No. 15-3838

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT H. TILDEN,
Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal From The United States Tax Court

In Docket No. 11089-15

The Honorable Robert N. Armen, Jr., Presiding

APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLEE'S SUPPLEMENTAL BRIEF

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ARGUMENT IN RESPONSE TO APPELLEE'S SUPPLEMENTAL BRIEF

The time limit filing provision of section 6213(a) of the Internal Revenue Code is a claim-processing rule and not a jurisdictional provision.

I. Introduction.

On November 10, 2016 the Appellee, the Commissioner of the Internal Revenue (the "Commissioner"), filed a motion for leave to file a supplemental brief to address the issue of whether the time limit provision I.R.C. § 6213(a) is a jurisdictional or if it is non-jurisdictional claim-processing rule. The Commissioner sought to file its supplemental brief to resolve "uncertainty" as to whether time limits in tax statutes should be treated as non-jurisdictional claims-processing rules. The Commissioner noted that this Court recently expressed "the view that doubt has been cast on the line of cases that recognizes that the administrative-claim requirement in I.R.C. § 7422(a) is a jurisdictional requirement" in its non-precedential decision in *Gillespie v. United States*, No. 15-CV-0434, Order (7th Cir. Nov. 1, 2016). The Commissioner argues that the time limit provision of Section 6213(a) of the Internal Revenue Code ("I.R.C.") is a jurisdictional statutory provision, not a claim processing rule.

The same day the Commissioner filed its motion, the Court granted the Commissioner's motion for leave to file his supplemental brief and stated, "Appellant may file a supplemental brief in response by November 28, 2016." Given this opportunity, the Appellant, Robert Tilden, (the "Taxpayer") through his counsel, responds that the time limit provision of I.R.C. § 6213(a) is, indeed, a claim-processing rule and not a jurisdictional prerequisite. The Taxpayer will respond to each point argued by the Commissioner's through his supplemental brief.

II. The Taxpayer Agrees That The "Clear Statement" Rule Is Appropriate For Determining Whether Time Limits On Suits Against The Government Are Jurisdictional.

The Commissioner's is correct that the "clear statement" rule provides the analytical framework for this Court to test whether or not the time limit provision of I.R.C. § 6213(a) is a claim processing rule or jurisdictional. The Supreme Court makes is clear that most time limit and filing deadline statutes are claim processing rules and are not jurisdictional. The U.S. Supreme Court in *United States v. Wong*, 135 S.Ct. 1625, __ U.S. __, 191 L.Ed.2d 533, 83 U.S.L.W. 4258, 25 Fla.L.Weekly Fed. S 204 (2015) stated:

> …in applying that clear statement rule, we have made plain that most time bars are nonjurisdictional. See, e.g., id., at ___, 133 S.Ct. 817, 825, 184 L.Ed.2d 627, 638 (noting the rarity of jurisdictional time limits). Time and again, we have described filing deadlines as "quintessential claim-processing rules," which "seek to promote the orderly progress of litigation," but do not deprive a court of authority to hear a case. *Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011); see *Auburn Regional*, 568 U.S., at ___, 133 S.Ct. 817, 825, 184 L.Ed.2d 627, 638; *Scarborough v. Principi,* 541 U.S. 401, 413, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004). That is so, contrary to the dissent's suggestion, see post, at 4, 10-11, even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so "however emphatic[ally]" expressed those terms may be. *Henderson*, 562 U.S., at 439, 131 S.Ct. 1197, 179 L.Ed.2d 159 (quoting *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009)). Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.

Thus, it is the exception for a time limit and filing deadline provision to be jurisdictional rather than a claim processing rule. The *Wong* Court also made it clear that the person seeking to show that a statute is jurisdictional, "must clear a high bar to establish that a statute of limitations is jurisdictional". *Id*.

The Taxpayer first argues that this Court's analysis of the time limit provision of 26 U.S.C. §6213 under the "clear statement" rule is slightly different than is presented by the Commissioner. The Supreme Court in *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237, 559 U.S. 154, 176 L.Ed.2d 18, 78 U.S.L.W. 4176 (2010) stated:

> A statutory condition that requires a party to take some action before filing a lawsuit is not automati-cally "a jurisdictional prerequisite to suit." *Zipes*, 455 U.S., at 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (emphasis added). Rather, the jurisdictional analysis must focus on the "legal character" of the re-quirement, *id*., at 395, 102 S.Ct. 1127, 71 L.Ed.2d 234, which we discerned by looking to the condition's text, context, and relevant historical treat-ment, id., at 393-395, 102 S.Ct. 1127, 71 L.Ed.2d 234; see also N*ational Railroad Passen-ger Corporation v. Morgan*, 536 U.S. 101, 119-121, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). We similarly have treated as nonjurisdictional other types of threshold requirements that claimants [130 S.Ct. 1247] must complete, or exhaust, before filing a lawsuit.

Thus, to be more precise, this Court should analyze the "legal character" of this sentence in 26 U.S.C. §6213(a):

> 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 (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.

It is the above quotation that is the specific "time bar" of 26 U.S.C. §6213(a) that is at issue in this case. Thus, this Court's analysis should focus only the "legal character" of this portion of the statute.

The Commissioner also identifies that the "historical treatment" of a time limit provision "may be dispositive"…"under principles of *stare decisis*."[1] While this is true there is some specificity that the Commissioner fails to point out. The Supreme Court, in *Reed Elsevier, Inc. v.*

[1] See the Supplemental Brief of the Commissioner at page 6. References to the Supplemental Brief of the Commissioner will be hereinafter cited as Supp. Br. at [page #].

Muchnick, 130 S.Ct. 1237, 559 U.S. 154, 176 L.Ed.2d 18, 78 U.S.L.W. 4176 (2010), discussed the proper method for a stare decisis analysis:

> *Bowles* and *Arbaugh* can be reconciled without distort-ing either decision, however, on the ground that Bowles "rel[ied] on a long line of this Court's decisions left undis-turbed by Congress." *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. 67, 82, 130 S.Ct. 584, 597, 175 L.Ed.2d 428, 444 (2009) (citing *Bowles*, 551 U.S., at 209–211, 127 S.Ct. 2360, 168 L.Ed.2d 96). The same is true of our decision, subsequent to *Bowles*, in [176 L.Ed.2d 35] J*ohn R. Sand & Gravel Co. v. United States*, 552 U.S. 130,128 S.Ct. 750, 169 L.Ed.2d 591 (2008). There the Court concluded, largely on stare decisis grounds, that the Court of Federal Claims statute of limitations requires sua sponte consideration of a lawsuit's timeliness. *Id*., at 136,128 S.Ct. 750, 169 L.Ed.2d 591 ("[P]etitioner can succeed only by convincing us that this Court has overturned, or that it should now overturn, its earlier precedent.").

Thus, it is important to note that the principles of *stare decisis* rely on decisions that the United States Supreme Court has made. The Commissioner overstates the test, albeit in a somewhat tacit way, quoting *John R. Sand & Gravel v. United States*, 128 S.Ct. 750, 552 U.S. 130 (2008) and stating that "reexamin[ing] * * * well-settled precedent" holding that a limitations period was jurisdictional would "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability." See Supp. Br. at 6. It is critical to note that the "well-settled precedent" refers only to the "well-settled precedent" of the United States Supreme Court. This is made clear in *John R. Sand & Gravel*, 552 U.S. at 139, referring to (emphasis added) "**our** earlier cases…" in the sentence preceding the quote cited by the Commissioner. However, this principle is made crystal clear in *Wong*[2] (emphasis added) when the Supreme Court stated, "What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from **this** Court's prior rulings, not from Congress's choice of wording."

[2] *United States v. Wong*, 135 S.Ct. 1625, __ U.S. __, 191 L.Ed.2d 533, 83 U.S.L.W. 4258, 25 Fla.L.Weekly Fed. S 204 (2015)

III. An Analysis of the "Clear Statement" Rule Shows that the Provision of I.R.C. § 6213(A) at Issue Is a Claim-Processing Rule and Is Not Jurisdictional.

The Commissioner's Supplemental Brief goes through its analysis of the "clear statement" rule in Section C by separating arguments into the following three categories of sub-argument analysis: (1) "The text of the statute" (2) "The legislative history" and (3) "The historical treatment of I.R.C. § 6213(a)". See Supp. Br. at 7 to 23. The Taxpayer will address each sub-argument section in a similar organizational format by refuting each sub-argument advanced by the Commissioner. The Taxpayer will show that none of the Commissioner's arguments are valid to make a showing that the time-limit provision of I.R.C. § 6213(a) is jurisdictional in nature.

1. The text of the Statute.

The Commissioner argues that "the text of I.R.C. § 6213(a) establishes that its time limit was designed to define a federal court's jurisdiction" However, this is a misapplication of the analysis of the clear statement rule. In *Wong*[3] the Supreme Court stated that to show a provision of a statute is jurisdictional—when the Government is the party seeking to show the provision to be construed as a jurisdictional prerequisite—the Government must, "show that Congress made the time bar at issue jurisdictional." *Wong*[3] also shows that the "text" that should be analyzed is the provision itself, not the text of other statutes, by stating (emphasis added), "text of **that provision** speaks only to a claim's timeliness…"

The text that is specifically at issue from 26 U.S.C. §6213(a) is this:

> 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 (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the

[3] *United States v. Wong*, 135 S.Ct. 1625, __ U.S. __, 191 L.Ed.2d 533, 83 U.S.L.W. 4258, 25 Fla.L.Weekly Fed. S 204 (2015)

deficiency.

It is clear that the text of the time limit provision of 26 U.S.C. §6213(a) at issue "speaks only to a claim's timeliness, not to a court's power." See *Wong*[3]. Thus, as to the "text" portion of the clear statement analysis as to this case, the Court need not venture further because the time limit provision of 26 U.S.C. §6213(a) "does not speak in jurisdictional terms." See *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817, ___ U.S. ___ (2013). However, for clarity the Taxpayer will address this point further.

The Taxpayer notes that the word "jurisdiction" does not appear in the time limit filing provision of I.R.C. § 6213(a). The Taxpayer would not argue against the premise that for the Tax Court to hear a taxpayer's case I.R.C. § 6213(a) requires a taxpayer to have received a compliant notice of deficiency from the IRS and that the taxpayer must file a compliant petition with the Tax Court. However, the existence of those two requirements does not make the time limit provision of I.R.C. § 6213(a) jurisdictional.

Three Supreme Court opinions issued after *Kontrick* have held statutory time limit provisions to be claim processing rules (i.e., not jurisdictional), because (1) there was no clear statement otherwise from Congress within the statute and (2) an actual jurisdictional grant in the United States Code was located far away from the stated time period. See *Musacchio v. United States*, 136 S. Ct. 709 (2016); *Wong*, supra; *Henderson v. Shinseki*, 562 U.S. 428 (2011) (holding the time limit provision in a statute given to file in an Article I Court of Appeals for Veterans Claims was a claim processing rule and not jurisdictional). Since *Kontrick*, the Supreme Court has only once held that a time period is a claim processing rule (not jurisdictional), even though a jurisdictional grant was in the same sentence containing that time period. *Sebelius v. Auburn*

Regional Med. Cntr., 133 S. Ct. 817 (2013).

The Court has never yet held, following *Kontrick*, that statutory words clearly stated Congress' intent that a time period be jurisdictional. This makes it especially difficult for lower courts to hold time periods jurisdictional under the clear statement rule, since there are no such examples to consider at this time.

The Supreme Court opinion most pertinent to interpreting the time limit provision of I.R.C. § 6213(a) is its 2013 opinion in *Sebelius v. Auburn Regional Med. Cntr.*, supra. That opinion involved the 180-day time period under 42 U.S.C. § 1395oo(a)(3) where Medicare providers had to file in an Article I tribunal in order to complain of insufficient reimbursements. In a single, long sentence, subsection (a) of 42 U.S.C. § 1395oo provided that those providers "may" obtain hearings before administrative boards if (1) the providers were dissatisfied with certain administrative reimbursement determinations, (2) the amount in controversy was $10,000 or more, and (3) the providers requested a hearing within 180 days after the determination.

The Supreme Court appointed an amicus to argue that the 180-day period was jurisdictional. However, the Court then rejected that argument, writing:

> Amicus urges that the three requirements in § 1395oo(a) are specifications that together define the limits of the PRRB's jurisdiction. Subsection (a)(1) specifies the claims providers may bring to the Board, and subsection (a)(2) sets forth an amount-in-controversy requirement. These are jurisdictional requirements, amicus asserts, so we should read the third specification, subsection (a)(3)'s 180-day limitation, as also setting a jurisdictional requirement.
>
> Last Term, we rejected a similar proximity-based argument.

See *Auburn*, 133 S. Ct. at 825. The *Auburn* Court then noted that 42 U.S.C. § 1395oo(a)(3) did not contain words similar to "shall file a notice of appeal"—words insufficient even in *Henderson* to make the time period jurisdictional—but rather contained the much milder phrase

"may obtain a hearing" before the board if "such provider files a request for a hearing within 180 days after notice of the intermediary's final determination." *Id*. at 824-825. The *Auburn* Court found this did not overcome the general rule that filing deadlines are not jurisdictional.

As the *Auburn* Court noted, the proximity-based argument made by the amicus was also made the year before in *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012). In that case, 28 U.S.C. § 2253 addressed the jurisdiction of district courts in habeas review. Section (c)(3) of that statute provided that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." As in *Auburn*, the Court in *Gonzalez* refused to consider the requirement of paragraph (c)(3) jurisdictional, even though it was adjacent to several jurisdiction-related provisions within the same section of the United States Code. The Court reasoned that, "Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez*, 132 S. Ct. at 651.

Even before *Gonzalez* and *Auburn*, the Ninth Circuit held that a time period was not jurisdictional, despite its being adjacent to a jurisdictional grant in the same sentence. 15 U.S.C. § 1692k authorizes a suit for monetary damages under the Fair Debt Collection Practices Act. Subsection (d) thereof provides: "Jurisdiction: An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs." The Ninth Circuit wrote:

> [W]e attach no particular significance to the fact that this statute of limitations appears in the same sentence in which the jurisdiction provision appears. Nothing in the structure of that sentence tells us that the time limitation was also a jurisdictional limitation. In fact, a more natural reading is that parties may bring their action in any "court of competent jurisdiction" and may do so "within one year." 15 U.S.C. § 1692k(d). It is fair to say that parties are faced with a "when"

> issue and a "what court" issue for every action, but the former does not usually control or affect the latter.

Magnum v. Action Collection Services, Inc., 575 F.3d 935, 940 (9th Cir. 2009).

Similarly to in *Auburn* and *Magnum*, section 6213(a)'s first sentence is a single sentence containing an implicit jurisdictional grant and a time period. But, there is no clear statement that the time period is similarly intended to be jurisdictional. And note that, just like the first sentence of section 6213(a), the sentence involved in *Auburn* contained an implicit grant to the Medicare boards to hear reimbursement disputes, as no other provision of the Medicare statute explicitly stated that the boards had "jurisdiction". Indeed, in both sentences, the word "jurisdiction" or "jurisdictional" is absent—making those sentences very poor examples for arguing that Congress made a clear statement that a filing period contained therein was jurisdictional. While Congress need not incant "magic words" to make a time period jurisdictional, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Wong*, supra, 135 S. Ct. at 1632.

Thus, it is clear that the time limit provision of 26 U.S.C. § 6213(a) at issue "speaks only to a claim's timeliness, not to a court's power." See *Wong*[3]. The text of the time limit provision of 26 U.S.C. §6213(a) is a claim processing rule and is not a jurisdictional prerequisite.

a. Responses to the Commissioner's "Text" Arguments That Are Purportedly "Related" to § 6213(a).

The Commissioner also spends time evaluating the "text" of provisions that are "related" to 26 U.S.C. § 6213(a). The Commissioner briefly looks at I.R.C. § 7442, spends more time on the injunction provision of I.R.C. § 6213(a), and then concludes by looking at other statutes argued to be related to I.R.C. § 6213(a). The Taxpayer notes that the clear statement rule does

expressly denote engaging in this type of analysis, but the Taxpayer will briefly address each point raised by the Commissioner.

i. I.R.C. § 7442

The Commissioner correctly notes that Tax Court's general grant of jurisdiction as an Article I court comes through 26 U.S.C. § 7442, which "provides that the Tax Court 'shall have jurisdiction as is conferred' by the Internal Revenue Code." See Supp. Br. at 7. However, it is clear that the fact that the Tax Court is Article I court and receives it authority through Congress is not dispositive on whether or not a statutory provision is jurisdictional rather than a claim processing rule. For example, *Henderson v. Shinseki*, 131 S.Ct. 1197, 562 U.S. 428, 179 L.Ed.2d 159, 79 U.S.L.W. 4130 (2011) is an appeal originally from the Court of Appeals for Veterans Claims, an Article I tribunal, to review Board decisions adverse to veterans. In *Henderson* 38 U.S.C. §7266(a), which provides a 120-day filing deadline, was found to be a claim processing rule. *Wong* is an appeal originally from Article I courts from the Executive Office for Immigration Review (this is the Article I court that oversees immigration courts in the United States through the Office of the Chief Immigration Judge and the Board of Immigration Appeals). *Kontrick v. Ryan*, 124 S.Ct. 906, 540 U.S. 443, 157 L.Ed.2d 867, 72 U.S.L.W. 4126 (2004) is an appeal originally from the U.S. Bankruptcy Court, which is an Article I court having original and exclusive jurisdiction over all cases arising under the bankruptcy code (see 28 U.S.C. § 1334(a)). *Scarborough v. Principi*, 124 S.Ct. 1856, 541 U.S. 401, 158 L.Ed.2d 674, 41 U.S.L.W. 4340 (2004) is an appeal from the Court of Appeals for Veterans Claims which is an Article I court that receives its jurisdictional grant from Congress in 38 U.S.C. § 7252. *Henderson*, *Wong*, *Kontrick*, and *Scarborough* are all appeals from Article I courts that received

their general jurisdictional grants through statutes enacted by Congress. Yet in those cases the U.S. Supreme Court found the statutory provisions analyzed in each of those cases to be claim processing rules.

ii. The Injunction Provision of I.R.C. § 6213(a).

The Commissioner argues that the following language from I.R.C. § 6213(a) shows that the provision at issue in this case is jurisdictional, "The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed" (hereinafter referred to as the "Injunction Provision"). First, the Injunction Provision of I.R.C. § 6213(a) does not speak to a time limit for filing claim with the Tax Court. This Injunction Provision speaks to when the Tax Court has the authority to "enjoin any action or proceeding or order any refund under this subsection" and when it does not. By the terms of the Injunction Provision the Tax Court's authority to "enjoin" or "order any refund" is only had when a "timely petition for a redetermination of the deficiency has been filed." However, the language of the Injunction Provision also does not define the term "timely" in any way. Thus, if the 90 or 150 day time limit of first sentence of I.R.C. § 6213(a) is, for example, waived or tolled (because it is a claim processing and not a jurisdictional provision) then the Injunction Provision would still be operative for the Tax Court to "enjoin" or "order any refund" as the petition would still be "timely". Thus, it is clear that the Injunction Provision has no bearing on whether the first sentence of I.R.C. § 6213(a) is a claim processing rule or a jurisdictional prerequisite.

iii. I.R.C. § 7459(d).

Next the Commissioner argues that I.R.C. § 7459(d) is "integrally related to I.R.C.§ 6213(a)"

is such way that it "makes plain, viz., that its time limit is jurisdictional." See Supp. Br. at 9. The Commissioner argues that if I.R.C.§ 6213(a) is found to be a claim processing rule that I.R.C. § 7459(d) becomes "harsh and illogical". See Id. at 10. The Commissioner argues this on an untested premise that I.R.C. § 7459(d) would create a "decision on the merits" for a taxpayer who filed a petition to the Tax Court late and gets dismissed for not meeting the time limits of I.R.C.§ 6213(a) (and not for lack of jurisdiction). The Commissioner argues that such a result would create the "harsh and illogical" consequence that such a taxpayer would not have another forum to address her liability. This is not a result that has been tested in the courts. But the Taxpayer would argue that it is a faulty premise of the Commissioner that I.R.C. § 7459(d) is the equivalent to a "decision on the merits." I.R.C. § 7459(d) states only that "the deficiency is the amount determined by the Secretary."

The Taxpayer does acknowledge that a late-petitioning taxpayer, after paying the tax, and in a later refund lawsuit, may be barred by res judicata from the Tax Court decision from contesting the amount of tax deficiency on the merits. No court opinion so holds (since no refund suit opinion has yet treated a dismissal for late filing of a Tax Court petition as a non-jurisdictional dismissal). However, even if the Commissioner is correct, this is a policy argument that should be addressed by Congress rather than the courts.

Like any policy discussion, Congress would have to compare how many taxpayers might fall victim to the I.R.C. § 7459(d) problem (and so lose the opportunity to bring a refund lawsuit because they filed a late Tax Court petition) to the number of late-petitioning taxpayers who might benefit if the Tax Court filing period was not jurisdictional. It is already clear that Taxpayers vastly prefer filing pre-payment deficiency case in the Tax Court to filing post-

payment refund lawsuits in the district courts and Court of Federal Claims. In the fiscal year ended September 30, 2015, IRS Chief Counsel statistics reveal that 32,394 petitions were filed in the Tax Court, while only 234 tax refund suits were filed in the district courts and Court of Federal Claims combined. See IRS Data Book, 2015, at 63 (Table 27) (available at https://www.irs.gov/pub/irs-soi/15databk.pdf). It would be hard to believe that more than a handful of the 234 refund lawsuits were commenced only after a taxpayer filed a Tax Court petition that was dismissed as untimely, and then the taxpayers paid the tax and sued for a refund. By contrast, we already know of at least six pending Tax Court cases that may be affected by the ruling in this case. There is not only this case, but five others in which the Tax Court has stayed proceedings pending the ruling by this Court herein. See unpublished orders in *Pearson v. CIR*, Docket No. 11084-15 (Jan. 8, 2016); *Frieda G. Oliner Irrevocable Trust v. CIR*, Docket No. 12766-15 (Jan. 8, 2016); *Corey v. CIR*, Docket No.13312-15 (Jan. 11, 2016); *Piepmeyer v. CIR*, Docket No. 30486-15S (Apr. 1, 2016); *Hansen v. CIR*, Docket No. 2189-16S (July 28, 2016). A former law school professor recently estimated that between 500 and 1,000 Tax Court petitions each year are dismissed for late filing. Marie Sapirie, "News Analysis: Will the Seventh Circuit Unsettle Tax Court Timing Rules?", Tax Notes Today (Oct. 24, 2016), 2016 TNT 205-3. There may be many more pending Tax Court cases where the government will not on its own timely raise an objection to the untimeliness of the petition. Further, there may be many pending Tax Court cases where circumstances beyond the taxpayer's control prevented timely filing, and if the filing period is not jurisdictional, equitable tolling might be allowed to make the petitions be treated as timely filed. Doubtless, far more taxpayers would benefit from a holding that the deficiency petition filing period is not jurisdictional than would be hurt by the

rare issue the government raises under section 7459(d) (if the government is even correct in its analysis).

The Commissioner next makes the argument that if the time limit portion of I.R.C.§ 6213(a) is non-jurisdictional the *only* way for a "dismissal is for lack of jurisdiction" to exist under I.R.C. § 7459(d) is for there to be no notice of deficiency to have been issued, which would in turn make it impossible for a petition to be filed. This argument is invalid because there are many other reasons why the Tax Court would dismiss for lack of jurisdiction. Here are some examples: If the incorrect taxpayer files a petition from a notice of deficiency (wife files a petition for deficiency that solely belonged to husband or corporate officer files a petition for individual deficiency when only the corporation was assessed a deficiency) then the Tax Court could dismiss the incorrect petitioning party. In *Allied Transportation, Inc. v. Commissioner*, T.C. Memo. 2016-102, the Tax Court dismissed a corporate taxpayer for lack of jurisdiction because its corporate charter had been revoked for failure to pay state taxes. See also *David Dung Le, M.D., Inc. v. Commissioner*, 114 T.C. 268 (2000), aff'd 22 Fed. Appx. 837 (9th Cir. 2001) (dismissing the corporate taxpayer for not having a valid charter). If a taxpayer files a petition after receiving a 30-day letter to appeal a tax examination to the IRS appeals office then the Tax Court could dismiss the taxpayer's petition because it is premature. If the notice of deficiency was mailed to an address other than the taxpayer's "last known address" then the Tax Court will dismiss the petition for lack of jurisdiction. See *Estate of Rule v. Commissioner*, T.C. Memo 2009-309. In *Pietanza v. Commissioner*, 92 T.C. 729 (1989), aff'd mem., 935 F.2d 1282 (3d Cir. 1991), the 3rd Circuit held that the IRS must show existence of notice of deficiency as well as date of mailing, and therefore court held that draft of notice of deficiency and uncertified Form

3877 were insufficient proof of mailing of the notice of deficiency. In the 9th Circuit case, *Scar v. Commissioner*, 814 F.2d 1363 (9th Cir. 1987) the notice of deficiency stated that the tax return had not been reviewed but that, in order to protect the government's interest, a tax deficiency was being asserted at the top marginal rate on an amount of income equal to a partnership loss which the IRS assumed that the taxpayers had improperly reported on their return. To compound matters, the IRS accidentally named a partnership in which the taxpayers had never been partners. The Ninth Circuit held that the IRS did not "determine" the existence of a deficiency before issuing the deficiency notice. The court stated, "the Commissioner could not determine a deficiency for the Scars without examining their return for 1978 to see whether they had claimed a deduction for such an investment." Since there was no determination, the notice of deficiency was deemed invalid and the petition had to be dismissed. *Id*. There are other reasons where the notice of deficiency could be found deficient that would result in the Tax Court dismissing a petition for lack of jurisdiction. Thus, the Commissioner's arguments that I.R.C. § 7459(d) is "integrally related to I.R.C.§ 6213(a)" is such way that it "makes plain, viz., that its time limit is jurisdictional" are all invalid or erroneous. None of these arguments preclude I.R.C.§ 6213(a) from being a claim processing rule. They certainly do not show a "clear statement" that the time limit provision in I.R.C.§ 6213(a) is jurisdictional.

iv. I.R.C. §§ 6213(c), 6512(a), and 6212(c).

The Commissioner's last argument in the "text" section of his supplemental brief is that "the text of Code §§ 6213(c), 6512(a), and 6212(c) also provides clear evidence of Congress' intent of the time limit in I.R.C. § 6213(a) being jurisdictional." Supp. Br. at 11. This argument is also invalid.

I.R.C. § 6213(c) merely sets forth the consequence for not filing within the time limits provided. There is no indication in the language of I.R.C. § 6213(c) that the Tax Court is divested of its inherent "power" to hear a petition under I.R.C. § 6213(a). See *Wong*[3].

I.R.C. § 6512(a) denotes that once a taxpayer has filed a timely petition with the Tax Court, the taxpayer is, as a general rule, barred from filing a suit for recovery of any part of the tax which was the subject of the Tax Court petition. There are enumerated exceptions to this rule. However, again, the language of I.R.C. § 6512(a) contains no indication that the Tax Court is divested of its inherent "power" to hear a petition under I.R.C. § 6213(a). See *Wong*[3].

I.R.C. § 6212(c) does not speak at all to the power or authority of the Tax Court. Rather that statute is directed to the conduct of the Secretary of the Treasury. It is inapplicable to the analysis of the "clear statement" rule.

In analyzing the arguments raised by the Commissioner in the "text" factor of the "clear statement" rule none of the Commissioner's arguments are valid to make a showing that the time limit provision of I.R.C. § 6213(a) is jurisdictional.

2. The Legislative History.

The Commissioner shifts focus next to his sub-argument that "The legislative history also squarely supports the position that I.R.C. § 6213(a) is a jurisdictional provision." See Supp. Br. at 13. The Commissioner's makes two arguments in this section. The first is that the Tax Court's predecessor, the United States Board of Tax Appeals, along with the Tax Court have consistently held that when a petition is untimely it must be dismissed for "lack of jurisdiction". The Taxpayer points out that this argument really doesn't belong in the "legislative history" category. Regardless, the U.S. Supreme Court has addressed this point. The first time the U.S. Supreme

Court asked courts and litigants to differentiate between claim processing rules and jurisdictional claims appears to be in 2004 in *Kontrick v. Ryan*, 124 S.Ct. 906, 540 U.S. 443, 455, 157 L.Ed.2d 867, 72 U.S.L.W. 4126 (2004) in that case the U.S. Supreme Court stated, "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." The *Kontrick* Court also stated, "Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court." *Kontrick v. Ryan*, 540 U.S. at 454. Thus, the term "jurisdictional" used by the Tax Court and the United States Board of Tax Appeals was likely a case of mislabeling.

The Commissioner's second argument is that the Senate and House Reports[4] cited by the Commissioner (see Supp. Br. at 16) (hereinafter the "Reports"), describe the "present law" of I.R.C. §§ 6212(a) and 6213(a) to include the following statement, "If the petition is not filed within that time period, the Tax Court does not have jurisdiction to consider the petition." The Commissioner makes the argument that this statement indicates that Congress intended I.R.C. § 6213(a) to be jurisdictional. The Taxpayer first notes that the enactment of Section 3463(a) of RRA 1998 (the specific provision referenced by the Commissioner) modifies only the language of I.R.C. § 6212(a). It does not modify any language contained in I.R.C. § 6213(a). The Taxpayer also notes that the Reports are not from the original enactment of I.R.C. §§ 6212(a), 6213(a), or their predecessors.

[4] These Reports are related to Internal Revenue Restructuring and Reform Act of 1998 (hereinafter referred to as the "RRA 1998")

Section 3463(b) of RRA 1998 (which was not referenced by the Commissioner) merely adds to the end of I.R.C. § 6213(a) the following: "Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary on the notice of deficiency shall be treated as timely filed." That provision is helpful to taxpayers whether or not the filing period is jurisdictional. The Commissioner has not cited any legislative history relating to the enactment of I.R.C. § 6213(a)'s first sentence (or its predecessor statutes) identifying the time period as jurisdictional.

Further, the Supreme Court has warned that views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. See *Hagen v. Utah*, 510 U.S. 399, 420 (1994). The Supreme Court in *Wong* recently doubted that legislative history alone could satisfy the clear statement exception to the general rule that timing provisions are not jurisdictional. *Wong*, 135 S. Ct. 1625, 1632 (2015) ("Finally, even assuming legislative history alone could provide a clear statement (which we doubt), none does so here.").

The descriptive language used in the Reports is merely a mislabeling of how a legislative committee summarized the combination of I.R.C. §§ 6212(a) and 6213(a). This is mislabeling is even understandable given how the Tax Court has used the term "jurisdiction" in its case law. This is mislabeling in the same way that the U.S. Supreme Court described in *Kontrick v. Ryan*, 540 U.S. at 454. What is more important is that during the enactment of the RRA 1998, and subsequent to the RRA 1998 the codified language of I.R.C. §§ 6212(a) or 6213(a) has never included the statement made in the Reports or used the words "jurisdiction" or "jurisdictional". A review of Statutes of Law, Public Law, 105-206-July 22, 1998, cited as "112 STAT. 767" and the present version of I.R.C. § 6212(a) and 6213(a) confirms this. The Commissioner has not

identified any legislative history of I.R.C. § 6213(a) that shows that Congress intended for the character of its time limit provision to be jurisdictional.

Moreover, the Commissioner has conveniently not discussed the last sentence of section 6213(a) in comparison to the various sentences elsewhere in the Internal Revenue Code that he says indicate that the time period in the first sentence of I.R.C. § 6213(a) must be read as rigidly jurisdictional. The last sentence of I.R.C. § 6213(a) introduces into the Internal Revenue Code the concept of a petition that is deemed timely filed, even though not filed within the actual, rigid filing period of the first sentence. Presumably, any petition that the Tax Court would deem timely under this last sentence of I.R.C. § 6213(a) (i.e., because the IRS furnished an incorrect, late last date to file on the notice of deficiency) (1) would also be "timely" for purposes of giving rise to the Tax Court's injunctive power in the penultimate sentence in I.R.C. §§ 6213(a), and (2) would be treated as having been filed "within the time prescribed in" the first sentence of section 6213(a) for purposes of I.R.C. §§ 6212(c), 6213(c), and 6512(a). Indeed, I.R.C. § 7502 (the timely-mailing-is-timely-filing provision of the Internal Revenue Code at issue in this case) also creates a deemed timely petition that was not actually filed within the period in I.R.C. § 6213(a). So do other sections of the Internal Revenue Code, sections 7503 (Saturday, Sunday, or holiday extensions), 7508 (combat zone tolling), and 7508A (Presidentially-declared disaster area tolling). It would do no violence to any of the provisions cited by the Commissioner if, because the IRS waived or forfeited raising a timeliness issue or under equitable doctrines such as equitable tolling, a court also deemed a petition timely.

3. The Historical Treatment of I.R.C. § 6213(a).

The Commissioner lastly argues that "[t]he historical treatment of I.R.C. § 6213(a) also

confirms that its time limit is jurisdictional." See Supp. Br. at 17. To support that assertion the Commissioner makes these three arguments: (1) that the Tax Court and every Circuit Court of Appeals has held that I.R.C. § 6213(a) is a "jurisdictional requirement" (See Supp. Br. at 19); (2) that "the Tax Court and its predecessor, the Board of Tax Appeals) has repeatedly held that its statutorily prescribed filing period for deficiency cases is jurisdictional" (See Supp. Br. at 20); and (3) that "the reasoning of the Court in *John R. Sand & Gravel Co.* supports our contention that I.R.C.§ 6213(a)'s time limit is jurisdictional" (See Supp. Br. at 21).

The Taxpayer will not spend much time addressing the first two arguments made by the Commissioner. As it has already been discussed, the Taxpayer is of the opinion that term "jurisdictional" has been mislabeled by the Courts in the way the U.S. Supreme Court described it in *Kontrick v. Ryan*, 540 U.S. at 454. But more importantly the Taxpayer does not believe that the "clear statement" rule's reference to "historical treatment" refers to the language used by the United States Courts of Appeal, the Tax Court, or the Board of Tax Appeals. The U.S. Supreme Court, in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. at 168, stated (emphasis added) that it was "**this** Court's historical treatment of the type of limitation [a statute] imposes (i.e., statutory deadlines for filing appeals)" that led the U.S. Supreme Court to its conclusion in *Bowles*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 that a statutory provision was jurisdictional. See also *Bowles v. Russell*, 551 U.S. at 214. *John R. Sand & Gravel Co. v. United States*, 552 U.S. at 140 analyzed "our history"—meaning the history of U.S. Supreme Court cases of "statutes of limitations in suits against the Government"—to determine the historical treatment of statutory provision.

Thus, the Commissioner's first two arguments are not within the scope of the historical

treatment analysis of the "clear statement" rule. Rather, it is clear from *Reed Elsevier, Bowles,* and *John R. Sand & Gravel Co.* that the "type" of time bar in the statutory provision in comparison with the U.S. Supreme Court's previous holdings is the analysis that should be undertaken. However, the Court in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. at 169 also cautioned that, "historical treatment as 'jurisdictional' is a factor in the analysis, it is not dispositive." Because the Commissioner's first two arguments do not address the analysis of the "clear statement" rule the Taxpayer will not address them other than to say that the cases cited mislabeled the time limit of I.R.C. § 6213(a) as being jurisdictional and that none of the cases cited undertook the analysis of whether the time limit provision of I.R.C. § 6213(a) is jurisdictional or a claim processing rule.

The Commissioner's third argument in his "historical treatment" section that "the reasoning of the Court in *John R. Sand & Gravel Co.* supports our contention that I.R.C.§ 6213(a)'s time limit is jurisdictional" is closer to the "clear statement" rule's required analysis.

The Commissioner argues that this Court holding that I.R.C.§ 6213(a) is a claim processing rule "would "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability" citing to *John R. Sand & Gravel Co.*, 552 U.S. at 139. See Supp. Br. at 21. The Commissioner acknowledges that the U.S. Supreme Court has not addressed the time limit provision of I.R.C.§ 6213(a) as being jurisdictional or a claim processing rule. But argues that the Supreme Court's silence is acceptance of what other courts have done for a long time.

The problem with this analysis is that the Commissioner does not articulate how Courts would be confused, disrupted, or uncertain by calling I.R.C.§ 6213(a) a claim processing rule. The Commissioner fails to mention that he already routinely deals with circumstances where he

initially thought no Tax Court petition was timely filed, so, under I.R.C. § 6213(c), he assessed the tax and began collection, but was subsequently told by the Tax Court or a taxpayer that a timely petition was in fact filed. A significant percentage of Tax Court petitions are mailed to the Tax Court on or near the last date to file and, as a result, arrive at the court more than a week after mailing (mail sent to the Tax Court is irradiated so delivery times are longer than one might expect). I.R.C. § 7502 deems these petitions timely filed. Yet, IRS employees sometimes assume that no petition was mailed within the time period and so, shortly after the time period has passed, make the assessment of the deficiency set out in the notice of deficiency. The injunctive power contained within I.R.C. § 6213(a) allows courts (including the Tax Court) to order the IRS to abate those premature assessments, but in practice, taxpayers almost never ask for an injunction, since they merely call up the IRS counsel who has filed the answer in the case and point out that an erroneous assessment was done (indicated by the taxpayer having received a post-assessment notice and demand for payment under I.R.C. § 6303). The IRS counsel then contacts other individuals in the IRS to abate the premature assessment. This same, routine process would be followed if this Court holds that the time period to file is not jurisdictional, but can be extended by IRS forfeiture or waiver or perhaps equitable doctrines: Any assessment of the deficiency done on the assumption that no timely petition had been filed would simply be abated by IRS employees after the taxpayer pointed out any premature assessment to the IRS counsel in the case. The IRS later treats such petition as filed "within the time period prescribed in" I.R.C. § 6213(a) for purposes of I.R.C. §§ 6212(c), 6213(c), and 6512(a), as well. Thus, there would be no confusion, disruption, or uncertainty if this Court held the filing period nonjurisdictional.

Also, the Commissioner does not address the fact that the U.S. Supreme Court has addressed the "type" of time limit statute that I.R.C.§ 6213(a) is. For example, in *Henderson*, 562 U. S, at 438, the 38 U.S.C. § 7266(a) filing time limit is that "a person adversely affected by [a Board of Veterans' Appeals] decision shall file a notice of appeal . . . within 120 days after" the decision. This was found to be a claim processing rule. The Supreme Court in *Wong*[3] held that the time limit provisions of 28 U.S.C. § 2401(b) ("two years after [the] claim accrues" and "within six months" of the agency's denial) are claim processing rules. In *Scarborough v. Principi*, 541 U.S. at 405 a 30-day appeal right granting filing deadline was found to be a claim processing rule. The 180-day limitation in §1395oo(a)(3) was found to be a claim processing rule in *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817, ___ U.S. ___ (2013).

These cases illustrate the "type" of time limit provisions that are claim processing rules. The *Wong*[3] Court stated, "most time bars are nonjurisdictional…" Thus, as a matter of historical context, the time limit provision of I.R.C.§ 6213(a) is the "type" of time limit provision that U.S. Supreme Court would label as a claim processing rule. The Commissioner has not raised any arguments to show that I.R.C.§ 6213(a) should be the exception to that general rule.

CONCLUSION

The time limit provision of I.R.C.§ 6213(a) is a claim processing rule, the Taxpayer respectfully requests that this Court reverse the Tax Court's September 22, 2015 Memo Opinion and September 25, 2015 Order dismissing the Petitioner-Appellant's Petition as they are erroneous and order that the Tax Court has jurisdiction to hear the Taxpayer's Petition and deny the Commissioner's Motion to Dismiss.

Dated this 28th day of November, 2016

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CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,586 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman in 12 point font.

Dated: 11/28/16 /s/ Paul W. Jones

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016 the Appellant's Supplemental Brief In Response To Appellee's Supplemental Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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