

**Legislative Recommendation #52****Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions****PRESENT LAW**

IRC § 6511(a) provides that the limitations period for filing a claim for refund generally expires two years after paying the tax or three years after filing the return, whichever is later. The amount a taxpayer can recover is limited to amounts paid within the applicable lookback period provided by IRC § 6511(b)(2). If the claim was filed within three years of the return, then the lookback period is three years, plus any filing extension. If the claim wasn't filed within three years of the return or the taxpayer never filed a return, the lookback period is two years.

When a taxpayer does not file a return, the IRS sometimes sends a notice of deficiency to assess additional tax. A notice of deficiency gives the taxpayer the right to petition the United States Tax Court, and if the taxpayer timely does so, then the Tax Court generally has jurisdiction under IRC § 6512(b) to determine whether the taxpayer is due a refund for the taxable year at issue, provided the tax was paid within the applicable lookback period under IRC § 6511(b). Under IRC § 6512(b), if the taxpayer did not file a return before receiving the notice of deficiency, the date on the notice of deficiency becomes the hypothetical date of the taxpayer's refund claim, and the two- or three-year lookback period in IRC § 6511(b)(2) runs from the date the IRS mailed the notice of deficiency. Absent a special rule, the Tax Court would have no jurisdiction to award refunds to non-filers who are issued a notice of deficiency more than two years after paying the tax.

However, the flush language of IRC § 6512(b)(3) provides just such a rule. It says that certain taxpayers who do not file a tax return are entitled to a three-year look-back period. Before Congress amended IRC § 6512 to add this special rule, a taxpayer who had not filed a return before the IRS mailed a notice of deficiency was entitled only to a two-year lookback period. But Congress, seeking to extend the lookback period available to such non-filing taxpayers, provided that if a notice of deficiency is mailed "during the third year after the due date (with extensions) for filing the return," and if no return was filed before the notice of deficiency was mailed, the lookback period is three years.

This special rule contains an unintended glitch. In the case of a non-filer who had requested an extension of time to file and then received a notice of deficiency, the words "with extensions" could delay by six months the beginning of the "third year after the due date." As a result, if the IRS mailed a notice of deficiency before the beginning of the third year, the Tax Court would not have jurisdiction to look back more than two years from the notice of deficiency, and thus would not be able to consider any overpayment that had been paid on the original due date of the return, usually April 15. Thus, there is a six-month "donut hole" during which the IRS can send a notice of deficiency without triggering the Tax Court's jurisdiction to consider the taxpayer's claim for refund.

An example may help to illustrate these rules. Assume John Doe had made estimated tax payments in excess of his tax liability by April 15, 2016, the original filing deadline for a 2015 tax return. He had requested a six-month extension of time to file but did not file a return. On July 2, 2018, the IRS mailed him a notice of deficiency for the 2015 tax year. He responded to the notice by petitioning the Tax Court and explaining the notice was incorrect because he had paid the asserted deficiency. He then filed a tax return showing he

had overpaid his tax and was due a refund. Under the flush language of IRC § 6512, the Tax Court can only refund payments made within two years of the date on the notice of deficiency, without regard to extensions (*i.e.*, for taxes paid on or after July 2, 2016). The special rule (flush language of IRC § 6512(b)(3)) would not help Mr. Doe because the notice of deficiency was mailed on July 2, 2018.

The special rule would only apply if the IRS had mailed the notice of deficiency during the third year after the due date of his return (with extensions) (*i.e.*, the year beginning after October 15, 2018). Because the IRS mailed his notice of deficiency before the third year had begun, the special rule did not apply, and John Doe could not get his refund.

## REASONS FOR CHANGE

According to the legislative history, Congress enacted the special rule of IRC § 6512(b)(3) to put non-filers who receive notices of deficiency after the two-year lookback period on the same footing as taxpayers who file returns on the same day the IRS mailed the notice of deficiency. The special rule was supposed to allow non-filers “who receive a notice of deficiency and file suit to contest it in Tax Court during the third year after the return due date, to obtain a refund of excessive amounts paid within the 3-year period prior to the date of the deficiency notice.”<sup>1</sup>

However, the statute as written may not fix the problem it was enacted to solve. In *Borenstein*, the Tax Court concluded that it had no jurisdiction to determine a non-filer’s overpayment because the non-filer had requested a six-month extension to file and the IRS mailed the notice of deficiency during the first six months of the third year following the original due date — after the second year following the due date (without extensions) and before the third year following the due date (with extensions).<sup>2</sup> Thus, the court found that the special rule of IRC § 6512(b)(3) leaves a donut hole in its jurisdiction. Although the U.S. Court of Appeals for the Second Circuit reversed the Tax Court’s decision, the Tax Court is not required to follow the Second Circuit’s decision in cases arising in other circuits.<sup>3</sup> Thus, unless the Tax Court revisits its decision, a legislative fix is still needed.

Although this problem only affects the relatively limited number of taxpayers who request a six-month filing extension and then, for whatever reason, do not file a return, Congress felt it was important to provide non-filers with this special rule. We believe it is important to highlight this unintended result and recommend a solution.

<sup>1</sup> H.R. REP. NO. 105-220, at 701 (1997) (CONF. REP.).

<sup>2</sup> *Borenstein v. Comm’r*, 149 T.C. 263 (2017), *rev’d*, 919 F.3d 746 (2d Cir. 2019).

<sup>3</sup> *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971).

**RECOMMENDATION<sup>4</sup>**

- Amend IRC § 6512(b)(3) to clarify that when the IRS mails a notice of deficiency to a non-filer after the second year following the due date of the return (without regard to extensions), the limitations and lookback periods for filing a claim for refund or credit are at least three years from the due date of the return (without regard to extensions).

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4 For more detail, see National Taxpayer Advocate 2018 Annual Report to Congress (Legislative Recommendation: *Tax Court Jurisdiction: Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions*); Nina E. Olson, *The Second Circuit in Borenstein Helped to Close the Gap in the Tax Court's Refund Jurisdiction, but Only for Taxpayers in that Circuit*, NATIONAL TAXPAYER ADVOCATE BLOG, <https://www.taxpayeradvocate.irs.gov/news/ntablog-the-second-circuit-in-borenstein-helped-to-close-the-gap-in-the-tax-courts-refund-jurisdiction-but-only-for-taxpayers-in-that-circuit/> (Apr. 27, 2019). This recommendation could be implemented by revising the flush language in IRC § 6512(b)(3) to insert the word "original" before "due date" and striking the parenthetical phrase "(with extensions)."