

Procedural Actions Following the Supreme Court Remand in *Boechler*

May 31, 2022

Key Takeaways:

- In *Boechler P.C., v. Commissioner*[1] ("*Boechler*"), the Supreme Court held that the thirty-day period to petition the Tax Court for review of an adverse determination by the IRS Appeals Office in a collection due process hearing *could* be equitably tolled but not if it *should* be equitably tolled.
- It is likely that the Tax Court will toll the filing period if the taxpayer shows that it pursued its rights diligently and that extraordinary circumstances prevented it from filing timely.
- Now pending in Tax Court is *Hallmark Research Cooperative v. Commissioner*,[2] which will consider if *Boechler* applies to the ninety-day Tax Court filing period to contest a notice of deficiency.

Supreme Court Decision: In *Boechler*, the taxpayer petitioned the Tax Court for review of an adverse determination by the IRS Appeals Office in a collection due process hearing. The petition was filed one day after the thirty-day filing period expired. At risk for the taxpayer was the seizure of its property to collect payment of an intentional disregard penalty. The Supreme Court held that the filing period *could* be equitably tolled and remanded the case to determine if the filing period *should* be equitably tolled.

Holding Below: In the Eighth Circuit, the taxpayer argued that the thirty-day period for filing a petition to the Tax Court from an adverse IRS determination in a collection due process hearing should be equitably tolled.[3] Treasury Regulations[4] commence the thirty-day filing period from the day after the date of the IRS determination letter rather than from the date of the taxpayer's receipt of the determination letter. The IRS mailed the determination letter to the taxpayer. The taxpayer asked that the thirty-day period be tolled for the three days that it took the mail to reach it, arguing that it was inequitable to commence the filing period from the date of the determination letter because other taxpayers closer geographically to the mailing location are a preferred class and that counting from the day of mailing is arbitrary and capricious. The Eighth Circuit rejected the taxpayer's argument, finding that the statutory thirty-day filing period is jurisdictional, meaning that the Tax Court did not have jurisdiction to hear a late-filed case.[5]

Overruling the Eighth Circuit, the Supreme Court decided only that in proper circumstances the thirty-day filing period *could* be equitably tolled.

Circumstances Justifying Equitable Tolling: While the Supreme Court did not decide whether the filing period should be tolled for the three-day period for delivery of the mail, the Court cited two previous cases in which it discussed circumstances when a filing period *should* be equitably tolled. Although the Court cited the cases for another purpose, they are instructive. The cases reason that to be entitled to equitable tolling, a litigant must prove that it diligently and actively pursued its rights, but an extraordinary circumstance prevented timely filing. Examples of diligence are filing a defective pleading during the statutory period and filing late because the adversary's misconduct tricked the litigant into filing after the filing period expired. An example of lack of diligence is the absence of the lawyer from the office when the notice that commenced the filing period was received.[6]

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Eighth Circuit cases allowed tolling when a litigant's failure to file timely was out of the litigant's hands^[7] but not if the litigant did not actively pursue its judicial remedies.^[8] In *Boechler*, the three days lost because of mailing was out of the taxpayer's hands, but the taxpayer still must show that it actively pursued filing the Tax Court petition and explain why the loss of the three days prevented the filing within thirty days. The Tax Court has developed no jurisprudence on this issue because it mistakenly believed that the period was not subject to tolling, so it is possible that on remand it will formulate a different test.

Further Application of Boechler: The Tax Court now is considering if the ninety-day filing period to contest a deficiency notice is jurisdictional and if it should be equitably tolled.^[9] The Tax Court initially dismissed the taxpayer's petition, but the taxpayer moved to vacate the dismissal in light of *Boechler*. The motion is pending. The outcome should depend on whether the ninety-day statutory filing period^[10] provides clearly that it is jurisdictional.

Conclusion: It is possible that *Boechler* will apply to other filing periods in the Tax Court, but even if other Tax Court filing periods are determined to be jurisdictional, the taxpayer must prove equitable circumstances that justify tolling, and, as in the *Boechler* case, even if it proves that, it must prove that it did not intentionally disregard its obligation to file correct information returns. Equitable tolling is only the first step in gaining relief.

Should you have any questions about the issues addressed in this alert, please contact your Miller Canfield lawyer or the authors.

[1] 2022 WL 1177496 (U.S. April 21, 2022).

[2] No. 21284 (U.S.T.C. Sept. 2, 2021).

[3] 967 F.3d 760 (2020).

[4] Treas. Reg. §6330-1(f)(1).

[5] The Eighth Circuit also rejected the taxpayer's argument that the statute unconstitutionally discriminated against taxpayers distant from the mailing location, reasoning that the statute did not reflect an underlying suspect classification favoring those near a mailing location and provided the IRS with a workable system to administer the tax laws.

[6] *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10–11 (U.S. 2014); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (U.S. 1990).

[7] *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir.1990), *cert. denied*, 498 U.S. 1026 (1991).

[8] *Medellin v. Shalala*, 23 F.3d 199, 204–05 (8th Cir. 1994).

[9] *Hallmark Research Collective v. Commissioner*, No. 21284 (U.S.T.C. Sep. 2-2021).

[10] I.R.C. §6213(a).