

Myers May Make It Easier To Find Equitable Relief In Tax Court

By Laura Gavioli

When is a statutory filing deadline not a deadline? A recent decision from the U.S. Court of Appeals for the District of Columbia Circuit[1] may provide an equitable avenue for hearing of late-filed petitions in U.S. Tax Court. Specifically, the D.C. Circuit's decision in *Myers v. Commissioner* opens the door to taxpayer arguments for equitable tolling against the Internal Revenue Service — that is, the taxpayer may be able to argue that filing deadlines should be suspended due to the IRS' failure to advise them of any adverse action.



Laura Gavioli

In addition to the decision's impact upon filing deadlines in Tax Court, the D.C. Circuit took a more expansive view of the Tax Court's equitable jurisdiction than had previously been endorsed in the case law, relying on recent U.S. Supreme Court precedent. The decision has potentially far-reaching ramifications regarding the Tax Court's powers to grant equitable relief.

On July 2, 2019, the U.S. Court of Appeals for the District of Columbia Circuit reversed the Tax Court and left unresolved the question of whether the Tax Court may hear the petitioner's otherwise time-barred claim under principles of equitable tolling.[2]

In *Myers v. Commissioner*,[3] a potential whistleblower filed suit in Tax Court in January 2015, challenging the denial of his application for an award related to information he offered regarding his employer. More than five years earlier, in August 2009, the potential whistleblower had filed the relevant claim for an award with the Internal Revenue Service.

The IRS had issued the last of several denial letters regarding the claim in March 2014, almost a year before the potential whistleblower filed suit in Tax Court. Internal Revenue Code Section 7623(b)(4)[4] provides a window of 30 days following the date of the IRS' "determination" for the filing of a petition in Tax Court.

The potential whistleblower had clearly filed after the statutory deadline, but he argued that the Tax Court should hear the case regardless under the principle of equitable tolling: Essentially, the statute of limitations cannot run against a plaintiff who was not aware of his

or her cause of action. Because the IRS whistleblower determination letters failed to discuss the relevant statutory time periods for appeal of the determination to Tax Court, he argued that he could not have known of the relevant deadlines in time to file.

The Tax Court was sympathetic but held that the whistleblower had received “actual notice” of the IRS’ denial of the claim in April 2014, almost eight months before he had filed suit. Finding that the claim was untimely under the strict terms of the statute, the Tax Court held that equitable principles could not expand its jurisdictional grant, which is statutory.

On appeal to the D.C. Circuit, the appellate court agreed that, under the literal terms of the statute, the petition was untimely. The court agreed with the Tax Court that “actual notice” “without prejudicial delay and with sufficient time to file a petition” would trigger the 30-day filing period under Section 7623(b)(4). The court further stated that “we share the Tax Court’s concern” that the IRS whistleblower denial letters lacked information regarding appeal rights and timeframes.

The D.C. Circuit diverged from the Tax Court, however, about the possibility of equitable remedies. Noting recent Supreme Court case law on the subject, the court observed that most time bars are not jurisdictional but are more akin to claim processing rules that would not deprive courts of authority to hear cases.[5] Instead, Congress must state the time bar is jurisdictional and must “make unmistakable its intent to deprive the Tax Court of authority to hear an untimely petition.”

It is not enough that the statute uses mandatory language: The statute must speak in jurisdictional terms. Because Section 7623(b)(4) was non-jurisdictional, the D.C. Circuit remanded the case to the Tax Court to determine whether equitable tolling would hold open the statute of limitations for filing his petition.

The D.C. Circuit’s permissive view of the Tax Court’s equitable jurisdiction stands in striking contrast to the Tax Court’s own views of its jurisdictional remit. The Tax Court is keenly aware of its status as a court of limited jurisdiction, and it has frequently taken the position that it generally lacks equitable authority except where specifically granted by Congress.[6]

Moreover, because Section 7623(b)(4) contains language similar to that used in other statutes granting Tax Court jurisdiction, Myers may have sweeping implications. It creates a circuit split.

In rendering its decision in *Myers*, the D.C. Circuit acknowledged that the U.S. Court of Appeals for the Ninth Circuit had recently held that Section 6330, regarding collection due process jurisdiction in Tax Court, was jurisdictional, such that principles of equitable tolling would not apply to extend that statute of limitations.^[7] Section 6330^[8] and 7623(b)(4) contain “nearly identical” language, as the D.C. Circuit recognized, but the D.C. Circuit disagreed with the Ninth Circuit’s reasoning.

How far could the equitable powers of the Tax Court announced in *Myers* extend? The decision’s application in other jurisdictional contexts remains unclear. The language used in Section 7623(b)(4) is similar not just to Section 6330’s grant of collection due process jurisdiction, but also to Section 6015(e)(1),^[9] regarding innocent spouse determinations, among others.

In all three of these areas — challenges to denial of whistleblower awards, collection due process proceedings, and innocent spouse claims — petitioners in Tax Court are often representing themselves and may face obstacles in learning and understanding the deadlines and procedures that apply to their claims.

Between *Myers* and *Duggan*, it would be reasonable to expect litigants in all of these areas to argue that equitable tolling would cure late-filed petitions in Tax Court, because the statutory deadlines and language are almost identical.

Further, the IRS is likely to review and revise its standard whistleblower claim determination letters to outline clearly whistleblower claim appeal rights and timeframes, in light of the criticism leveled by the Tax Court and D.C. Circuit.

The availability of equitable tolling in Tax Court, though, would not necessarily open the floodgates to untimely litigation. The whistleblower claimant in *Myers* — and others using this argument — will have a steep climb to demonstrate that equitable tolling applies. The doctrine is used sparingly and is often predicated on fraud between the litigants, and the claimant must show that he or she exercised all due diligence in pursuing his or her claims.

Could *Myers* extend equitable tolling to the touchstone of all Tax Court jurisdictional statutes — deficiency jurisdiction under Section 6213?^[10] That statute is worded somewhat differently than the one at issue in *Myers* and speaks more clearly in jurisdictional terms, but

analogies could be drawn. Regardless, Myers reminds us to cautiously evaluate the notices we receive from the IRS and to carefully calculate and monitor any statutory deadlines that spring from those notices.

Laura L. Gavioli is a partner at McDermott Will & Emery 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] [https://www.cadc.uscourts.gov/internet/opinions.nsf/437782881C4B51598525842B00503A0B/\\$file/18-1003-1795401.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/437782881C4B51598525842B00503A0B/$file/18-1003-1795401.pdf).

[2] Myers v. Commissioner, -- F.3d --, 2019 WL 2750850 (D.C. Cir. 2019).

[3] Myers v. Commissioner, 148 T.C. 438 (2017).

[4] Internal Revenue Code Section 7623(b)(4). 

[5] See United States v. Kwai Fun Wong, 135 S.Ct. 1625 (2015).

[6] See, e.g., Menard, Inc. v. Commissioner, 130 T.C. 54 (2008) (discussing scope of equitable powers); I.R.C. § 6214 (providing the Tax Court with jurisdiction to hear claims of equitable recoupment).

[7] See Duggan v. Commissioner, 879 F.3d 1029 (9th Cir. 2017).

[8] Internal Revenue Code Section 6330. 

[9] Internal Revenue Code Section 6015(e)(1) 

[10] Internal Revenue Code Section 6213 