

Courts disagree when it comes to tolling tax statute

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How much time does the Internal Revenue Service have to assess taxes? This simple question is put to tax lawyers and accountants all the time, but the answer isn't always simple. Usually it is three years, in some cases it is six years, and sometimes it is even more.

Then there is the IRS collection statute, which is generally 10 years. But that assumes the taxes were validly and timely assessed. Most of the fights turn out to be about whether the IRS has made a timely assessment or is too late.

Handicapping what is timely and what is too late can get particularly tricky when the IRS tries to make an assessment but has made a mistake at some point in the process. The IRS may send a required notice to a bad address or to the wrong taxpayer, or there may be some other snafu. These types of situations happen more than you might think, even if the taxpayer's name doesn't include Patriot or Tea Party!

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Recently the tax court and the 11th U.S. Circuit Court of Appeals came to different conclusions on the key question of tolling a tax statute. In *Shockley v. Commissioner*, T.C. Memo 2011-96, the IRS sent two notices to a corporation, one to the correct address and one to an incorrect one. The IRS also sent another notice to the correct address of the corporation's former shareholders, the Shockleys, who filed a protective petition in tax court.

In their petition, the Shockleys claimed the notice was improper, and in the alternative, they said no tax was owed. The Shockleys were trying to protect the corporation from being assessed taxes if no petition were filed. Their plan worked since the IRS did not make an actual tax assessment.

The tax court ruled that what the Shockleys did was proper. Thus, the IRS was now out of time to assess the taxes. The notice sent to the Shockleys was invalid, as they were no longer associated with the corporation. For that reason, their tax court petition didn't toll the statute of limitations.

However, the 11th Circuit disagreed. It held the Shockleys' tax court petition did toll the statute to benefit the IRS. 686 F.3d 1229

(11th Cir. 2012). After all, at least one valid notice was sent to the corporation. The appeals court said the tax court's decision gave the IRS an unfair Hobson's choice.

If the IRS made an assessment *after* the tax court petition was filed, it might have violated the law. Yet if the IRS didn't make an assessment, the statute could expire. The 11th Circuit said the best outcome was to rule that the statute was tolled as long as the tax court proceeding was ongoing.

What should the Shockleys have done? Perhaps kept quiet and not filed a petition. Of course, the IRS would almost surely have automatically assessed the corporation. Filing a protective tax court petition was probably the right move.

If the IRS had not provided *any* valid notice to the corporation, the 11th Circuit would likely have ruled differently. Indeed, whether the statute is tolled by a tax court petition can depend on whether the IRS has issued a valid notice in the first place. In one of the earliest cases in this area, a petition filed in response to an *invalid* notice did *not* toll the statute. *Greve v. Commissioner*, 42 B.T.A. 142 (1940). There, the notice error was the IRS's own fault. In fact, the IRS had multiple opportunities to correct its error but decided instead to rely on what had already been done.

Another key factor is whether the statute has already expired. In the Shockleys' case, the tax court petition was filed just before the statute expired. When a petition is filed before the statute expires, the limitations period may be tolled. However, a petition can only toll the statute if the statute is still open. See, e.g., *Strong v. Commissioner*, T.C. Memo 1991-531; c.f., *Midland Mortgage Co. v. United States*, 576 F. Supp. 101, 107 (W.D. Okla. 1983).

Does any petition filed in response to an IRS notice allow the IRS additional time to make a tax assessment? Perhaps *it depends*.

What really matters is whether the IRS has sent a *valid* notice to the proper taxpayer and whether the statute is *still* open. If the IRS's notice is not valid, and the IRS has reason to know that, a petition filed in response to the notice should surely *not* toll the statute. The same goes for cases where the statute has already expired.

After all, a tax court petition can't "restart" the statute. In cases where the taxpayer gets to tax court too late after a *valid* assessment, the law is clear that such a late petition has no legal effect. If the IRS assessment is itself invalid or the statute of limitations has already run, the mere fact that the taxpayer takes the belt and suspenders precaution of filing in tax court should not bring an already dead tax assessment back to life.

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