be the end of the analysis. Under the old presumption, a statute that used mandatory language was presumed jurisdictional and mandatory language made it difficult to overcome the presumption. Under the new thinking, however, while mandatory language is still one factor to consider, it is no longer very important. Words like “shall” or “must” just don’t cut it anymore. The Supreme Court has repeatedly rejected the idea that mandatory language alone—even really emphatic language—makes a time period jurisdictional. Musacchio v. United States, 136 S.Ct. 709 (2016) (defendant in criminal prosecution not allowed to raise statute of limitations for first time on appeal because the limitation period was not jurisdictional despite its mandatory language); United States v. Kwai Fun Wong, 135 S.Ct. 1625 (2015) (limitations period which said a claim brought after the deadline date “shall be forever barred” was not jurisdictional).

2. Magic Words

A second factor is the presence or absence of the term “jurisdiction.” It turns out that while the word “jurisdiction” is important, it is not determinative. The Supreme Court has found a statute jurisdictional even without the word “jurisdiction” in it. Miller-El v. Cockrell, 537 U.S. 322 (2003)(finding that the
statutory context of 28 U.S.C. §2253 made it jurisdictional even though it did not contain the magic word “jurisdiction”). And on the flip side, the Court has also found a statute of limitations to be non-jurisdictional even though the statute contained the word “jurisdiction” in it! See Reed Elsevier v. Muchnick, 559 U.S. 154 (2010)(overruling widespread agreement among Circuit Courts to hold that the term “jurisdiction” in 17 U.S.C. §441(a) was not a clear enough statement because it just described a court’s ability to hear a particular issue in a larger copyright infringement suit and not the courts ability to hear the rest of the suit).

3. Statutory Context

A third important factor to consider is the relationship of the limitation period to the surrounding statutory scheme. That is statutory context. The Supreme Court has focused on this factor to explain its reluctance to label a limitation period as “jurisdictional” when the limitation period is present in the same statutory section as a concededly jurisdictional grant. See Gonzalez v. Thaler, 565 U.S. 134 (2012)(even though 28 U.S.C. §2253(c)(1) was a jurisdictional provision, the neighboring limitation in §2253(c)(3) was not); Sebelius v. Auburn Regional Medical Center, 568 U.S. 145 (2013)(rejecting argument that proximity of 42 U.S.C. §1395oo(a)(3) to concededly jurisdictional requirements in §1395oo(a)(1) and §1395oo(a)(2) made the (a)(3) time requirements also jurisdictional).

4. Judicial Context

This is just another word for “precedent.” The Court has not been reluctant to reverse long-standing precedent…when the precedent is from lower courts. See e.g Reed Elsevier v. Muchnick, 559 U.S. 154 (2010). But it’s a different story when the long-standing precedent is of the Supreme Court’s own making. See Bowles v. Russell, 551 U.S. 205 (2007)(deciding that the time limits in 28 U.S.C. §2107 were jurisdictional simply because of “our longstanding treatment of statutory time limits for taking an appeal”); JR. Sand and Gravel v. United States, 552 U.S. 130 (2008)(holding that time limits in 28 U.S.C. § 2501 were jurisdictional because of four prior Supreme Court cases said so and “petitioner can succeed only by convincing us that this Court has overturned, or that it should now overturn, its earlier precedent.”).

5. Legislative Context

The final type of context that the Supreme Court has factored into its jurisdictional analysis is what I call the legislative context. Others might call it legislative purpose. Whatever you call it, the Court has sometimes looked to see whether finding a limitation period jurisdictional would further or hinder the policy goals of the underlying statutory scheme. I would not put a whole lotta faith in this factor right now because the current composition of the Supreme Court seems to me (and to this USA Today article) to tilt towards textualists. And textualists don’t seem to like looking to purpose unless they get really desperate.

But there is hope. I think the clearest example of where the Court found legislative context to be the deciding factor is Henderson v. Shinseki, 562 U.S. 428 (2011). And that opinion was authored by Justice Alito. There the Court held
that the limitation period in 38 U.S.C. §7266(a) for a veteran to obtain court review from an adverse Veterans Administration agency decision was not jurisdictional. After first finding that neither the factors of text nor precedent pointed clearly in one direction or another, Justice Alito turned to the legislative context. “While the terms and placement of §7266 provide some indication of Congress’ intent, what is most telling here are the singular characteristics of the review scheme that Congress created for the adjudication of veterans’ benefits.” Focusing then on the Congressional intent, Justice Alito found that Congress meant for the entire statutory scheme for veterans benefits to be highly remedial.

The reason I go into some detail on the Henderson case is because I think it is pretty relevant to how a court might approach interpreting the limitation provisions in the Tax Code. After all, the whole point of the U.S. Tax Court’s existence is to give taxpayers a pre-payment remedy. It’s a big-time remedial scheme. That is, I think, particularly important when considering the limitation periods in §6213, §6330(d), and §6015(e). More on that in Part III, coming soon.