In Part IV of the series “After the Shutdown,” Professor Bryan Camp examines the role of equity in addressing time limitations that have become tangled by the shutdown. Christine

It is unconscionable to enforce against taxpayers a statutory time limitation when Congress itself denied taxpayers the ability to protect their rights during all or part of that time period by forcing the closure of the IRS and the Tax Court. That is, Congress failed to fund either the Tax Court or the IRS, causing both to shut down for between 31 (Tax Court) and 35 (IRS) days. This failure caused both the agency and the Court to be closed to taxpayer’s attempts to resolve disputes about either the determination or collection of tax. This failure is an act of Congress just as much as the statutory limitations periods are acts of Congress. And Congress should not be able to demand that a taxpayer act within a certain time period while at the same time denying the taxpayer any ability to act during all or part of that time period. Equity should, and I believe can, prevent that result.

The above proposition is the basis for this, my last Post in the “After the Shutdown” series. Part I discussed how a reopened Tax Court might apply the Guralnik case to ostensibly late-filed petitions. Part II explained the new thinking about how jurisdictional time periods differ from non-jurisdictional. Part III explained why the time period to petition the Tax Court in §6213 should no longer be viewed as a jurisdictional limitation. I invite those readers interested in how the new thinking would apply to the time periods in §6330(d) and §6015(e) to look at my paper posted on SSRN, which I am trying to get published in a Law Review.

Legal academics must publish or perish and, apparently, blogging does not count.

Today’s post explores why the Tax Court should be able to apply equitable principles to evaluate the timeliness of taxpayer petitions filed after the shutdown, regardless of whether any of the applicable limitations periods are jurisdictional or not.

Before diving in to equity, I wanted to point out that Congress itself could actually save a lot of litigation here by passing a very simple off-Code statute that says something like: “For purposes of computing time limitations imposed in Title 26 on taxpayers to petition the Tax Court, the days between December 22, 2018 and January 28, 2019 shall be disregarded.” Congress could do that. Congress should
do that (for the reasons I explain below). But you can bet you sweet bippy that Congress won’t do that. It made this mess. But it is unlikely to clean it up. So it will fall to the Tax Court to sort through cases. When it does so, I believe the circumstances of the shutdown strongly support the extraordinary remedy of equitable tolling.

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The Tax Court is truly a unique court. It is neither fish nor fowl, as Prof. Brant Hellwig so nicely explains in his article “The Constitutional Nature of the U.S. Tax Court,” 35 Va. Tax Rev. 269 (2015). That is, all efforts to type the Tax Court as part of the Legislative Branch, Judicial Branch, or Executive Branch of the federal government are flawed, both as a matter of theory and as a matter of practice. Channeling Felix Cohen and other Legal Realists, Brant sensibly concludes that we don’t really need to worry about “where” the Tax Court belongs in the Constitutional structure. It’s indeterminate position poses no threat to the structural integrity of the federal government, and its useful work in resolving taxpayer disputes with the IRS does not depend on its precise location in any branch.

But there is no doubt that the Tax Court exercises the “judicial power” of the United States. The Supreme Court said so in Freytag v. Commissioner, 501 U.S. 868 (1991). And part of that “judicial power” is the power to apply equitable principles and doctrines to the disputes that are properly brought before the Court for resolution. Prof. Leandra Lederman has a lovely article on this subject: “Equity and the Article I Court: Is the Tax Court’s Exercise of Equitable Powers Constitutional?” 5 Fla. Tax Rev. 357 (2001).

It is important to remember that equitable doctrines are not simply free-floating grants of power. Equitable doctrines are linked to, and bounded by, a set of principles. But what distinguishes equitable principles from legal rules is that the application of equity is highly contingent on the facts before the court. The great legal historian F. W. Maitland put it this way in his 1910 Lectures On Equity: “I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection.” (p. 19) And in this 1913 law review article, Professor Wesley Newcomb Hohfeld discussed the difficulty of teaching equity as a system of rules separate from legal rules. I think it this way: equity fixes problems that legal rules cannot fix.

One equitable doctrine that might apply here is equitable tolling. When litigants show that, despite diligent efforts, some extraordinary circumstance prevented them from protecting their rights by timely filing within a period of limitations, a court will equitably toll the limitation period. See e.g. Holland v. Florida, 560 U.S. 631 (2010). The idea of “tolling” means that the limitations period is suspended for the tolling period. That is, it stops running and then starts running again when the tolling period ends, picking up where it left off. Artis v. District of Columbia, 138 S.Ct. 594 (2018).

Remember, this is equity, not a hard and fast legal rule or doctrine. So how much diligence a litigant must show varies with circumstances. Similarly, how extraordinary the barrier had to be also varies with circumstance. If the Tax
Court applies that doctrine, it could decide—consistent with the logic of my very first paragraph—that the days in which Congress’s failure to fund the Court forced it to shut its doors should stop the running of any applicable limitation period. The Court may decline to apply equitable tolling, however, for two reasons.

First, the Tax Court has repeatedly said it cannot equitably toll jurisdictional time periods and it believes that the relevant time periods in the Tax Code are jurisdictional. I believe the Tax Court is simply wrong that the deficiency and jurisdictional time periods are jurisdictional. That’s what I explained in the prior blog posts and in my SSRN paper.

Even if the time periods are jurisdictional, however, I believe there is good authority to toll them nonetheless. The authority is from the Supreme Court. In Honda v. Clark, 386 U.S. 484 (1967), 4,100 plaintiffs of Japanese descent whose assets had been seized by the U.S. during World War II sued for recovery years after the applicable limitation period had ended. The district court dismissed the cases “on the ground that the court lacked jurisdiction over the subject matter of the actions because they were not commenced within the time set forth in section 34(f) of the Trading with the Enemy Act.” 356 F.2d 351, 355 (D.C. Cir. 1966). Both the district court and the D.C. Circuit dismissed their suit for the standard reason: equitable principles did not apply to when limitation periods were a waiver of sovereign immunity. The D.C. Circuit gave the standard analysis: “All conditions of the sovereign’s consent to be sued must be complied with, and the failure to satisfy any such condition is fatal to the court’s jurisdiction.” 356 F.2d at 356.

The Supreme Court disagreed. While noting the general rule, it characterized the rule as a presumption and said that one needed to look at the particular statutory scheme at issue to discern purpose. Whether or not the time period was jurisdictional was totally absent from the Court’s approach to applying equitable tolling. The Court concluded it was “much more consistent with the overall congressional purpose to apply a traditional equitable tolling principle, aptly suited to the particular facts of this case and nowhere eschewed by Congress, to preserve petitioners’ cause of action.” 386 U.S. at 501.

The Supreme Court’s focus in Honda (and later in other cases, as I explain in my paper) was on the relationship between Congress and the limitation period. When you approach the limitation periods in §6213 and §6330(d) in that way, I believe the approach used by the Supreme Court in Honda strongly support application of equitable tolling, in two ways.

First, as I have argued here, the Tax Court itself has relied upon the great remedial purposes of §6213 and §6330 to in fact enlarge what it believes are jurisdictional time periods under certain circumstances. A careful reading of its cases shows that what animates its decisions is the remedial purpose of the statutory scheme that allows taxpayers a day in court before either (1) being forced face a tax assessment and its consequences or (2) being forced to pay an assessed tax. To count the shutdown days as part of a limitations period would run counter to that remedial purpose.
Second, I again restate the idea of my first paragraph. This is not a situation where a taxpayer would seek equitable tolling because of some individual government employee’s bad behavior. This is Congressional bad behavior. Another way to think of the relationship is this: if the time periods are part of Congress’s waiver of Sovereign Immunity, and if only Congress can waive Sovereign Immunity, then one can reasonably find that Congress itself has here waived its immunity by ceasing to fund the government.

The second reason that the Tax Court might look askance at applying equitable tolling here is that the doctrine usually applies in a fact pattern where the party seeking tolling has done all it can. Here, there may be instances where that is not true. For example, a taxpayer may not have even attempted to file a petition when the last day ran during the shutdown period. Or the taxpayer may not have even been prepared to file during the shutdown period and only prepares and files once the shutdown period ends. Most importantly, a taxpayer’s period might have been disrupted by the shutdown period but may not have ended during the shutdown period. How is the Tax Court supposed to measure a taxpayer’s diligence in that situation, when no one knew until Friday that the government would reopen on Monday?

I do not know the answer to these questions because equity is a case-by-case determination. The Tax Court can help avoid the time and effort of applying equitable tolling by applying a uniform counting rule that simply disregards the shutdown days, based on the idea underlying FRCP 6, as I will argue in an article I hope to publish in Tax Notes soon. Even there, however, there will be cases that are not covered even by a broad reading of FRCP 6. That will be the cases where the last day of the period came after the shutdown ended. Yet there may be such cases that command the sympathy of the Tax Court. I think the Court has the power to act and to apply equitable tolling in the cases where the circumstances support it.