Today Professor Bryan Camp returns for Part III of the series “After the Shutdown,” in which he examines the time limit for appealing a notice of deficiency. Now that the government has reopened, Professor Camp’s analysis may soon be tested in the Tax Court. The Tax Court’s website advises that the court will resume full operations on Monday, January 28, and that the February 25 trial sessions will proceed as scheduled. Christine

Part I discussed how a reopened Tax Court might apply the Guralnik case to ostensibly late-filed petitions. The Tax Court is likely to apply Guralnik narrowly which means petitions not filed on the first day the Court reopens will be outside their Statutes of Limitation, putting the SOL in SOL. Equitable tolling could help cure that problem but the Tax Court takes the position that it cannot apply equitable doctrines to the time periods for taxpayers to petition the Tax Court because, in its view, those time periods are jurisdictional restrictions on its powers.

Part II explained the new thinking about how jurisdictional time periods differ from non-jurisdictional. I read the opinions and drew out five indeterminate factors that the Supreme Court instructs lower courts to consider when deciding whether a particular statutory time period is jurisdictional or merely a “claims processing rule.”

Today’s post applies the rules to the 90/150 day period in §6213. The most reasonable conclusion under the new thinking is that §6213 is not a jurisdictional time period. That means that the Tax Court can apply equitable principles to decide whether an ostensibly late-filed petition is timely or not. And when the Tax Court is closed for more than 33 days in a row, that is a big start to an equitable tolling analysis for those cases that cannot fit within a narrow or even a broad application of Guralnik.

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Four of the five factors point to treating §6213 as a claims processing rule. Again, this is basically a summary of what I have written in this paper posted on SSRN. As usual, please comment on any errors or omissions that you spot.
1. Mandatory Language

As it currently reads, §6213(a) now contains five sentences. The first sentence contains the limitations period, as follows: “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.”

Notice there is no mandatory language. Nothing in that sentence tells the reader what happens if the taxpayer misses the 90/150 day deadline. And nothing in that sentence gives the Tax Court the power to hear or decide matters raised in the petition.

2. Magic Words

The word “jurisdiction” does not appear in the first sentence. One finds the jurisdictional grant to the Tax Court over in §6214, which provides that the Tax Court has “jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency...and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.” The §6214 power to redetermine a deficiency is simply not hooked into the §6213 timing rule.

The fourth sentence of §6213 does contain the magic word “jurisdiction.” But, as I explain in much greater detail in my paper on SSRN, while the word “jurisdiction” does appear in the fourth sentence, it is not there tied to the Court’s power to redetermine a deficiency. It was added to the Tax Court much, much, later than first sentence and later than the §6214 jurisdictional language.

3. Statutory Context

As I explain in my SSRN paper, Congress first gave the Tax Court jurisdiction to redetermine a proposed deficiency in 1924. It did that in a statute separate from the 90/150 day limitation period. The codifiers also put that jurisdictional grant in a separate section of the Tax Code, both in the 1939 Code and the 1954 Code.

Much later, in 1954, Congress added to the Tax Court’s jurisdiction the power to enjoin the IRS from assessing or collecting a tax liability when the taxpayer had filed a timely petition. The codifiers put that injunctive power in the same statute as the 90/150 limitation period and conditioned that power on a timely petition being filed. But the Tax Court’s jurisdiction to redetermine a deficiency is still in a separate statute.

As applied to the shutdown, that distinction possibly makes a difference. The IRS computers will automatically set up an assessment if no IRS employee inputs the Transaction Code (TC) indicating that a petition has been filed in the Tax Court. To account for notification delays, the computers are programmed to wait 110 days after the NOD date before setting up the assessment. Readers should understand that assessments are made in bulk. Each week, all the assessments that are ready to be made are aggregated into a single document.
that is signed, either physically or electronically, by a designated official and, hey presto, all of the taxpayers who were set up for that week are now assessed.

The problem in the shutdown is that the IRS computers keep counting the shutdown days as part of the 110 days. So if and when the Tax Court decides that a petition ostensibly filed 140 days late is actually timely, whether under a narrow or broad reading of Guralnik or under equitable principles, the question arises as to what to do about that assessment. The IRS should abate the assessment as §6404 authorizes when an assessment “is erroneously or illegally assessed.”

4. Judicial Context

This is the only factor that supports reading §6213 as jurisdictional. But it’s not especially strong because it consists only of lower court precedent that relies on other lower court precedent. As I explained in Part II, the Supreme Court has not hesitated to scrub even long-standing lower court precedent when it believes the new thinking requires a different result. The only judicial context that counts for the Supremes is their own former opinions!

Still, there is plenty of lower court precedent holding that §6213 is jurisdictional. First, the most recent Tax Court case to express an opinion about §6213 was—you guessed it—Guralnik. That was in 2016. But the Court in Guralnik chose to look exclusively at only this factor and gave no analysis on the other four factors, saying:

In cases too numerous to mention, dating back to 1924, we have held that the statutorily-prescribed filing period in deficiency cases is jurisdictional. See, e.g., Satovsky v. Commissioner, 1 B.T.A. 22, 24 (1924); Block v. Commissioner, 2 T.C. 761, 762 (1943). Even if the “equitable tolling” argument advanced by petitioner and amicus curiae were otherwise persuasive, which it is not, we would decline to adopt that argument solely on grounds of stare decisis.

The error here is in relying on old thinking. As I explained in Part II and also in my paper, the Supreme Court keeps emphasizing that courts should not rely solely on precedent developed under the old thinking. In particular, my paper looks at both the cases cited by Guralnik here and not only shows how neither is particularly useful but also discovers that the Tax Court itself no longer follows Block’s rationale on how to count jurisdictional time periods!

The most recent Circuit Court opinion of note is Tilden v. Commissioner, 846 F.3d 882 (7th Cir. 2017). There, Judge Easterbrook gave two reasons for holding that §6213 was jurisdictional. First, he swooned over the magic word “jurisdiction” in §6213 and totally ignored how it related, or did not relate, to the 90/150 time period. Second, he relied on—wait for it—wait for it—Guralnik!
For many decades the Tax Court and multiple courts of appeals have deemed § 6213(a) as a whole to be a jurisdictional limit on the Tax Court’s adjudicatory competence. [String cite omitted]. We think that it would be imprudent to reject that body of precedent, which places the Tax Court and the Court of Federal Claims, two Article I tribunals, on an equal footing. So we accept Guralnik’s conclusion and treat the statutory filing deadline as a jurisdictional one.

What is especially sad here is that the string cite that I omitted from the quote does not contain a single case after 1995. Nor could it. There is not a single court case—much less one from the Supreme Court—that actually analyzes §6213 under the Supreme Court’s new thinking and applies all the factors.

5. Legislative Context

The legislative context of §6213(a) also supports reading the provision as a claims-processing rule and not as a jurisdictional requirement. The legislative context is very similar to that which the Supreme Court found so important in Henderson v. Shinseki, 562 U.S. 428 (2011) discussed in Part II. In brief, Congress created the original Board of Tax Appeals to give taxpayers a theretofore unavailable judicial remedy. The legislation creating the BTA was manifestly remedial.

The remedial nature of deficiency proceedings has been long recognized by the Supreme Court. I think Helvering v. Taylor, 293 U.S. 507 (1935) is particularly instructive. There, the taxpayers proved that the Notice of Deficiency contained significant error. The government argued that taxpayers had to not just show the NOD was wrong but also had to prove up their correct tax. The Supreme Court responded this way: “The rule for which the Commissioner here contends is not consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals.”

The Tax Court itself has used the remedial nature of deficiency proceedings to soften the effect of its continued holding that §6213 is jurisdictional. In effect, the Tax Court “cheats” on applying §6213 by choosing from among multiple starting dates to help taxpayers meet the 90 day requirement. It does so because it recognizes the legislative context of the deadline. I explain this in my article Equitable Principles and Jurisdictional Time Periods, Part II, 159 Tax Notes 1581 (free download here).

It would be no stretch at all for the Tax Court to apply that precedent to an analysis of whether §6213 is jurisdictional in the first place.

Under the new thinking, then, four of the five factors point towards reading §6213 as a claims processing rule and not a jurisdictional rule.