IRS Insights
A closer look

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Interest Netting—The Hunt for the Definition of "Same Taxpayer"—Update

In our November 2024 issue, we discussed the *Bank of America Corp. v. United States*[1] district court decision that Bank of America ("BoA") was not entitled to a $163 million interest netting benefit under section 6621(d) of the Internal Revenue Code ("IRC" or "Code") for pre-merger underpayments and overpayments and BoA's appeal thereof.

On July 29, 2025, the Fourth Circuit in *Bank of America Corp. v. United States*, 148 F.4th 171 (Fourth Cir. 2025), affirmed the district court decision.

Statutory Background

In 1998, Congress enacted section 6621(d) to eliminate the corporate interest rate disparity on equivalent underpayments and overpayments by the same taxpayer accruing interest during the same period. Devoid of its application, a corporate taxpayer could pay up to 4.5% more interest on a tax underpayment than it would receive on an equal amount of tax overpayment accruing interest during the same period.

Factual Background

Beginning in 1998, several banks merged into BoA, including Merrill Lynch ("Merrill") in 2013, with BoA surviving. Between 2015 and 2017, BoA filed interest netting claims with the Internal Revenue Service ("IRS") for overlapping periods of underpayment and overpayment with respect to pre-merger tax years of the merged banks and BoA.[2] The IRS disallowed[3] the claims "taking the position that interest netting applies only when the taxpayer was the same entity at the time it originally made the overpayments and underpayments, even if the taxpayer is the same entity at the time the interest is due."[4]

BoA filed a refund suit maintaining that the merged banks and BoA are the same taxpayer for purposes of section 6621(d).[5] The parties narrowed the issues to two test cases, both involving pre-merger overpayments of Merrill with pre-merger underpayments of BoA. The district court held that Merrill and BoA were not the same taxpayer explaining "[a]t the time of Merrill's overpayments and BoA's underpayment, the two were different corporations and different taxpayers. The payment dates … precede the corporations' merger in 2013. When 'the payments were … made before [a] merger,' then 'the payments were made by two separate corporations' that were not the 'same taxpayer.'"[6]

BoA appealed.

Fourth Circuit's Decision

The Fourth Circuit affirmed the district court's decision that BoA and Merrill were distinct corporate entities when the relevant underpayments and overpayments were made, therefore preventing them from being the same taxpayer and precluding interest netting on such underpayments and overpayments.

The Fourth Circuit explained that it is the underpayments and overpayments themselves, and not the interest that is payable on underpayments and allowable on overpayments, that must be by the same taxpayer. Further, the statute provides an identified point in time at which the taxpayer must be the same, that is, when the overpayments and underpayments are made. Concluding, underpayments and overpayments are made on specific dates prescribed in federal law, in this case, well before BoA merged with Merrill in 2013.

The Fourth Circuit found the most natural definition of the word "by" in the phrase "by the same taxpayer" to be "through the means or instrumentality of," reasoning that "the central relationship between 'underpayments and overpayments' and 'taxpayer' is one of causation by the taxpayer: the taxpayer underpays or overpays." The Fourth Circuit did not accept BoA's interpretation of "by" as meaning "with respect to" or "concerning" as such interpretation would rewrite statutory text "to require the 'same taxpayer' to be liable now for interest payable on an underpayment and entitled now to interest allowable on an overpayment."

The Fourth Circuit dismissed BoA's additional arguments with respect to consistent application with section 6402(a), legislative history, and state merger law.

Conclusion

Since section 6621(d)'s enactment in 1998, the absence of a clear definition of "same taxpayer" has prolonged the quandary of the statute's applicability to situations involving acquisitions and/or mergers. The Fourth Circuit decision provides some clarity.

While the particular fact pattern in the *Bank of America* case precludes interest netting, there remain many situations, including certain mergers and acquisitions, for which interest netting is allowable.

Important Reminder: The IRS does not apply interest netting on its own, requiring taxpayers to request the benefit of this taxpayer favorable interest saving provision.

Appeals Launches Post Appeals Mediation Pilot Program

The IRS Independent Office of Appeals ("Appeals") announced a new pilot program aimed at addressing impartiality concerns in the Post Appeals Mediation (PAM) alternative dispute resolution program.

Background

On October 1, 2025, the IRS announced a new two-year pilot program [IR-2025-100] intended to make PAM "more attractive to taxpayers." PAM is a voluntary program offered to taxpayers who have been unable to reach a settlement on tax issues under Appeals consideration.

PAM provides taxpayers an opportunity to request to participate in non-binding mediation to get a second review of any unresolved issues that remain after an unsuccessful Appeals proceeding. All parties, including the Appeals team, must agree to enter into PAM. The mediator is generally another Appeals officer, although the taxpayer may bring in their own mediator as well.

The last PAM pilot program, announced in January 2025, expanded access to PAM. Most significantly, that prior pilot program allowed taxpayers to participate in PAM even if they previously participated in Fast Track Settlement for the same matter.

New PAM Pilot Program

The new PAM pilot program makes a significant structural change to the existing PAM process. Cases will be reassigned to an Appeals team unconnected with the underlying case, who will represent Appeals in the mediation session. So, if a taxpayer's request for PAM is accepted, their case is assigned to a new Appeals team that had no prior involvement in the matter.

This change is intended to provide a new perspective and facilitate a more effective resolution process. The pilot program also mentions accelerated mediation sessions, often lasting only one day.

All other aspects of PAM will remain the same.

Conclusion

PAM may serve as a valuable tool for controversy resolution, and the recent pilot program represents an opportunity for taxpayers interested in mediation to avoid potential litigation.

IRS Modernizes Refunds for Individuals: Electronic Payments to Replace Paper Checks

On September 23, 2025, the IRS announced the first phase of its plan to eliminate paper refund checks for individual taxpayers, in line with Executive Order 14247 (the "Order"), "Modernizing Payments To and From America's Bank Accounts," issued on March 25, 2025. Generally, the Order requires that the Department of the Treasury cease issuing paper checks for all federal disbursements, that all payments made by the federal government be electronically processed, and that all federal receipts should be processed electronically.[7]

In its announcement, the IRS indicated that it intends to provide additional guidance and information for filing 2025 taxes prior to the 2026 filing season. But until then, taxpayers should continue to use the existing methods for filing returns and making payments, including any 2024 returns filed on extension before the end of 2025.

The IRS announcement highlighted the fact that the vast majority of individual tax refunds are already distributed electronically, with only a small percentage of refunds still issued via paper checks. Going forward, for those individuals who do not have access to bank accounts, the IRS plans to offer alternatives such as prepaid debit cards, digital wallets, or other secure electronic options, and limited exceptions will be available where necessary. The transition to electronic refunds is intended to enhance the security of payments, as electronic transfers are significantly less susceptible to loss, theft, or delay compared to paper checks.

If you or anyone you know may be impacted by this transition, please contact your tax adviser or a tax controversy services representative for assistance.

Two Additional Federal Appellate Courts Join Third Circuit in Holding that the Section 6213 Deadline Is a Claims Processing Rule and Not Jurisdictional

Section 6213(a) generally states that taxpayers seeking a redetermination of a deficiency "may" file a petition "[w]ithin 90 days … after the notice of deficiency … is mailed." Historically, the Tax Court and every federal appellate court that heard the issue had held that section 6213(a)'s deadline was jurisdictional. That was until July 2023 when the US Court of Appeals for the Third Circuit held in *Culp v. Commissioner*, 75 F.4th 196 (2023), that the section 6213(a) 90-day deadline was not jurisdictional and subject to equitable tolling.

Since the Third Circuit's ruling in *Culp*, other section 6213 cases have been heard by the Second and Sixth Circuits with similar, taxpayer-favorable outcomes. See *Buller v. Commissioner*, No. 24-1557 (2d Cir. 2025) and *Oquendo v. Commissioner*, No. 24-1205 (6th Cir. 2025), respectively. A third case, *O'Neill v. Commissioner*, No. 25-5250, is now before the Ninth Circuit.

Buller v. Commissioner

Following the examination of the taxpayers' 2018 joint income tax return, the IRS mailed a Notice of Deficiency on August 22, 2022, to the taxpayers' last known address. Under section 6213(a), taxpayers had 90 days to file a petition with the Tax Court. Counsel for the taxpayers, however, filed a petition for redetermination nine days late. In response, the IRS filed a motion to dismiss the petition for lack of jurisdiction. The taxpayers opposed the motion to dismiss for lack of jurisdiction and argued that the section 6213(a) deadline was nonjurisdictional and subject to equitable tolling. The Tax Court granted the government's motion to dismiss, and the taxpayers appealed the dismissal to the Second Circuit.

The Second Circuit acknowledged that its existing precedent held that the 90-day deadline was jurisdictional and those decisions were binding on subsequent cases unless overruled by an en banc panel or an intervening Supreme Court case.

Looking at Supreme Court cases on filing deadlines, the Second Circuit ultimately rejected the government's argument that the section 6213(a) deadline contained a clear jurisdictional statement. Section 6213(a) "speaks only to a claim's timeliness, not to a court's power." *United States v. Wong*, 575 US 402, 410 (2015). The language of section 6213(a) says that taxpayers "may file a petition," which indicates that the deadline is directed to the taxpayer and not the Tax Court.

Having determined that the section 6213(a) deadline was nonjurisdictional, the Second Circuit then addressed whether the deadline was subject to equitable tolling. The Court was not persuaded by the government's argument that *United States v. Brockamp*, 519 US 347 (1997), where the Supreme Court previously held that the period of filing a refund claim was not subject to equitable tolling, was applicable. For refund claims, the deadlines are laid out "in unusually emphatic form" and in a "highly technical manner."

The Second Circuit reversed and remanded the case so that the Tax Court could determine whether equitable tolling was applicable in *Buller*.

Oquendo v. Commissioner

The taxpayer filed her 2022 individual income tax return and claimed head of household status. On May 30, 2023, the IRS mailed a Notice of Deficiency after determining the taxpayer was not entitled to claim head of household and that she had improperly claimed earned income tax and childcare credits. The taxpayer filed a petition for redetermination with the Tax Court on November 1, 2023, even though the Notice of Deficiency she received showed August 28, 2023, as her last date to file a petition. The IRS filed a motion to dismiss the petition for lack of jurisdiction, and the taxpayer opposed the motion. The Tax Court, again, ruled in favor of the government and granted its motion to dismiss. The taxpayer appealed the dismissal to the Sixth Circuit.

The Sixth Circuit also noted that its existing precedent held that the 90-day deadline was jurisdictional but noted that the issue had not been reconsidered following "the Supreme Court's recent guidance about jurisdictional requirements." The Sixth Circuit went on to note that the referenced "guidance makes clear that the jurisdictional language in this court's cases interpreting [section] 6213(a) is a characterization left over from days when [courts] were less than meticulous in [their] use of the term jurisdictional." *Hamer v. Neighborhood Hous. Servs.*, 583 US 17, 27 (2017) (internal quotation marks omitted).

The government argued that since a Notice of Deficiency is a predicate for jurisdiction, the 90-day deadline found in section 6213(a) was also a predicate for jurisdiction. The Sixth Circuit, however, found this argument unpersuasive and noticed that the language of section 6213(a) did not include any language that could be read as "a directive to courts." As such, the Sixth Circuit noted that section 6213(a) lacks the classical markers of a jurisdictional rule.

The Sixth Circuit referenced both the *Buller* and *Culp* circuit court cases and noted that in both cases, the courts held that section 6213(a) was not jurisdictional before turning to the question of equitable tolling. However, because equitable tolling is not automatically applied and is made on a case-by-case basis it is generally handled by the lower court. Because the Tax Court did not consider equitable tolling, the case was reversed and remanded to the Tax Court to review the facts and determine if equitable tolling was applicable.

Tax Court's Response

Following the Second Circuit's decision in *Buller*, the Tax Court temporarily suspended dismissing late-filed deficiency cases so it could decide whether a change in its position that the section 6213(a) deadline is jurisdictional and subject to equitable tolling was warranted. On September 19, 2025, the Tax Court resumed dismissals for lack of jurisdiction and dismissed more than 20 section 6213 cases for lack of timely filing.

Conclusion

For Tax Court petitions appealable to a circuit in which the precedent is still that section 6213(a) is a jurisdictional rule, it should be expected that the IRS will continue filing motions to dismiss untimely petitions for lack of jurisdiction. The Tax Court may also continue to dismiss untimely petitions appealable to those circuits as the issue can be raised *sua sponte*.

Endnotes

1. *Bank of America Corporation v. United States*, 656 F. Supp. 3d 574 (W.D. NC, Charlotte Division 2023).
2. Claim covered tax adjustments for 23 years across seven pre-merger banks.
3. The IRS disallowed two claims and didn't act upon the third.
4. *Bank of America Corporation v. United States of America*, No. 23-251 (4th Cir.)(Petition for Interlocutory Review Pursuant to 28 U.S.C. § 1292(b), Statement, Factual Background citing the IRS's Disallowance of September 14, 2015, *Bank of America v. United States*, W.D. NC case No. 3:17-cv-00546-RJC-WCM, Third Am. Compl. Dkt. 29-23).
5. *Bank of America Corporation v. United States*, No. 3:17-cv-00546-RJC-DSC, Plaintiff's Motion for Partial Summary Judgment (August 19, 2022).
6. *Bank of America Corporation v. United States*, 656 F. Supp. 3d 574, 578 (W.D. NC, Charlotte Division 2023).
7. IR-2025-94, Sept. 23, 2025.

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