RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

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I. ACCOUNTING

A. Accounting Methods

1. Who says land is not depreciable? Farmer-taxpayer's costs for "base acres" with rights to USDA subsidies might be amortizable, but the taxpayer's change from not amortizing to amortizing the base acres was an unauthorized "change in method of accounting" under § 446 and resulted in a positive § 481 adjustment. Conmac Investments, Inc. v. Commissioner, 139 F.4th 723 (8th Cir. 6/6/25), *aff'g* T.C. Memo 2023-40. The taxpayer was in the business of farming, including leasing land to tenant farmers. In tax years 2004, 2006 through 2008, and 2010 through 2013, the taxpayer acquired farmland that came with "base acre" rights. Base acres rights entitle farmers, including tenant farmers, to subsidies from the U.S. Department of Agriculture ("USDA") for growing certain crops. Before 2009, the taxpayer did not allocate any of the purchase price of farmland to base acre rights associated with the farmland. Starting in 2009, though, the taxpayer began allocating part of the purchase price of the farmland to base acre rights and taking 15-year amortization deductions (presumably under § 197) for the portion of the purchase price allocated to base acres rights (instead of including such costs in the basis of the farmland). The taxpayer did not farm any of the base acres at issue; it leased them to tenant farmers. The amortization deductions attributable to base acres rights partially offset the taxpayer's rental income from its tenant farmers.[1] The tenant farmers, not the taxpayer, received the USDA base acre subsidies. The taxpayer neither (i) filed amended returns reflecting amortization of base acres costs for years before 2009, nor (ii) attached Form 3115, Application for Change in Accounting Method, to the taxpayer's 2009 return reflecting its amortization of base

[1] The taxpayer apparently developed its own per acre methodology with respect to accounting for and amortizing base acres rights. Interested readers should refer to the Tax Court's opinion for an explanation of the methodology used by the taxpayer.

acres costs beginning that year. Years later, the IRS audited the taxpayer's 2013 and 2014 tax returns, eventually issuing a notice of deficiency dated December 18, 2017, proposing additional income taxes of $48,374 for 2013 and $44,980 for 2014. These proposed deficiencies resulted from disallowing the taxpayer's base acres amortization deductions for taxable years 2013 and 2014. Further, the IRS proposed an additional deficiency of $141,614 for tax year 2013 relating to the taxpayer's closed tax years 2009-2012. This additional 2013 deficiency attributable to closed tax years resulted from the IRS's determination that the taxpayer improperly changed its method of accounting for base acre costs in 2009 without obtaining the consent of the Commissioner as required by §446(e). According to the IRS, the taxpayer's unauthorized change in method of accounting in 2009 resulted in a positive § 481 adjustment to the taxpayer's taxable income for 2013, the "year of change" within the meaning of § 481, as a consequence of the IRS's audit. The taxpayer timely filed a petition in the Tax Court challenging the IRS's proposed deficiencies.

Tax Court. Before the Tax Court, the taxpayer argued that its amortization of base acre costs starting in 2009 was due to a change in "underlying facts," including applicable law, thereby qualifying for an exception (discussed further below) under which a change due to an underlying change in facts is not a change in the taxpayer's method of accounting. Moreover, the taxpayer argued that the IRS's proposed § 481 adjustment related to closed years 2009-2012 and thus was not permissible. The IRS countered that there was no change in "underlying facts" or law in 2009 relating to amortization of intangibles such as base acre subsidy rights. Instead, the taxpayer and its tax advisors merely failed to recognize that costs associated with base acre subsidy rights were amortizable until 2009. With respect to the proposed § 481 adjustment for closed tax years 2009-2012, the IRS relied upon several authorities, including *Huffman v. Commissioner*, 126 T.C. 332 (2006), *aff'd* 518 F.3rd 357 (6th Circ. 2008), and Rev. Proc. 2015-13, 2015-5 I.R.B. 419 at 425 § 2.06(1), standing for the proposition that a § 481 adjustment may be attributable to closed tax years. The Tax Court (Judge Paris) rejected the taxpayer's arguments, primarily because the taxpayer had not shown any change in "underlying facts" or law in 2009 that would qualify for an exception to the normal rule that a change in the treatment of an item as non-amortizable to amortizable (or vice versa) is a change in method of accounting. The taxpayer appealed to the Eighth Circuit.

Eighth Circuit: Before the Eighth Circuit, the taxpayer reemphasized its argument that an exception to the regulations under § 446 applied to permit the taxpayer to modify its treatment of costs for base acres rights. Specifically, the taxpayer argued that its discovery in 2009 of the ability to amortize costs (again, presumably under § 197) associated with base acre rights was a change in underlying facts, including applicable law, within the meaning of the regulations under § 446. The IRS reiterated the arguments it had made before the Tax Court. In an opinion by Judge Benton, a three-judge panel of the Eighth Circuit affirmed the Tax Court's decision in favor of the IRS. Judge Benton's analysis began by quoting Reg. § 1.446-1(e)(2)(ii)(d)(2), which provides in part:

> *Changes in depreciation or amortization that are a change in method of accounting*. Except as provided in paragraph (e)(2)(ii)(d)(3) of this section, a change in the treatment of an asset from nondepreciable or nonamortizable to depreciable or amortizable, or vice versa, is a change in method of accounting.

Judge Benton also quoted the exception relied upon by the taxpayer in paragraph (e)(2)(ii)(d)(3) of the regulations, which provides:

> [A] change in method of accounting does not include adjustment of any . . . deduction that does not involve the proper time for . . . the taking of a deduction . . . . A change in method of accounting also does not include a change in treatment resulting from a change in underlying facts.

The taxpayer maintained that its amortization of costs associated with base acre rights beginning in 2009 either (i) was not a timing issue but rather merely an "adjustment" (within the meaning of the above-quoted exception) of the amount allowable as a deduction or (ii) was the result of a change in underlying facts because the taxpayer's CPAs had not previously identified base acre rights as a potentially amortizable intangible asset. The Eighth Circuit disagreed, with Judge Benton reasoning, "By beginning to deduct amortization of the base acres, [the taxpayer] changed the time it recovered the original cost by spreading the cost over the years before eventual disposition." 139 F.4th at 725. Furthermore, Judge Benton cited *Pinkston v. Commissioner*, T.C. Memo. 2020-44 at *22-23, holding that a taxpayer's "subjective misunderstanding of fact or law does not equate" to "a change in underlying facts" within the meaning of Reg. § 1.446-1(e)(2)(ii)(d)(3). Finally, the Eighth Circuit rejected the taxpayer's argument that the IRS's proposed § 481 adjustment for 2013 pertaining to closed tax years was improper. Section 481 allows an IRS adjustment "in the year of change." The taxpayer argued that the "year of change" for this purpose was 2009, not 2013. Again, the Eighth Circuit disagreed, concluding that the "year of change" under § 481 was 2013 (not 2009). The "year of change" was 2013 because that is when the IRS audited the taxpayer and changed the taxpayer's method of accounting for costs associated with base acre rights. Again, citing *Pinkston* at *9-10, Judge Benton wrote: "[B]ecause [§ 481] would be virtually useless if it did not affect closed years, courts have uniformly interpreted it to allow adjustments, in the year of change, to reflect adjustments to tax liabilities for years closed by the period of limitations." 139 F.4th at 727.

B. Inventories

C. Installment Method

D. Year of Inclusion or Deduction

II. BUSINESS INCOME AND DEDUCTIONS

III. INVESTMENT GAIN AND INCOME

IV. COMPENSATION ISSUES

A. Fringe Benefits

B. Qualified Deferred Compensation Plans

C. Nonqualified Deferred Compensation, Section 83, and Stock Options

D. Individual Retirement Accounts

1. Crime doesn't pay except, perhaps, when the government seizes your IRA under criminal forfeiture laws that relate back to the time your criminal activity funded your IRA. Hubbard v. Commissioner, 132 F.4th 437 (6th Cir. 3/19/25), *rev'g* T.C. Memo. 2024-16. This opinion from the Sixth Circuit (Judge Murphy) irresistibly opens as follows:

> After a jury convicted Lonnie Hubbard of operating an illegal "pill mill," the government punished him in the expected ways. The district court ordered Hubbard to serve decades in prison. The government also confiscated his homes, vehicles, watercraft, and financial accounts using the criminal-forfeiture laws. Years later, though, the Internal Revenue Service (IRS) sought to punish Hubbard in an unexpected way. As part of the earlier forfeiture, the IRS had seized over $400,000 from Hubbard's individual retirement account (or IRA, in the vernacular of retirement planning). The IRS suggested that the transfer of this money into its own coffers qualified as "income" for Hubbard that he should have paid taxes on from prison. The tax court agreed and ordered Hubbard to pay over $180,000 in taxes and penalties.

132 F.4th at 437.

At the time the government seized the taxpayer's IRA in 2017, he was incarcerated. The IRA custodian, T. Rowe Price, issued Form 1099-R for 2017 reporting a taxable distribution to the taxpayer. The taxpayer did not file a return for 2017. The IRS prepared a substitute for return (commonly known as an SFR) and later issued a notice of deficiency. The notice of deficiency asserted that the taxpayer owed income tax, late-filing and late-payment penalties, an underpayment penalty, and a 10 percent penalty for a premature withdrawal from the IRA. The taxpayer responded by timely filing a petition in the Tax Court. (The IRS later conceded in the Tax Court that it did not seek to impose the 10 percent early withdrawal penalty.)

Mr. Hubbard, a pro se taxpayer, contended before the Tax Court and the Eighth Circuit that it was improper for the IRS to assess back taxes and penalties of over $180,000 attributable to the forfeiture to the U.S. government of the approximately $400,000 balance in his “simplified employee pension” (SEP) IRA connected to his trade or business. The taxpayer’s income from his criminal “pill mill” trade or business as a pharmacist in Kentucky, funded his IRA.

Section 408(d)(1) provides that the “payee or distributee” of IRA funds must include in gross income funds withdrawn from an IRA. The taxpayer argued that, due to the government forfeiture, he was not the “payee or distributee” of the funds withdrawn from his IRA within the meaning of § 408(d)(1). The Tax Court (Judge Marshall) disagreed, holding that the taxpayer was the “payee or distributee” and therefore responsible for income taxes and penalties relating to the forfeiture of his IRA. The Eighth Circuit, however, reversed, with Judge Murphy explaining in his opinion that the Tax Court had misinterpreted the criminal forfeiture laws at play in the case. Judge Murphy recounted that two types of criminal forfeitures generally are authorized under U.S. law. One type, which applied to the taxpayer, allows the government to seize and take ownership of a criminal defendant’s assets connected to a crime. Moreover, this type of forfeiture can trigger a “relation-back doctrine,” which means the government has “[a]ll right, title, and interest” in the criminal defendant’s property, including his IRA, as of the time the defendant committed his crimes. The other type of criminal forfeiture, which did not apply to the taxpayer in this case, allows the government to enforce a “personal money judgment” against a criminal defendant. According to the Eighth Circuit, this distinction matters when a criminal defendant forfeits his or her IRA. For IRA forfeitures used to satisfy a “personal money judgment,” the Eighth Circuit would agree with the IRS and the Tax Court that imposing back taxes and penalties on a deemed distribution of the IRA is proper. But, if the nature of the forfeiture is instead a seizure of the criminal defendant’s IRA triggering the “relation-back doctrine,” then the government becomes the owner of the IRA as of the time the defendant funds the IRA with his criminal activity. Imposing back taxes and penalties upon the criminal defendant for this type of forfeiture of a criminal defendant’s IRA is improper because the taxpayer is not the owner and therefore is not the “payee or distributee” of the funds withdrawn from the IRA. Judge Murphy’s opinion summarizes:

> Hubbard forfeited his IRA to the IRS under the district court’s forfeiture order. The forfeiture laws made the IRS—not Hubbard—the owner of this IRA at the time of the order, and the agency gained the kind of control over this account that any normal owner would possess. [Citations omitted.] Not only that, the forfeiture order triggered the relation-back doctrine, which meant that the IRS also had “[a]ll right, title, and interest” in the IRA as of the earlier time that Hubbard committed his crimes. 21 U.S.C. § 853(c). Exercising this ownership interest, the IRS liquidated the IRA and deposited the money in another government fund.
>
> We fail to see why Hubbard must pay taxes on the IRS’s choice to withdraw the funds given that he no longer owned or controlled the IRA. … The IRA was not Hubbard’s. He should no more have to pay taxes on its funds than a person randomly selected from the Kentucky voter rolls.

132 F.4th at 444.

V. PERSONAL INCOME AND DEDUCTIONS

VI. CORPORATIONS

A. <u>Entity and Formation</u>

B. Distributions and Redemptions

C. Liquidations

D. S Corporations

E. Mergers, Acquisitions and Reorganizations

F. Corporate Divisions

G. Affiliated Corporations and Consolidated Returns

H. Miscellaneous Corporate Issues

1. Cash grants to a corporation from the New York State were not nontaxable contributions to capital, were not gifts, and were not qualified disaster relief payments, and therefore were includible in gross income, says the Tax Court. CF Headquarters Corporation v. Commissioner, 164 T.C. No. 5 (3/4/25). In a unanimous, reviewed opinion by Judge Kerrigan, the Tax Court has held that cash grants received by a corporation from the State of New York were not nontaxable contributions to capital, were not gifts, and were not qualified disaster relief payments, and therefore were includible in gross income.

The taxpayer in this case is part of a group of corporations owned by Cantor Fitzgerald, L.P. (collectively, the Cantor Group). Prior to the September 11, 2001, terrorist attack on the World Trade Center, the Cantor Group occupied several floors in the north tower of the World Trade Center. Six hundred and fifty-eight of their approximately 1,000 employees were killed in the attack. Following the attack, the Cantor Group used other office space in Manhattan.

In response to the September 11 attack, the State of New York established certain grant programs under which cash proceeds were distributed to aid businesses that were adversely affected by the attacks. The Empire State Development Corporation (Empire State) established the World Trade Center Job Creation and Retention Program (the JCRP). Under the JCRP, grant proceeds were awarded to businesses that had incurred expenses after the September 11 attack in at least one of five eligible categories, including rent, and that committed to retain employees in New York City and specifically in lower Manhattan.

Empire State entered into a binding grant disbursement agreement that authorized a cash grant, the proceeds of which were to be used by the taxpayer solely for expenses in the five eligible categories incurred after September 11, 2001. In 2007, the taxpayer requested and received $3.1 million in distributions under the agreement as reimbursement for rent. The IRS contended that the taxpayer had to include these cash distributions in gross income under § 61. The taxpayer argued that the grant proceeds were excluded from gross income: (1) as a contribution to capital under § 118(a); (2) as a gift under §102(a); or (3) as a qualified disaster relief payment under § 139(a). The court disagreed with each of the taxpayer's three arguments.

Whether the grant proceeds qualified as a nonshareholder contribution to capital. During the year in question (2007), under § 118, any contribution, including a nonshareholder contribution, to the capital of a corporation was generally excluded from the corporation's gross income.[2] This exclusion, however, does not apply to any money transferred to a corporation in consideration for goods or services rendered. *See* Reg. § 1.118-1. Further, in determining whether a transfer qualifies as a tax-free contribution to capital, the transferor must intend that the transfer be a contribution to capital. *United States v. Chicago, Burlington & Quincy R.R. Co.*, 412 U.S. 401, 411 (1973). The

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[2] The 2017 Tax Cuts and Jobs Act, § 13312, amended Code § 118 effective after December 22, 2017, to provide that nonshareholder contributions to the capital of corporations made by governmental entities or civic groups no longer are excludable from the recipient corporation's gross income. Accordingly, the result in this case would have been the same (but for a different reason) if the years involved had been subject to amended § 118.

Supreme Court's decision in *Chicago, Burlington & Quincy R.R.* established five characteristics of a nonshareholder contribution to capital. The first four of these characteristics have been interpreted by some courts to be requirements that all must be satisfied for a payment to constitute a contribution to capital. *See AT&T, Inc. v. United States*, 629 F.3d 505, 513 (5th Cir. 2011). The first of these characteristics is that the payment must become a permanent part of the recipient's working capital structure. In this case, the Tax Court relied on the Third Circuit's decision in *Commissioner v. BrokerTec Holdings, Inc.*, 967 F.3d 317 (3d Cir. 2020), *rev'g* T.C. Memo 2019-32. In *BrokerTec*, the Third Circuit held that similar grant payments by the State of New Jersey's Economic Development Plan in response to the September 11 attack were not nontaxable, nonshareholder contributions to capital under § 118. The Third Circuit reasoned that a payment becomes a permanent part of the recipient's working capital structure only when the payment is "in some way … designated for use as capital—whether by an explicit restriction on the use of the funds, or by tying the amount of funds to the amount of a capital investment required of the company. The Third Circuit in *BrokerTec* held that the grant payments in that case were unrestricted, which indicated intent on the part of the grantor to provide income and not a capital contribution. 967 F.3d at 324. The taxpayer in this case attempted to distinguish *BrokerTec* on two grounds. First, unlike the JCRP, the New Jersey grant program in *BrokerTec* did not restrict how the taxpayer could use the cash. Second, the New Jersey grants in *BrokerTec* were based on income tax revenue that the new jobs would generate and that the JCRP had no such requirements. In disagreeing with these distinctions, the Tax Court emphasized that § 118 applies only where a transferor of grant funds intends to make a capital contribution. Evidence of such intent is reflected by the manner in which the funds are used by the recipient. For example, if the funds might be used for payment of dividends, operating expenses, capital charges, or any other purpose for which operating revenue might be used, it would not reflect an intent to make a capital contribution. Following *BrokerTec's* reasoning, the Tax Court held that the grants received by the taxpayer in this case were not linked to capital improvements and were not restricted to the use of capital assets. The Tax Court observed that the terms of the JCRP allowed a grantee to request payment of, or reimbursement for, eligible expenses in five categories, all tied to employment: (1) wages, (2) payroll taxes, (3) employee benefits, (4) rent, and (5) movable equipment and furniture. The Tax Court concluded that, like the taxpayer in *BrokerTec*, the taxpayer here received cash grants for creating jobs after the World Trade Center terrorist attacks. The amount of the grant was based on the number of full time employment positions created. Because the grant proceeds at issue were intended to reimburse petitioner for expenses it had already incurred and the proceeds could be used at the taxpayer's discretion, the grant proceeds were not intended to become part of the taxpayer's working capital. The Tax Court specifically concluded that the grant proceeds were distributed to reimburse the taxpayer for subcategory (2) of the JCRP relating to rents. In coming to this conclusion the Tax Court was not persuaded by the taxpayer's evidence at trial to the contrary that the payments were used for moveable equipment and furniture. Because the grant payments were found to be reimbursements for rent, the proceeds were not intended to become a permanent part of the recipient's working capital structure and were not contributions to capital.

Whether the grant proceeds were excludable gifts under § 102(a). The taxpayer also argued that the grant proceeds received under the JCRP were excludable from gross income as gifts. Section 102(a) provides that gross income does not include the value of property acquired by gift. In disagreeing with the thetaxpayer's argument, the Tax Court concluded that the evidence established that Empire State's motive for granting the funds was not detached, disinterested generosity as required under the Supreme Court's decision in *Commissioner v. Duberstein*, 363 U.S., 278, 285-86 (1960). Instead, Empire State's goals in making the grants to the taxpayer turned on how many jobs were created and maintained in Manhattan during the years after the terrorist attacks. The grants were found to be incentives to get something back for the State of New York. The Tax Court was persuaded that the grantors of the funds did not, therefore, possess the requisite donative intent to conclude that the grant proceeds were in the nature of a gift. The Tax Court additionally relied on the legislative history of the congressional authorization of the federal funding for the program, which emphasized "the tremendous human losses suffered by those businesses located in the World Trade Center, particularly those firms which suffered the greatest loss of life in the attacks" and indicated that the funds were meant "to support the redevelopment of the areas of New York City affected by the attacks …." H.R. Rep. No. 107-593, at 180 (2002) (Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N. 544, 613. Thus, reasoned the Tax Court, the congressional intent of the acts that provided the funding made it clear that the main objective of the JCRP was economic revitalization and not simply detached and disinterested generosity. Based on this reasoning, the court found that the grants were not excludable from gross income as gifts under § 102(a).

Whether the grant proceeds were excludable as qualified disaster relief payments under § 139. The taxpayer also argued that the grant proceeds received under the JCRP were excludable from gross income under § 139 as qualified disaster relief payments. The court summarily rejected this argument because the exclusion of § 139 is available only to individuals.

Penalties. The Tax Court declined to uphold the imposition of accuracy-related penalties on the taxpayer because, in the court's view, the taxpayer had substantial authority for excluding the payments from gross income.

Conclusion. The court held that the taxpayer failed to establish that the grant proceeds were excludable under any statutory provision and were, therefore, includible in the taxpayer's gross income in 2007.

VII. PARTNERSHIPS

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

A. Exempt Organizations

1. Tax-exempt organizations that filed Form 990-T to receive payments of renewable energy credits and, in doing so, adopted a taxable year, have IRS approval to change that taxable year to conform to their annual accounting period. Rev. Proc. 2025-6, 2025-6 I.R.B. 713 (1/16/25). Code § 6417 allows certain tax-exempt entities to receive direct payments from the IRS for specific, refundable tax credits enacted as part of the Inflation Reduction Act of 2022. The credits for which direct payments are allowed include the alternative fuel vehicle refueling credit (§ 30C), the energy credit (§ 48), and other renewable energy and carbon sequestration credits. Section 6417 and the regulations thereunder contemplate that an "applicable entity" (as defined in § 6417(d)(1)(A), but generally including entities exempt from federal income tax such as § 501(c)(3) organizations, state and local governments, Native American Tribes, etc.) may claim these refundable credits and secure direct payments from the IRS by filing a Form 990-T (Exempt Organization Business Income Tax Return). Ordinarily, exempt organizations use Form 990-T to report and potentially pay federal income tax on so-called unrelated business income; however, § 6417 and the regulations thereunder use Form 990-T as the vehicle for "applicable [tax-exempt] entities" to claim one or more of the Inflation Reduction Act credits mentioned above, even if the exempt organization has no unrelated business income and has never filed a Form 990-T. *What's the rub, you ask?* Form 990-T requires the filer to specify a taxable year, yet some "applicable entities" may have never previously filed a tax return or adopted a taxable year. On the one hand, many (if not most) tax-exempt organizations file an annual information return, IRS Form 990 (Return of Organization Exempt from Income Tax), regardless of whether they have unrelated business income requiring a Form 990-T. Those tax-exempt organizations previously have adopted a taxable year for filing their Forms 990 even if they have never filed a Form 990-T to report unrelated business income. On the other hand, certain tax-exempt organizations, such as state and local governments, Native American Tribes, and others, are not required to file an annual information return such as a Form 990 and may have never adopted a taxable year. Nonetheless, to claim an IRS direct payment attributable to one of the

Inflation Reduction Act credits, these special types of exempt organizations must file a Form 990-T. Rev. Proc. 2025-6 labels these special types of exempt organizations "in-scope applicable entities," a subset of § 6417(d)(1)(A)'s "applicable [tax-exempt] entities." Some of these "in-scope applicable entities" apparently have claimed Inflation Reduction Act credits by filing a Form 990-T designating a taxable year that does not correspond to their annual accounting periods (if any). Now, however, these "in-scope applicable entities" wish to "change" their taxable year to correspond to their annual accounting periods. Normally, of course, IRS consent (using Form 1128) is required for a taxpayer to change its taxable year under § 441 (assuming the taxpayer is permitted to have a taxable year other than the calendar year). Therefore, to assist these "in-scope applicable entities," Rev. Proc. 2025-6 provides automatic IRS consent to select a taxable year that is different from any taxable year the entity may have designated on an IRS Form 990-T used to claim one or more of the Inflation Reduction Act credits. For interested readers, Rev. Proc. 2025-6 contains helpful examples. *Caveat*: The Inflation Reduction Act credits are on the chopping block as part of the "One Big Beautiful Bill Act" currently being considered by Congress.

B. Charitable Giving

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

1. Tax Court holds that the 90-day period to file a petition for redetermination of a notice of employment tax determination is a nonjurisdictional claim-processing rule. Belagio Fine Jewelry, Inc. v. Commissioner, 162 T.C. No. 11 (6/25/24). The IRS audited the taxpayer, a corporation, to determine the employment status of individuals performing services for the taxpayer. After determining that the taxpayer had an employee, the IRS issued and mailed a notice of employment tax determination (the Notice) dated August 24, 2021. Pursuant to § 7436(b)(2), the taxpayer had 90 days to challenge this determination by filing a petition in the U.S. Tax Court. The notice stated that the last day for the taxpayer to file a Tax Court petition was November 22, 2021. The taxpayer mailed its petition via FedEx Express Saver on November 18, 2021, which arrived at the Tax Court on November 23, 2021, one day after the 90-day deadline. When the petition is delivered by U.S. mail after the deadline, § 7502(a) provides that the petition is considered to be timely if it is postmarked on or before the deadline. Under § 7502(f) this "timely mailed is timely filed" rule continues to apply if certain specifically designated private delivery services are used by the taxpayer. The FedEx Express Saver service used by the taxpayer, however, was not, during the year in question, a specifically designated private delivery service. *See* IRS Notice 2016-30, 2016-18 I.R.B. 676. The IRS argued that, because the "timely mailed, timely filed" rule did not apply and the petition was received a day late, the Tax Court lacked jurisdiction to hear the case. In order to determine whether the petition was a day late, the court first needed to determine the date that the IRS had mailed the notice of employment tax determination to the taxpayer to begin the 90-day period.

Burden of Proof. An IRS agent issuing a notice is required to complete USPS Form 3877, Firm Mailing Book for Accountable Mail, to establish the date of mailing of the notice. See I.R.M. 4.8.10.8.2 (Apr. 20, 2018). Having never previously addressed the issue of which party (the IRS or the taxpayer) has the burden of proving when a notice of employment tax determination was mailed, the Tax Court (Judge Greaves) relied on its prior decisions relating to the mailing of notices of deficiency. In relation to notices of deficiency, the Commissioner has the burden of proving the date of mailing because (1) it was the Commissioner's motion, and (2) the relevant information is within the Commissioner's knowledge. *Casqueira v. Comm'r*, T.C. Memo. T.C. Memo 1981-428. *See also S. Cal. Loan Assoc. v. Comm'r*, 4 B.T.A. 223, 224-25 (1926). Placing the burden on the IRS, the Tax Court concluded that the Form 3877 in this case was incomplete because it did not bear a USPS date stamp. However, even though the Form 3877 did not bear a proper USPS stamp, the court concluded that the form was valid because the IRS agent filled out and initialed the form on August 24, 2021. The IRS also provided evidence that the mailing number listed on the USPS Form 3877 matched the stamp on the notice. Further, the IRS submitted a sworn declaration by the IRS employee that she completed the forms on the same day. This evidence supported the court's finding that the IRS carried its burden of proof that the notice was mailed on August 24, 2021. This meant that the last day of the 90-day period of § 7436(b)(2) was November 22, 2021, and the taxpayer's petition, received by the court on November 23, was one day late. The issue then became whether the 90-day period of § 7436(b)(2) is jurisdictional. If so, then the taxpayer's failure to adhere to the 90-day deadline meant that the Tax Court had no jurisdiction to consider the taxpayer's case.

Clear Statement Standard. The Tax Court began with the Supreme Court's rule that, where a federal court's subject matter jurisdiction depends on a filing deadline, failure by a litigant to comply with the deadline deprives the court of jurisdiction to hear the case. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). However, where a party is required under a rule to complete specific procedural steps at certain specified times but the rule does not condition a court's authority to hear the case on compliance with such steps, the rule is treated as a nonjurisdictional "claim-processing" rule. *See Boechler, P.C. v. Comm'r*, 142S.Ct. 1493, 1497 (2022). Such claim-processing rules do not deprive a court of jurisdiction to hear a case. *U.S. v. Wong*, 575 U.S. 402, 410 (2015). A procedural requirement is treated as jurisdictional if Congress "clearly states" that a deadline is jurisdictional. In order to determine whether Congress has clearly stated that a requirement is jurisdictional, the court must examine the (1) text, (2) context, and (3) historical treatment of the requirement. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). The Tax Court first addressed the text of § 7436(b)(2) and observed that, while the statute provides a 90-day deadline, it does not use the word "jurisdiction". Rather, the statute provides only that a proceeding may not be initiated in the Tax Court if the 90-day rule is not complied with. Thus, nothing in the statute textually restricts the court's ability to hear the case. Second, the court reasoned that the statutory context of the statute supports the conclusion that Congress did not "clearly state" that the 90-day deadline is jurisdictional. The court noted that mere proximity of the jurisdictional grant and the procedural requirement does not indicate that the procedural requirement is jurisdictional. Here, the jurisdictional grant is found in § 7436(a) whereas the 90-day deadline is found in subsection (b)(2). Such a separation without a clear tie of the jurisdictional grant to the 90-day rule supported the court's conclusion that the 90-day deadline is not jurisdictional. In addition to the separation of the jurisdictional grant from the deadline, the court concluded that § 7436(b)(2) has limited applicability because the 90-day deadline applies only to a subset of cases covered by § 7436. Further, the 90-day deadline applies only to cases in which the Commissioner sends a notice of employment tax determination to the taxpayer by certified mail. In cases in which the Commissioner fails to properly send its determination, the 90-day deadline is inapplicable. The court reasoned that its jurisdiction is based on the IRS determination and not on whether the notice of determination was mailed. Third, from a historical context, the court reasoned that § 7436, as well as similarly worded statutes, lack any historical precedent interpreting deadlines as jurisdictional. Accordingly, the court held, the relevant historical treatment of § 7436 does not reflect an intent on the part of Congress that the 90-day rule be jurisdictional.

Conclusion. After considering the text, statutory context, and history of the statute, the court reasoned that it was not deprived of jurisdiction because of the taxpayer's late filing. The court therefore denied the IRS's motion to dismiss based on a lack of jurisdiction. The court reserved judgment on the issue whether the 90-day period of § 7436(b)(2) is subject to equitable tolling.

a. The 90-day period of § 7436(b)(2) for filing a Tax Court petition in response to a notice of employment determination is subject to equitable tolling, but the taxpayer's garden variety negligence did not warrant equitable tolling. Belagio Fine Jewelry, Inc. v. Commissioner, 164 T.C. No. 7 (4/15/25). As prevously discussed, following an employment tax audit, the IRS issued a notice of employment tax determination in which it concluded that the taxpayer had an employee. Pursuant to § 7436(b)(2), the taxpayer had 90 days to challenge this determination by filing a petition in the U.S. Tax Court. The notice stated that the last day for the taxpayer to file a Tax Court petition was November 22, 2021. The taxpayer mailed its petition via FedEx Express Saver on November 18, 2021, which arrived at the Tax Court on November 23, 2021, one day after the 90-day deadline. When the petition is delivered by U.S. mail after the deadline, § 7502(a) provides that the petition is considered to be timely if it is postmarked on or before the deadline. Under § 7502(f) this "timely mailed is timely filed" rule continues to apply if certain specifically designated private delivery services are used by the taxpayer. The FedEx Express Saver service used by the taxpayer, however, was not, during the year in question, a specifically designated private delivery service. *See* Notice 2016-30, 2016-18 I.R.B. 676. Therefore, the taxpayer's petition was filed late. In a previous opinion, the Tax Court held that the 90-day deadline of § 7436(b)(2) to file a petition for redetermination is a nonjurisdictional claim-processing rule. *See Belagio Fine Jewelry, Inc. v. Commissioner*, 162 T.C. 243, 250-60 (6/25/24) (*Belagio I*). In *Belagio I*, the Tax Court denied the IRS's motion to dismiss for lack of jurisdiction but reserved judgment on the question of whether the 90-day deadine of § 7436(b)(2) is subject to equitable tolling. In this case (*Belagio II*), in an opinion by Judge Greaves, the Tax Court addressed the IRS's subsequent motion to dismiss for failure to state a claim upon which relief can be granted. In its motion, the IRS argued that the 90 day deadline is not subject to equitable tolling. In the alternative, the IRS argued, if equitable tolling applies, equitable tolling was not warranted on the facts of this case. The taxpayer argued that, had the taxpayer's attorney's legal staff sent the petition via FedEx Priority Overnight, the petition would have been treated as timely under the "timely mailed, timely filed" rule of § 7502(a). Due to the this error in selecting a method of delivery, the taxpayer sought equitable tolling of the 90-day deadline.

Whether equitable tolling applies to the 90-day deadline. The court first addressed whether the 90-day deadline of § 7436(b)(2) is subject to equitable tolling, an issue of first impression for the court. Under the doctrine of equitable tolling, a nonjurisdictional statutory deadline is presumed to be subject to equitable tolling. *See Irwin v. Dep't Veterans Affairs*, 498 U.S. 89, 95-96 (1990). This presumption, however, may be rebutted if equitable tolling is inconsistent with the text of the statute or the applicable statutory regime. *Id.* In beginning its analysis, the Tax Court observed that the U.S. Supreme Court, in *United States v. Brockamp*, 519 U.S. 347, 354 (1997), had held that the period of limitations set forth in § 6511 for filing an administrative claim for refund is not subject to equitable tolling.[3] In *Brockamp*, the Court held that the presumption of equitable tolling was rebutted with respect to the limitations periods of § 6511. The Court in *Brockamp* reasoned that § 6511 sets forth the relevant time limits in an "unusually emphatic form" and in a "highly detailed technical manner" that "cannot easily be read as containing implicit exceptions." Further, the Court reasoned in *Brockamp*, permitting equitable tolling would result in serious administrative problems for the IRS given the more than 90 million refund claims processed each year. The Tax Court then compared the facts and reasoning in *Brockamp* to the Supreme Court's later decision in *Boechler, P.C. v. Commissioner*, 596 U.S. 199, 210-211 (2022). In *Boechler,* the Supreme Court held that the 30-day time limitation in § 6330(d)(1) for filing a Tax Court petition seeking review of an IRS determination following a collection due process hearing was subject to equitable tolling. The presumption of equitable tolling, the Court held in *Boechler*, was not rebutted in the case of § 6330(d)(1). The Court in *Boechler* reasoned that nothing in the text of § 6330 prohibited

[3] *See generally* Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 Mo. L. Rev. 797 (2000).

equitable tolling. Further, the Court observed, the short 30-day deadline of § 6330(d)(1) was directed to the taxpayer rather than the court. In addition, § 6330 is unusually protective of taxpayers and the taxpayers who file such petitions are often *pro se*. Also distinct was the fact that § 6330 has only one exception (related to suspending the time to file a petition in the event of bankruptcy) compared to § 6511, which has six exceptions. The Court in *Boechler* also concluded that, unlike the refund claim context in which over 90 million claims are filed annually, equitable tolling for the much smaller number of Tax Court petitions filed in collection due process cases would not be a significant administrative burden on the government. In light of this guidance from the *Brockamp* and *Boechler* decisions, the Tax Court analyzed the 90-day deadline of § 7436(b)(2) and concluded that there is nothing in the text of § 7436(b)(2) that expressly prohibits equitable tolling. Further, the Tax Court observed, the wording of the statute is neither highly detailed nor technical. The Tax Court declined to agree with the IRS's argument that restrictions on assessment and collection that are tied to the 90-day deadline indicate that Congress did not intend equitable tolling to apply under § 7436(b)(2). Instead, the court concluded that there is nothing inconsistent with permitting equitable tolling in relation to the filing deadline and allowing the IRS to proceed with assessment and collection after the expiration of the 90-day deadline. The Tax Court also reasoned that, unlike the situation in *Brockamp*, equitable tolling of the 90-day period of § 7436(b)(2) would not significantly increase the government's administrative burden. Very few petitions are filed annually for redetermination of employment status compared to the more than 90 million refund claims that the IRS processes annually. Based on this analysis, the Tax Court concluded that the 90-day period of § 7436(b)(2) is subject to equitable tolling.

Whether equitable tolling should apply in the circumstances of this case. After concluding that the 90-day period of § 7436(b)(2) is subject to equitable tolling, the Tax Court turned to the issue of whether equitable tolling applied in the taxpayer's circumstances. Under the Supreme Court's holding in *Menominee Indian Tribe of Wis. v. U.S.* 577 U.S. 250, 255 (2016), for equitable tolling to apply, a taxpayer must establish (1) that it pursued its rights diligently, and (2) that extraordinary circumstances outside of its control prevented it from filing on time. With respect to the first element of the *Menominee* test, the taxpayer did not present any evidence to support an argument that it diligently pursued its rights. Under § 7502(f), when a taxpayer files using a private delivery service rather than the U.S. mail, the "timely mailed, timely filed" rule of § 7502(a) applies only if the service is a "designated delivery service." During the year in question, FedEx Priority Overnight service was a designated delivery service, but the FedEx Express Saver service used by the taxpayer was not. *See* Notice 2016-30, 2016-18 I.R.B. 676. The taxpayer argued that its failure to meet the filing deadline was due to negligence on the part of its attorney or the attorney's staff. The Tax Court concluded, however, that the taxpayer did not diligently pursue its rights because there was no indication that it followed up with its attorney to ensure the petition was timely filed. Thus, the taxpayer did not meet the first requirement necessary to obtain equitable tolling. This alone was sufficient for the court to conclude that the taxpayer was not entitled to equitable tolling. The court went on, however, to inquire whether the taxpayer satisfied the second requirement to obtain equitable tolling, i.e., that extraordinary circumstances outside of its control prevented it from filing on time. The Tax Court concluded that the taxpayer failed to satisfy this second requirement as well. The Tax Court classified the error by the attorney's staff in selecting a delivery service was a "garden variety" type of negligence that does not warrant equitable tolling. *Citing Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

Conclusion. The Tax Court held that the 90-day period of § 7436(b)(2) is subject to equitable tolling but the taxpayer's circumstances did not warrant equitable tolling. Accordingly, the court granted the IRS's motion to dismiss for failure to state a claim on which relief can be granted.

F. Liens and Collections

1. Ninth Circuit affirms the Tax Court, holding that the taxpayer's offer in compromise (OIC) was not deemed to be accepted but was instead rejected by operation of law when the Service returned the OIC within the statutory period of time. Brown v.

Commissioner, 116 F.4th 861 (9th. Cir. 8/29/24). In general, a taxpayer who challenges a notice of federal tax lien or the IRS's intent to levy is entitled to a collection due process (CDP) hearing before the IRS Office of Appeals. See §§ 6320, 6330. Included among the issues that can be raised in a CDP hearing is a taxpayer's offer in compromise (OIC). At the conclusion of a CDP hearing, the assigned Appeals Officer must issue a notice of determination that, among other things, addresses all issues raised by the taxpayer, including any OIC made by the taxpayer. § 6330(c)(3), Reg. § 301.6330-1(e)(3). Under a separate statutory authorization, § 7122, Compromises, the IRS may compromise the amount of tax, interest or certain penalties assessed. § 7122(b). Under the § 7122 regime, a taxpayer submits an OIC and the offer remains pending until it is "accepted for processing" by the IRS. Reg. § 601.7122-1(d)(2). If an offer is accepted for processing and the IRS later returns the offer, the IRS's acceptance is deemed to be pending only during the period between the date the offer is accepted for processing and the date the IRS returns the offer to the taxpayer. *Id*. Under § 7122(f), an OIC is deemed to be accepted if the OIC is not rejected by the IRS before the date which is 24 months after the date the OIC was submitted. *Id*. Thus, if the IRS fails to act on a taxpayer's OIC within two years of the taxpayer's submission of the OIC, the IRS may not then reject the offer. However, "[a]n offer will not be deemed to be accepted if the offer is, within the 24-month period, rejected by the Service, [or] ***returned*** by the Service..." Notice 2006-68, § 1.07, 2006-2 C.B. 105, 106 (emphasis added). Brown, the taxpayer in this case, was served with a notice of tax lien on his property for unpaid taxes. The taxpayer requested a CDP hearing and submitted an OIC. Within seven months, the IRS returned Taxpayer's OIC because it was not processable. More than twenty-four months after the OIC was submitted, the IRS Appeals Officer sustained the notice of tax lien, ruling against the taxpayer.

Taxpayer's argument and history: The taxpayer brought his claim initially in the Tax Court (Brown I). In *Brown I*, the taxpayer argued that the IRS had not formally rejected his OIC within the 24 month period after he had submitted the OIC. See *Brown v. Comm'r (Brown I)*, T.C. Memo 2016-82. Therefore, argued the taxpayer, the OIC was "deemed accepted" by operation of law under § 7122(f). *Id.* In *Brown II*, Taxpayer appealed the Tax Court's decision in *Brown I*. On appeal, the U.S. Court of Appeals for the Ninth Circuit agreed with the Tax Court's conclusion that, because the IRS had returned Brown's OIC within one year after Brown had submitted his OIC, Brown's offer was not accepted by operation of law under § 7122(f). *Brown v. Comm'r (Brown II)*, 826 Fed. App'x 673, 674 (9th Cir. 2020). In *Brown II*, the Ninth Circuit explained that an OIC "will not be deemed to be accepted if the offer is, within the 24-month period, rejected by the IRS or returned to the taxpayer as nonprocessable or no longer processable." *Brown II*, 826 Fed. App'x at 674. The Ninth Circuit concluded in Brown II that, because "the IRS returned Brown's offer well before the 24 months had elapsed since the submission of the offer-in-compromise," the OIC was not accepted by operation of law under § 7122(f). In this case the taxpyer argued that because he submitted his OIC during a CDP hearing, only a notice of determination from the Office of Appeals can serve as a rejection which would terminate the 24-month rejection period.

Ninth Circuit's analysis: In disagreeing with Brown's argument, the Ninth Circuit held that the return of an OIC constitutes a "rejection" under § 7122(f). The Ninth Circuit reasoned that, because the OIC was "returned by the Service to the taxpayer as "nonprocessable" less than seven months after the offer was submitted, the offer was not pending for more than 24 months and, therefore, was not "deemed to be accepted" for purposes of § 7122(f). *See* Notice 2006-68, § 1.07, 2006-2, C.B. 105-106. In coming to this conclusion , the Ninth Circuit specifically agreed with the statement made in § 1.07 of Notice 2006-68, which stated, "[t]he period during which the Office of Appeals considers a rejected offer in compromise is not included as part of the 24 month period because the offer was rejected within the meaning of section 7122(f) prior to consideration of the offer by the Office of Appeals." Stated otherwise, the Ninth Circuit did not agree with the taxpayer's argument that § 6330 operates such that only the Office of Appeals' notice of determination that can result in a § 7122(f) rejection because it is a notice of determination. Further, the Ninth Circuit did not agree that it is not the Collection Division's return of the OIC to the taxpayer that is final and appealable. The Ninth Circuit, therefore, did not agree with the Taxpayer's argument that the requirements imposed on the Office of Appeals under § 6330 render the Collection Division's role in the context of a CDP hearing procedurally meaningless. In this regard, the Ninth Circuit reasoned that the taxpayer here (as well as the dissenting judge in this case) mistakenly combine the two separate statutory requirements into one. The Ninth Circuit reasoned that the requirement under § 6330 that the Office of Appeals issue a final notice of determination following a CDP hearing is separate and distinct from the requirement under § 7122(f) that the IRS act on an OIC within 24 months to prevent a "deemed acceptance." The rejection that is required to end the 24-month period under § 7122(f) is the same action as the Office of Appeal's final determination of the CDP hearing. Thus, the Collection Division may make an initial determination to return a taxpayer's OIC. Further, that the Collection Division's return of the OIC, and not the Office of Appeals' notice of determination, stops the 24 month clock. The Ninth Circuit ruled that when the Collection Division returned the Taxpayer's OIC as nonprocessable, the Taxpayer's offer was considered closed. As it was considered closed, the Taxpayer's OIC cannot be deemed as accepted under §7122(f) because the Office of Appeals did not issue a notice of determination.

Concurrence: In concurring with Judge Wardlaw, who wrote the majority opinion, Judge Lee distinguished the process under §7122 from that of §6330. Judge Lee reasoned that § 7122 creates an administrative process meant to address a taxpayer's standalone submission of an OIC. Under that process, the IRS has assigned processing and investigation of OICs to the IRS' Centralized Offer-in Compromise (COIC) Unit and Collection Division. If COIC and the Collection Division reject a taxpayer's OIC then, under §7122, the taxpayer can appeal only to the Office of Appeals, an independent organization within the IRS. In contrast, to the procedures under §7122, §6330 provides for a more thorough process incorporating due process concerns and, therefore CDP hearings. At a CDP hearing a taxpayer may raise issues in relation to an OIC which as offered by the taxpayer. Under §6330, the Office of Appeals is not bound to any timeline. However, once the Office of Appeals issues a determination, the taxpayer is allowed to judicial review. As such Judge Lee noted that the Taxpayer here requested a longer, more robust, CDP hearing under §6330 but improperly contends that the §7122(f) twenty four month limitation applies. However, nothing in text of §6330 allows for the incorporation of § 7122's procedural requirements into § 6330. In short, the 24 month time clock cannot be imported into the requirements of a CDP hearing. Thus, §7122(f) does not apply to an OIC submitted during a CDP hearing.

Dissent: Judge Bumatay, on the other hand, engaged in a labyrinth of analysis and concluded that the Ninth Circuit review panel (consisting of Judges, Wardlaw, Lee, and Bumatay) was split three ways. Judge Bumatay therefore concluded that none of the findings and pronouncements in this case are precedential. Rather, based on his reading of the Code, Judge Bumatay would have reversed the Tax Court and held that the appeals officer in this case needed to return Brown's OIC within the 24 month period. Upon expiration of the 24 month period in this case, the Taxpayer's OIC should have been deemed accepted.

G. <u>Innocent Spouse</u>

H. <u>Miscellaneous</u>

1. Federal Circuit Court of Appeals holds that if the IRS dispenses with the formal requirements of a refund claim by investigating the merits of a claim, certain regulatory requirements may be waived. <u>Vensure HR, Inc. v. United States</u>, 119 F.4th 7 (Fed. Cir. 10/4/24). The taxpayer, Vensure, is an organization that provides, among other things, tax reporting services to other companies including withholding, reporting, and paying employment taxes on behalf of its client companies to the IRS. Vensure believed it had substantially overpaid employment taxes for the second quarter of 2014 and filed refund claims on Forms 843, Claim for Refund and Request for Abatement, with the IRS. The Claims alleged that the overpayments led to Vensure's inability to timely pay taxes for later periods. The IRS assessed penalties on Vensure for those later periods. Vensure engaged tax counsel to represent it in a challenge to the penalties imposed. In order to represent a taxpayer before the IRS the taxpayer or its representative must file Form 2848, Power of Attorney and Declaration of Representative with the IRS. The instructions to Form 2848 provide that if the taxpayer's authorized representative files Form 843, an original Form 2848 must be attached. Vensure did not attach Form 2848 to any of its refund claims on Form 843 at the time of filing. However, at various points in time before filing the refund claims on Form 843, Vensure's tax attorney filed with the IRS at least three properly executed Forms 2848. After the IRS denied the taxpayer's administrative claim for refund on the ground that the taxpayer had not established there was reasonable cause to have the penalties waived, Vensure filed a complaint in the U.S. Court of Federal Claims seeking a refund of the penalties imposed by the IRS. In response, the government filed a motion to dismiss, which the court granted for lack of subject matter jurisdiction. The Court of Federal Claims granted the motion to dismiss because it determined that Vensure had failed to duly file its refund claims, as required by § 7422. The Court of Federal Claims ruled that Vensure had not duly filed its refund claims because a valid power of attorney must be submitted together with a refund claim and Vensure had failed to attach any powers of appointment to the claims.

Vensure raised the following three issues on appeal to the Federal Circuit: (1) whether Reg. § 301.6402-2(e)'s requirement that "a power of attorney must accompany the claim" (the "accompany" requirement) means a power of attorney must be attached to the claim for refund; (2) whether Reg. § 301.6402-2(e)'s use of the term "accompany" is a statutory, non-waivable requirement or is regulatory and therefore waivable; and (3) whether the IRS waived the "accompany" requirement of the same regulation. Although the parties argued the meaning of the term "accompany" as used in the regulations, the Federal Circuit declined to base its decision on the meaning or use of the term "accompany" under the regulations. Rather, the Federal Circuit addressed the second issue and concluded that Reg. § 301.6402-2(e)'s "accompany" requirement is regulatory and, therefore, waivable.

The Federal Circuit followed the Supreme Court's decision in *Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 296 (1945), which distinguished between "explicit statutory requirements" and "detailed administrative regulations" governing tax refund procedures. In general, when Congress makes statutory requirements that are explicit, such requirements must be complied with and are beyond the dispensing power of Treasury officials. *Id.* In contrast, if a requirement is regulatory in nature, the IRS may insist upon full compliance with the regulations. *Id.* However, when the IRS does not insist on full compliance, the requirements may be waived. The requirements are waived where, for example, the basis of the claim of waiver is that the Commissioner through his agents dispensed with the formal requirements of a claim by investigating the merits of the claim. *Id.* In *Angelus Milling*, the Supreme Court stated "[i]f the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action on it." *Id.* at 297. The Supreme Court in *Angelus Milling* determined that the specific informational requirements set forth in the applicable regulations were regulatory in nature and, therefore subject to waiver by the Commissioner. Stated otherwise, the requirements were not statutory requirements that the Commissioner had no discretion to waive. Applying the Supreme Court's analysis in *Angelus Milling*, the Federal Circuit in this case concluded that the "accompany" requirement of Reg. § 301.6402-2(e) is purely a regulatory requirement. The Federal Circuit reasoned that the "accompany" requirement presents a regulatory question of when, where, and how to file a power of attorney. Because the regulations do not speak to the when, where, and how of filing a power of attorney, the "accompany" requirement is waivable by the IRS. In coming to this conclusion, the Federal Circuit declined to follow the government's interpretation of the Federal Circuit's earlier decision in *Brown v. U.S.*, 22 F.4th 1008 (Fed. Cir. 2022). The government interpreted the *Brown* decision to require strict compliance with all signature and verification requirements. However, this interpretation was determined by the Federal Circuit in this case to be so broad that it conflicted with the Supreme

Court's decision in *Angelus Milling*. The Federal Circuit noted that the relevant statutory provisions governing actions for refund include § 7422(a), § 6061(a), and § 6065. In *Brown*, the Federal Circuit concluded that each of these provisions impose a default rule that individual taxpayers must personally sign and verify their tax refund claim, and that such taxpayers may authorize a legal representative to certify the claims and provide a valid power of attorney in place of the taxpayer signature. *Brown*, 22 F.4th at 1012-1013. The court reasoned that, because the signature and verification requirements derive from a statute, the IRS may not waive these requirements. However, such statutory provisions do not explain when, where, or how the taxpayer should comply with these requirements. Rather than appearing in a statutory provision, the requirements for when, where, and how a power of appointment may accompany a claim are derived from sub-regulatory IRS instructions and publications. Thus, for example, Reg. § 301.6042-2(e) requires claims for refund be accompanied by a power of attorney, but the regulation does not define "accompany" or "how" the form must be attached. The court further distinguished the facts in *Brown* in that the taxpayers in *Brown* admitted that they neither signed their refund claims nor tendered powers of attorney to permit their tax advisor to sign the claims on their behalf. *Brown*, 22 F.4th at 1013. In contrast, Vensure filed multiple powers of attorney that purported to cover the penalty refund claims as issue.

Conclusion. Based on the analysis described above, the court held that, when the IRS dispenses with the formal requirements of a claim by investigating the merits of the claim, the IRS may waive the regulatory requirements. The court clarified that the *Angelus Milling* waiver doctrine applies when (1) there is clear evidence that the Commissioner understood the claim that was made, even though there was a departure in form in the submission, (2) it is unmistakable that the Commissioner took action upon the claim, and (3) the Commissioner took action on the claim. Because the three-part test requires factual determinations, the Federal Circuit remanded the case. The court held that, assuming a valid power of attorney was filed with the IRS to cover the scope of representation for a claim, the lower court must determine whether the "accompany" requirement was waived by the IRS.

XI. WITHHOLDING AND EXCISE TAXES

A. Employment Taxes

B. Self-employment Taxes

C. Excise Taxes

XII. TAX LEGISLATION

XIII. TRUSTS, ESTATES & GIFTS