

Tax Court Invalidates Treasury Reg in Extension Case of First Impression

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In this post, the authors discuss *Abdo v. Commissioner*, a case in which the Tax Court invalidated a Treasury regulation interpreting [section 7508A\(d\)](#)'s automatic and mandatory extension for filing a Tax Court petition.

The validity of yet another tax regulation recently took a hit in *Abdo v. Commissioner*, [162 T.C. No. 7](#) (2024), a case of first impression regarding [section 7508A\(d\)](#)'s mandatory 60-day extension period for presidentially declared disasters. The case, which had been pending in the Tax Court since 2020, turned on whether a Treasury regulation, which limited the 60-day extension period to specific acts, was inconsistent with the statutory language of [section 7508A\(d\)](#). The Tax Court, in its April 2 opinion in *Abdo*, utilized the analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, [467 U.S. 837](#) (1984), to determine that [section 7508A\(d\)](#) was unambiguous, and therefore, the applicable Treasury regulation was invalid and not entitled to deference.

Note that in an earlier post, "[It's Getting Hard To Be A Tax Regulation](#)," Les discussed Judge Jones's concurring opinion in *Abdo*; the concurrence touched on the connection between the issue in this case and the question as to whether the time to file a petition in a deficiency case is jurisdictional. The main issue in *Abdo*, however, involves [section 7508A\(a\)](#), which provides the IRS with discretionary authority to postpone acts described under [section 7508\(a\)](#) for up to one year for taxpayers affected by a federally declared disaster or a terroristic or military action. [Section 7508A\(d\)](#), which was added to the code in December 2019 and the version in effect with respect to *Abdo*, provided a mandatory 60-day extension of time to disregard acts "in the same manner as a period under subsection (a) [7508A(a)]."¹

In *Abdo*, the taxpayers, who lived in Ohio, received a statutory notice of deficiency dated December 2, 2019. The notice informed the taxpayers that March 2, 2020, was the last day to petition the Tax Court, pursuant to [sections 6213\(a\)](#) and [7502](#). The taxpayers filed their petition on March 17, 2020. The government filed a motion to dismiss for lack of jurisdiction, asserting that the taxpayers late-filed their petition with the court.

The taxpayers asserted that their time to file a Tax Court petition was subject to the mandatory 60-day extension of [section 7508A\(d\)](#). On March 13, 2020, in response to the COVID-19 pandemic, the president declared a nationwide emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act and approved disaster declarations for each of the 50 states. On March 31, 2020, the state of Ohio was declared a major disaster area by the Federal Emergency Management Agency; the disaster declaration identified January 20, 2020, as the beginning date of the emergency conditions in Ohio. As such, the taxpayers contended their petition was timely under [section 7508A\(d\)](#) as of March 17, 2020, since it was within 60 days of January 20, 2020. The taxpayers noted that [section 7508A\(d\)\(1\)](#) stated that periods “shall be disregarded in the same manner as a period specified under [section 7508A\(a\)](#),” which allows the IRS to postpone the time for taxpayers to file a Tax Court petition.²

The government countered that reg. [section 301.7508A-1\(g\)](#)³, which interpreted [section 7508A\(d\)](#), prevented application of the 60-day extension to the taxpayers because the filing of a Tax Court petition was not listed among the “time-sensitive” acts that were postponed under the regulation. The government argued that [section 7508A\(d\)](#) was ambiguous because (1) it failed to address specific acts triggering a mandatory postponement period and (2) it did not address federally declared disasters without an incident date under [section 7508A](#). Therefore, the related regulation, with its defined list of acts entitled to the 60-day extension, was a reasonable interpretation of [section 7508A\(d\)](#) and was entitled to *Chevron* deference.

The Tax Court did not agree with the government’s position. Rather, in determining under its *Chevron* analysis that [section 7508A\(d\)](#) was unambiguous as to the mandatory 60-day extension for any of the acts covered by [section 7508\(a\)](#) (as cross-referenced by [section 7508A\(a\)](#)), the Tax Court reasoned:

The mandatory language of subsection (d) stands in stark contrast to the discretionary language of subsection (a). Under the discretionary language of [section 7508A\(a\)](#), the Secretary may specify (1) whether a period is disregarded, (2) how long a period is disregarded, (3) for whom a period is disregarded, and (4) for what purposes a period is disregarded. The mandatory language of subsection (d), however, provides the Secretary no discretion whatsoever regarding any of these four aspects of the extension. . . . The heading of subsection (d) — “Mandatory 60-day extension” — further confirms this reading.

The taxpayers appeared to sway the Tax Court’s view by asking one straightforward question and supplying one straightforward response: “Why would Congress provide qualified taxpayers with an automatic 60-day extension, only to have it limited, or even nullified if the Secretary does not act? That makes no sense.”

To answer the taxpayers’ question, the Tax Court acknowledged that the phrase “in the same manner,” as used in [section 7508A\(d\)](#), had been interpreted in case law to mean “to use the same methodology or procedures.” At the same time, the Tax Court also acknowledged that the phrase had been susceptible to ambiguity. Regardless, the Tax Court concluded that the “in the same manner” language of [section 7508A\(d\)](#) was not limited to describing process or procedure but was an

“unambiguously self-executing postponement period that incorporates all of the acts referenced by 7508A(a).”

Additionally, as to the supposed ambiguity of federally declared disaster without an incident date, the Tax Court pointed out that the *Abdo* taxpayers were relying on the Ohio disaster declaration, which did have an incident date (January 20, 2020).

Treasury’s motivation, through reg. [section 301.7508A-1\(g\)](#), for limiting the acts encompassed by [section 7508A\(d\)](#) is unclear. In the preamble to the proposed regulation, Treasury explained that, except for pension-related acts described in [section 7508A\(d\)\(4\)](#), [section 7508A\(d\)](#) did not specify which acts were subject to the mandatory postponement; thus, it was still up to the IRS to determine which acts under [section 7508\(a\)\(1\)](#) could be postponed. This was an interesting construction of legislative intent, since a House Ways and Means Committee report stated that Congress intended for [section 7508A\(d\)](#) to create an “automatic” extension of filing deadlines to provide certainty to taxpayers.

In the final regulations, Treasury acknowledged a comment to the proposed regulations that noted that the practical effect of Treasury’s approach was to nullify [section 7508A\(d\)](#). Subsuming the “mandatory” 60-day postponement under the IRS’s existing discretionary authority of 7508A(a) meant that the IRS could determine that there are circumstances where no acts are postponed under [section 7508A\(d\)](#). It is unclear what the policy basis was for this regulatory position, but the preamble to the proposed regulations provides a clue: Treasury commits two paragraphs to the description of acts it routinely does not postpone under its discretionary authority as part of the justification for its conclusions in limiting the acts subject to the mandatory 60-day extension of [section 7508A\(d\)](#). It seems that Treasury wanted to maintain the status quo of its discretionary authority because it felt that postponing all acts under [section 7508\(a\)\(1\)](#) was either unsound policy, difficult to administer, or both. But this results-oriented approach during a time of increased scrutiny of, and challenges to, Treasury regulations is surprising.

The timeframe of this discussion on the version of [section 7508A\(d\)](#) applicable to the *Abdo* case is limited because, in November 2021, Congress amended the statute to explicitly reference the acts that were subject to the mandatory 60-day extension. There does not seem to be congressional commentary on this amendment, but the amendment certainly appears prudent in light of the issues presented in *Abdo*.

Although Congress created an unambiguous mandatory 60-day extension of certain taxpayer acts with the enactment of [section 7508A\(d\)](#), it conflicted with the IRS’s long-standing discretion regarding which acts would be postponed by reason of a federally declared disaster. While this congressional action may or may not be good policy, Treasury’s reaction — to seemingly nullify [section 7508A\(d\)](#) with a regulation — was an aggressive approach, particularly in light of the current regulatory environment.

FOOTNOTES

¹ In 2021, Congress revised [section 7508A\(d\)](#) to define that the mandatory 60-day period applied to all acts under section 7508(a)(A)-(F). See [P.L. 117-58](#).

² [Section 7508A\(a\)](#) references [section 7508\(a\)\(1\)](#), which includes filing a Tax Court petition, with respect to acts that may be postponed.

³ This regulation was finalized in June 2021, after the taxpayers had filed their petition, but the regulation was made retroactive for disaster declarations occurring on or after December 21, 2019.

END FOOTNOTES