

How Justices May Interpret Statutory Time Bar In Tax Context

By **Saul Mezei and Terrell Ussing** (January 21, 2022, 4:50 PM EST)

Whether a statutory time period is jurisdictional or merely a claim-processing rule has been the subject of increased focus by the U.S. Supreme Court over the past few decades. The answer to the jurisdictional-or-claim-processing-rule question is consequential for various reasons, including because it can determine whether a court has the power to suspend or toll the time period.[1]

The issue has arisen in various contexts and is one that cuts across all legal areas. The Supreme Court has analyzed the issue in a diverse array of subject-matter areas, including veterans' benefits claims and federal tort claims. It now does so in the tax context.[2]

On Jan. 12, the Supreme Court heard oral argument in *Boechler PC v. Commissioner*, a case concerning Internal Revenue Code Section 6330(d)(1). That statute provides for U.S. Tax Court review of Internal Revenue Service Independent Office of Appeals' determinations regarding notices of intent to levy, under Section 6330(d)(1), which says:

The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).[3]

In *Boechler*, the U.S. Court of Appeals for the Eighth Circuit held that the 30-day deadline embodied in Section 6330(d)(1) for petitioning the U.S. Tax Court "is a rare instance where Congress clearly expressed its intent to make the filing deadline jurisdictional" and affirmed a Tax Court order dismissing the case for lack of jurisdiction.[4]

The U.S. Court of Appeals for the Ninth Circuit reached the same conclusion in its 2018 decision in *Duggan v. Commissioner*, and the Eighth Circuit found the Ninth Circuit's analysis persuasive.[5]

In between the issuance of the Ninth Circuit's 2018 opinion and the Eighth Circuit's 2020 opinion, the U.S. Court of Appeals for the D.C. Circuit analyzed a similarly worded statute — Section 7623(b)(4) — that addresses appeals to the Tax Court of whistleblower award determinations by the IRS Whistleblower Office. In *Myers v. Commissioner*, the D.C. Circuit ruled that Section 7623(b)(4) is not jurisdictional in nature.[6]



Saul Mezei



Terrell Ussing

In so doing, the D.C. Circuit acknowledged that its conclusion was "in some tension" with the Ninth Circuit's ruling regarding Section 6330(d)(1) but disagreed with the Ninth Circuit's conclusion that a statute is jurisdictional in nature simply because the filing deadline is contained in the same provision as the jurisdictional grant.[7]

Separate opinions within the Eighth Circuit and D.C. Circuit in *Boechler* and *Myers* further heighten the appearance of a disagreement among appellate-court judges.[8]

The Supreme Court has taken an increased interest in cases such as *Boechler* for good reason. In its 2004 *Kontrick v. Ryan* decision, the high court accepted responsibility for being "less than meticulous" over the years in how it used the term jurisdictional.[9]

In subsequent opinions, including in the 2015 *U.S. v. Wong* decision and the 2011 *Henderson v. Shinseki* decision, the Supreme Court has attempted to bring some discipline to the use of that consequential term.[10]

That attempt has included adhering to the so-called clear-statement rule, under which a statutory time bar is presumed to be nonjurisdictional — i.e., to speak only to a claim's timeliness and not to a court's power.[11] That presumption can be overcome only by a clear statement by Congress that the time bar was intended to be jurisdictional — i.e., to limit a court's power.[12]

Phrased another way, the clear-statement rule puts the onus on Congress to clearly provide that a time bar is intended to have jurisdictional consequences. But part of the problem — and a reason for continuing uncertainty — is that the clear-statement rule is itself not entirely clear. The rule raises questions, which include the following.

When is a statement clear enough, particularly in the context of a jurisdiction-conferring provision?[13] Does it matter where the statement is placed within the provision or whether the statement is contained within a parenthetical? Is the clear-statement rule really the "clearest possible statement" rule?

Much of the briefing and oral argument in *Boechler* focused on grammar and sentence structure — e.g., the location of "jurisdiction" in Section 6330(d)(1) relative to the time period for filing a petition in the Tax Court in that same provision and the fact that the reference to jurisdiction is contained in parentheses.

During the oral argument, multiple justices posed questions that seem to indicate a view that there is more than one plausible interpretation of Section 6330(d)(1). If this is ultimately the view of most of the justices, the Supreme Court might hold that Section 6330(d)(1) fails to satisfy the clear-statement rule and is therefore a claim-processing provision that does not limit the Tax Court's jurisdiction.[14]

The Supreme Court is unlikely to limit its analysis of the jurisdictional question to subsection (d) of Section 6330. Section 6330(e)(1) provides:

The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1).

The quoted statement ties the Tax Court's injunction jurisdiction to the "timely appeal" referenced in Section 6330(d)(1).

The parties in *Boechler* appeared to agree that, standing alone, this phrasing would satisfy the clear-statement rule. But the parties expressed divergent views on Section 6330(e)(1)'s relevance to whether the 30-day period in Section 6330(d)(1) is jurisdictional.

The government leaned much more heavily on Section 6330(e)(1) during oral argument, while the taxpayer argued that to allow that provision to determine the proper interpretation of Section 6330(d)(1) would amount to the tail wagging the dog.

In the taxpayer's view, the term "timely" as used in Section 6330(e)(1) should not dictate whether the 30-day period in Section 6330(d)(1) is jurisdictional but should be read consistently with the taxpayer's interpretation of the latter provision as a claim-processing rule that permits tolling.

The justices' questions regarding Section 6330(e)(1) indicate that the Supreme Court is not likely to determine Section 6330(d)(1)'s fate in isolation, and that their views as to the import — if any — of Section 6330(e)(1) might ultimately be a significant factor in their decision.

In deciding *Boechler*, the court could end up focusing on the general purpose of Section 6330 and the potential effects of an adverse ruling on taxpayers.

For example, the justices could be more willing to determine that Section 6330(d)(1) is merely a claim-processing provision if it was meant to serve an equitable function or if a conclusion that the provision is jurisdictional would disproportionately impact low-income taxpayers.

The court might also attempt to limit the consequences of a broad ruling, particularly with respect to Section 6213(a) and deficiency cases, which compose the vast bulk of the Tax Court's caseload.^[15]

Section 6213(a) provides specified time periods for filing petitions with the Tax Court after the mailing of a notice of deficiency. Section 6330 uses similar language in the levy-determination-appeal context.

The Tax Court has consistently — and for a long time — viewed Section 6213 as a jurisdictional provision and has dismissed many appeals for lack of jurisdiction on the basis that the petitions were untimely. If the Supreme Court determines that Section 6330(d)(1) is merely a claim-processing rule, then the court may attempt to limit its opinion in order to avoid unintended spillover effects that could have far broader ramifications.

Conclusion

In deciding whether a statutory time period is jurisdictional or merely a claim-processing rule, the Supreme Court has trended in recent years toward stricter adherence to the clear-statement rule, setting an increasingly high bar for when a statement is sufficiently clear to render a provision jurisdictional. This is not unexpected, as the court has set out to curtail lax use of the jurisdictional moniker and to shift the burden to Congress to be clear if it wishes to imbue a statutory time period with jurisdictional consequences.

If this trend continues and the court finds Congress' statement in Section 6330(d)(1) insufficiently clear to indicate a jurisdictional limitation, then the taxpayer in *Boechler* will prevail. Should that come to pass, it will be interesting to see whether the court seeks to limit its ruling to Section 6330(d)(1), and whether and how the ruling could affect other statutes, particularly Section 6213(a).

Saul Mezei and Terrell Ussing are partners at Gibson Dunn & Crutcher LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] It is also important because if the statutory time period is jurisdictional, then the statute limits a court's power to hear the case. This means that the court is independently obligated to raise the issue whether or not a party does. It also means that the court has to allow a party to raise the issue at any time, even after trial.

[2] See *United States v. Wong*, 575 U.S. 402 (2015) (holding that certain time limits under Federal Tort Claims Act are not jurisdictional); *Henderson v. Shinseki*, 562 U.S. 428 (2011) (holding that the 120-day deadline for filing appeals to the U.S. Court of Appeals for Veterans Claims is not jurisdictional).

[3] IRC Section 6330(d)(1).

[4] *Boechler, P.C. v. Commissioner*, 976 F.3d 760, 765 (8th Cir. 2020).

[5] *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018).

[6] *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019) (holding that Internal Revenue Code Section 7623(b)(4)'s requirement to file petition for Tax Court review within 30 days of a whistleblower award determination does not contain a "clear statement" that timely filing is jurisdictional).

[7] *Id.* at 1036 (holding that Congress must include words linking the time period for filing to the grant of jurisdiction and that jurisdiction is not conditional on a timely filing "simply because 'the filing deadline is given in the same breath as the grant of jurisdiction'").

[8] See *Boechler* 976 F.3d at 766–67 (Kelly, J. concurring on the basis of prior circuit precedent but stating, "I am not convinced the statute contains a sufficiently clear statement to justify this result."); see also *Myers* 928 F.3d at 1038–41 (Henderson, J. dissenting on the basis that "the statutory text clearly demonstrates that the Congress intended to make § 7623(b)(4)'s filing period jurisdictional").

[9] *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004).

[10] *United States v. Wong*, 575 U.S. 402 (2015); *Henderson v. Shinseki*, 562 U.S. 428 (2011).

[11] *Wong*, 575 U.S. at 409–10.

[12] *Id.* at 410 ("Most important, § 2401(b)'s text speaks only to a claim's timeliness, not to a court's power.").

[13] It is undisputed that Section 6630(d)(1) is a jurisdiction-conferring provision. The question is whether the 30-day filing period should be read as part of the jurisdictional grant or not.

[14] The justices could ultimately conclude that the 30-day filing period in Section 6330(d)(1) does not

limit the Tax Court's jurisdiction without also ruling on the availability of equitable tolling. If that happens, then the Tax Court would presumably have to decide the equitable-tolling issue on remand.

[15] IRC Section 6213(a). At least one tax professor believes that the statutory time limits in section 6213 are not jurisdictional under the clear-statement rule and recent Supreme Court recent case law. See Bryan T. Camp, *New Thinking About Jurisdictional Time Periods in the Tax Code*, 73 TAXL 1, 23–36 (2019).