2021-1721

In The

United States Court Of Appeals

For The Federal Circuit

GEORGE P. BROWN, RUTH HUNT-BROWN,

***Plaintiffs - Appellants*,**

v.

UNITED STATES,

***Defendant - Appellee*.**

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
ORIGINATING CASE NO.: 1:19-CV-00848-LAS

CORRECTED
BRIEF OF APPELLANTS

Tiffany Michelle Hunt
BARNES & HUNT, PLLC
4209 McKinney Avenue
Unit 415
Dallas, TX 75205
(352) 682-3948

Counsel for Appellants

*Gibson*MOORE APPELLATE SERVICES, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-1721

Short Case Caption Brown v. U.S.

Filing Party/Entity George P. Brown and Ruth Hunt-Brown

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 03/19/2021

Signature: /s/ Kathryn Magan

Name: Kathryn Magan

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
George P. Brown	George P. Brown	
Ruth Hunt-Brown	Ruth Hunt-Brown	

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for plaintiffs-appellants, George P. Brown and Ruth Hunt-Brown, state that (i) no other appeal in or from the proceeding in the lower court or body was previously before this or any other appellate court, and (ii) there is no case known to counsel to be pending in this or any other court or agency that will directly affect this Court's decision in the pending appeal.

JURISDICTION

The Browns appeal from the December 15, 2020 Memorandum opinion of the Court of Federal Claims ("COFC") entered in favor of defendant-appellee, United States. Appx2-8. The COFC had jurisdiction under 28 U.S.C. § 1346(a)(1) and § 1491(a)(1). This Court has jurisdiction under 28 U.S.C. § 1295(a)(3) to review that judgment. The COFC entered its final judgment on January 7, 2021. Appx9. The Browns timely filed their Notice of Appeal on March 1, 2021. Appx465.

STATEMENT OF THE ISSUES

1. Did the lower court commit clear error where it determined that a taxpayer's signature on a tax return is a Congressional mandate to which the doctrine of waiver does not apply?

2. Did the lower court commit reversible error where it dismissed Appellants' case for lack of subject matter jurisdiction?

STATEMENT OF THE CASE

This is an appeal from the final decision issued by the COFC dismissing without prejudice Appellants' tax refund suit seeking the overpayment of tax liability for their 2015 and 2017 tax years. The trial court's opinion is published and cited as *Brown v. U.S.,* 151 Fed. Cl. 530 (2020).

I. COURSE OF PROCEEDINGS AND DECISION OF THE COURT BELOW

Appellants filed their complaint against the United States to recover their tax refunds for years 2015 and 2017 on June 10, 2019. The COFC granted Appellants' Motion to Seal their complaint and exhibits on July 1, 2019. The United States filed its' Answer to Appellants' Complaint on January 1, 2020. Appx17-31. Appellants filed their redacted Second Amended Complaint and Exhibits for the public to view on April 22, 2020. Appx36-104.

The United States filed its' Motion to Dismiss the Complaint on May 15, 2020. Appx105-352. On the merits, the United States argued that the COFC did not have subject matter jurisdiction over Appellants' suit because Appellants' did not submit "duly filed" administrative claims for refund in accordance with Section 7422(a). This is due to Appellants' agent signing their amended returns instead of Appellants, and did not attach a power of attorney to the returns authorizing the agent's signature in accordance with Treasury Regulation §§ 301.6402-2(b) and (e).

On June 12, 2020, Appellants filed their Response to the United States' Motion to Dismiss. Appx353-378. Appellants argued that Sections 6061 and 6065 delegate rule-making authority to the Secretary to promulgate rules for how tax returns can be signed and verified. Thus, the signature and verification requirements are regulatory and subject to waiver by the Secretary under *Angelus Milling Co., v. Commissioner,* 325 U.S. 293 (1945). Further, waiver applied to Appellants' case.

On June 29, 2020, the United States filed its Reply to Appellants' Response. Appx379-414.

On October 20, 2020, the court held Oral argument on the United States' Motion to Dismiss. Thereafter, the court granted the United States' Motion to Dismiss finding that the signature and verification requirements are statutory mandates that cannot be waived. Appx2-8. The court entered its judgment on January 7, 2021. Appx9.

II. FACTUAL BACKGROUND

A. The filing of Appellants' 2015 and 2017 Amended Returns

Appellants are United States citizens who work at the Joint Defense Facility Pine Gap located near Alice Springs, Australia. Appx42. Appellants timely e-filed Form 1040 U.S. Income Tax Return for tax years 2015 and 2017 on March 8, 2016 and January 23, 2018, respectively.

It came to Appellants' attention in late 2018 that they overestimated their income tax for years 2015 and 2017 as they qualified for a foreign earned income exclusion that they did not previously claim. At this time, Appellants contracted with Castro & Co., LLC to review their tax returns and prepare amendments on their behalf as their authorized agents. Appx367; Appx370. During this time, Appellants were living and working overseas and authorized John Anthony Castro ("Castro") to sign the amendments on their behalf and submit to the IRS as their claims for refund. *Id.*

On or about October 1, 2018, Appellants via Castro & Co. submitted their 2015 and 2017 Forms 1040X Amended Income Tax Returns whereby the returns were signed and verified by Castro. Appx43. The returns did not attach a power of attorney to them.

B. The IRS's action upon Appellants' Amended Returns

On or about November 15, 2018, Appellants received a letter from the IRS, which indicated that they could not process Appellants' 2015 1040X due to an error on their 2016 1040X. *Id.* On or about January 10, 2019, Appellants via Castro & Co. timely re-submitted their 2015 Form 1040X, again with Castro's signature and verification and no power of attorney attached. *Id.*

On or about April 26, 2019, Appellants received a proposed disallowance letter from the IRS for both 2015 and 2017 stating:

> "On February 22, 2019, you filed Form 1040X or an *informal* claim for refund of $7,636.00 for tax year 2015 and $5,016.00 for tax year 2017. As a result of our examination, we have disallowed your claim. Our records show that as an employee of Raytheon E Systems living and working in Australia, you may have entered into a closing agreement with the U.S. Internal Revenue Service irrevocably waiving your rights to claim the Foreign Earned Income under Internal Revenue Code section 911(a). This wavier [*sic*] covers any income that was paid or provided to you as a consideration for services provided by your employer (Raytheon) In return for agreeing not to claim the section 911 exclusion, the government of Australia has entered into an agreement with the United States Government not to subject the income earned by the taxpayer to Australian taxes. Therefore, you are not allowed to claim the Foreign Earned Income Exclusion under Internal Revenue Code section 911(a). Accordingly, we are disallowing your claim of Foreign Earned Income Exclusion for tax years 2015 and 2017."

Appx96-98 (emphasis added). Later on, July 30, 2019, Plaintiffs received a final denial letter for their amended return for tax year 2015. This letter states:

> "We are sorry, but we cannot allow your claim for an adjustment to your tax, for the reasons stated below. This letter is your legal notice that we have fully disallowed your claim. If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing suit with the United States District Court having jurisdiction, or the United States Claims Court." "Taxpayer signed a closing agreement stating Foreign Earned Income Exclusion (FEIE) [sic] would not be claimed."

Appx377.

SUMMARY OF THE ARGUMENT

This Court should reverse the COFC's conclusion that it lacks subject matter jurisdiction over Appellants' claims. This appeal involves the question of whether the signature and verification requirements for tax returns are waiveable regulatory requirements within the dispensing power of the Secretary under *Angelus'* waiver

doctrine. Second, whether the COFC improperly dismissed Appellants' suit for lack of subject matter jurisdiction for not filing a formal administrative refund claim in compliance with Treasury Regulation § 301.6402-2 pursuant to Section 7422(a).

The signature and verification requirements contained in Sections 6061 and 6065 delegate rule-making authority to the Secretary to promulgate rules for how taxpayers can sign and verify their tax returns. The delegation of authority causes the Treasury's regulations to stand in place as law. For that reason, the Secretary can choose to dispense with its formal signature and verification requirements on tax returns and waive faulty signatures or verifications not in compliance with Treasury Regulation §§ 301.6402-2(b) and (e). Here, the Treasury intentionally waived its formal requirement of calling for a power of attorney to be attached to Appellants' claims for refund that were signed and verified by Appellants' agent and chose to substantively investigated Appellants' informal claims. Thus, the Secretary waived its' formal requirements for filing administrative claims for refunds and the lower court erred in granting the United States' Motion to Dismiss for lack of subject matter jurisdiction.

ARGUMENT

The COFC has jurisdiction over suits for the refund of taxes alleged to have been erroneously or unlawfully assessed or collected. 28 U.S.C. § 1346(a)(1); 28 U.S.C. § 1491(a)(1); *see also Ishler v. U.S.,* 115 Fed. Cl. 530, 534 (2014). The COFC

is a court of limited jurisdiction. *Brown v. U.S.,* 105 F.3d 621, 623 (Fed. Cir. 1997). The Tucker Act confers jurisdiction on the COFC over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

It is said that prior to filing suit for a refund of taxes, the taxpayer should complete two prerequisites. First, the taxpayer should file an administrative claim for refund with the IRS pursuant to Section 7422(a); and second, the taxpayer needs to wait six months before filing suit (unless the IRS has taken a final action on the claim). *see* I.R.C. § 6532(a)(1).

Section 7422(a) states, "No suit or proceeding shall be maintained… until a claim for refund…has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." The pairing regulation that speaks to how a taxpayer can file a claim for refund to be considered is Treasury Regulation § 301.6402-2.

Treasury Regulation § 301.6402-2(b)(1) provides:

> The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under penalties of perjury. A claim which does not comply with this will not be considered for any purpose as a claim for refund.

Treas. Reg. § 301.6402-2(b)(1). "A claim may be executed by an agent of the person assessed, but in such case a power of attorney must accompany the claim." *Id.* § 301.6402-2(e).

Appellants' submitted refund claims signed and verified by their authorized agent but did not attach a power of attorney. As a result, the refund claims are not in compliance with subsection (e). However, where the IRS has adjudicated an informal claim as if it were formal, the doctrine of waiver applies. *Martii v. U.S.,* 121 Fed. Cl. 87, 101 (2015); *Blue v. U.S.,* 108 Fed. Cl. 61, 69 (2012). Under the doctrine of waiver, the IRS may waive compliance with its regulatory requirements by investigating the merits of a claim and taking action upon it. *Angelus,* 325 U.S. at 297-98. Waiver 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 and (2) it is unmistakable that the Commissioner dispensed with the formal requirements and examined the claim. *Id.* The Supreme Court does differentiate between regulatory and statutory requirements, holding that the waiver doctrine only applies to regulatory requirements and not statutory mandates by Congress. *Id.* at 296 ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials"). However, the signature and verification requirements for tax returns are regulatory provisions within Treas. Reg. § 301.6402-2 that are subject to waiver.

I. THE TRIAL COURT COMMITTED CLEAR ERROR IN DETERMINING THAT THE SIGNATURE AND VERIFICATION REQUIREMENTS IN I.R.C. §§ 6061 AND 6065 ARE CONGRESSIONAL MANDATES NOT SUBJECT TO WAIVER.

A. Standard of Review

This Court reviews the COFC'S legal determinations *de novo* and its factual findings for clear error. *Palladian Partners, Inc. v. U.S.,* 783 F.3d 1243, 1252 (Fed. Cir. 2015) (*quoting CMS Contract Mgmt. Servs. V. Mass. Hous. Fin. Agency,* 745 F.3d 1379, 1385 (Fed. Cir. 2014)). The COFC's factual findings are reviewed for clear error. *Coast Prof'l, Inc. v. U.S., Fin. Mgmt. Sys., Inc.,* 828 F.3d 1349 (Fed. Cir. 2016). The COFC's dismissal for lack of subject matter jurisdiction is reviewed *de novo. Id.* This Court's task is to determine (1) whether the trial court clearly erred in its determination that the signature and verification requirements are Congressional statutory mandates not subject to waiver; and (2) whether the COFC erred in dismissing Appellants' suit for lack of subject matter jurisdiction for not filing a formal administrative claim for refund prior to filing suit.

B. The Signature and Verification requirements are regulatory provisions subject to waiver by the Secretary.

The Supreme Court holds, "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the

statute." *Chevron USA v. Nat. Res. Def.,* 467 U.S. 837, 843-44 (1984); *U.S. v. Mead Corp.,* 533 U.S. 218, 229 (2001)("it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.") "When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law." *Nat'l Latino Media Coalition v. F.C.C.,* 816 F.2d 785, 788 (D.C. Cir. 1987).

More specifically, the Supreme Court has determined that tax return filing requirements by the Secretary are given force of law where there is a statutory grant from Congress. In *Helvering v. Winmill,* 305 U.S. 79 (1938), the Supreme Court states, "Treasury regulations and interpretations long continued without substantial change, applying to un-amended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Id* at 83.

I.R.C. § 6061(a) provides:

> "Except as otherwise provided by subsection (b) and sections 6062 and 6063, any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be *signed in accordance with forms or regulations prescribed by the Secretary*."

(emphasis added). Congress' wording in Section 6061, "signed in accordance with forms or regulations prescribed by the Secretary" delegates authority to the

Secretary regarding individual return signature requirements. Had the language stopped at "shall be signed," there would be no such delegation of authority. Instead, Congress continues with the phrase "in accordance with forms or regulations prescribed by the Secretary." This wording is indicative of delegating the authority to another agency. "While a tax return can itself constitute an administrative claim for refund, the tax return must first *satisfy various Treasury Regulations*. *Walter v. U.S.,* 679 F.3d 1329, 1333 (Fed. Cir. 2012). Notably, the Lower Court recognized *Walter* and its entire jurisdictional analysis is on the basis of compliance with the verification requirement in Treas. Reg. § 301.6402-2, not Sections 6061 or 6065. Appx5. Further proof of this delegation of authority is Congress' express exception of subsection (b) and Sections 6062 and 6063 out of that statutory grant in (a) as to not allow the Secretary to issue regulations governing the manner of how a partnership or corporate return is signed. *See* I.R.C. § 6061(a).

The Fifth Circuit confirms this rationale in *Miller v. CIR,* 237 F.2d 830 (5th Cir. 1956) when the court distinguished between an individual taxpayer's signature requirement and a partnership signature requirement based on finding that Section 6063 had no statutory or regulatory authority allowing a partnership return to be signed by an agent while Section 6061 did have such statutory grant of authority. *Miller,* 234 F.3d at 836 (finding that *Lucas v. Pilliod Lumber co.,* 281 U.S. 245 (1930) did not apply).

Subsection (b) of Section 6061 is said to pertain to electronic signatures, although the text is especially important to this issue.

I.R.C. § 6061(b)(1) states:

> The Secretary shall develop procedures for the acceptance of signatures in digital or other electronic form. Until such time as such procedures are in place, the Secretary may –
>
> (A) *Waive the requirement of a signature*; or
> (B) Provide for alternative methods of signing or subscribing,
>
> A particular type or class of return, declaration, statement, or other document required or permitted to be made or written under internal revenue laws and regulations.

(emphasis added).

Subsection (b)(2) states:

> Notwithstanding any other provision of law, any return, declaration, statement, or other document filed and verified, signed, or subscribed under any method adopted under paragraph (1)(B) shall be treated for all purposes (both civil and criminal, including penalties for perjury) in the same manner as though signed or subscribed.

While the title of subsection (b) speaks to electronic signatures, the ideology within the subsection is useful because Congress states that a signature can in fact be waived by the IRS *and* that the IRS can provide for alternative methods of signing or subscribing. Then, any document filed and verified by an alternative means shall be treated in the same manner as though signed or subscribed under Section 6061(a). This means Congress is allowing the Secretary a great deal of authority over the signature and verifications on tax returns. This confirms that the Secretary does in

fact have the ability to waive a signature requirement and Congress is granting them the authority to do so.

In *Brotherhood of R.R. Trainmen v. Baltimore & O.R.Co.,* 331 U.S. 519, 528 (1947) the Supreme Court laid out that, "headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Headings and titles can do no more than indicate the provisions in a most general manner." The Court goes on to conclude that the "Heading of a section cannot limit the plain meaning of the text. Headings are tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes clear." *Id.* at 528-29. Thus, the heading of subsection (b) may shed light on the section's basic thrust, but it cannot limit the plain meaning of the text and has no power to give what the text of the statute takes away or, vice versa to take away what the statute gives. The plain language within (b)(1)(A) "the Secretary may waive the requirement of a signature" is certainly not ambiguous which would allow for Treasury interpretation. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999)("where the statutory language provides a clear answer, [the inquiry] ends there."

Next, I.R.C. § 6065 provides:

> "*Except as otherwise provided by the Secretary*, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury."

(emphasis added). The wording here mirrors that of Section 6061 delegating authority to the Secretary. Congress wants a verification but grants authority to the Secretary for how a return should be verified. Congress is clear in that Congress intends for returns to contain a verification of some sorts on a return; however, *how* that is to happen is delegated to the Secretary. Thus, the Secretary created regulations offering different ways in which a tax return may be verified. The Secretary can then choose to not stand by its' formal requirements and investigate a faulty verification not in compliance with its' rules. *Angelus,* 325 U.S. at 297.

In *Miller v. C.I.R.,* the Fifth Circuit reversed a Tax Court decision where the Tax Court found no return was filed for the taxpayer husband because the taxpayer wife signed on behalf of her husband without attaching a power of attorney. *Miller,* 237 F.3d at 832. The exact issue here for Appellants. The Fifth Circuit found, "Where, as here, a return complete in form signed in the taxpayer's name by one purporting to have authority and who actually had such authority, was filed, we find no basis for holding that this was no such return." *Id.* at 837. The court continues, "The Treasury's recognition, through the issuing of this regulation, that in certain circumstances chosen by it someone other than a taxpayer himself can sign his return and make it 'the return required' by the statute, cannot have the effect of cutting down or limiting what may be a return as defined in the law itself. *Such a regulation cannot be construed by the courts as making that does not comply with its terms 'no*

return at all.' The statutory grant of power to the Treasury to issue regulations does not touch upon the matter of the execution or making of the return, but covers only the extent and detail in which the items of gross income and the deductions and credits and 'such other information for the purpose of carrying out the provisions of this chapter' are to be stated." *Id.* (emphasis added). Moreover, *Ballantyne v. C.I.R.,* results in this same logic as the court states, "Where it is clear that a preparer had actual authority to electronically file a return for at taxpayer, the Secretary acts within his discretion in waiving the signature requirement." *Ballantyne v. C.I.R.,* 99 T.C.M. 1523 (T.C. 2010). Although the court is referencing an electronically filed return, the creed is that the Secretary acts within *his discretion* to *waive a signature requirement* where an authorized agent files a return on behalf of a taxpayer.

Miller, decided in 1956 comes after, *Turks Head Club v. Broderick,* a First Circuit case decided in 1948 in which the Lower Court relies. Appx7. In that case, a private club files for tax refunds on behalf of its members but did not accompany the refund claims with a power of attorney. *Turks Head Club v. Broderick,* 166 F.2d 877, 881 (1st Cir. 1948). The plaintiffs in *Turks Head,* argued that the IRS waived the taxpayer signature requirement because the IRS issued final disallowances on the claims, relying on *Angelus Milling. Id* at 882. The First Circuit rejected the argument holding that the taxpayer signature requirement could not be waived. *Id.*

While the Lower Court relies on *Turks Heads,* in its' ruling, it should not be so heavily relied on.

Instead, *Miller,* should be followed as it has more specific facts in congruence with Appellants' case and rules directly opposite of *Turks Head* in favor of the taxpayer. *Turks Head* can be further distinguished from the present case because the club was trying to collect a refund on behalf of the taxpayers. This is not the case here; nor was it the case in *Miller.* The First Circuit discusses the need to protect the government's interest against someone trying to collect a refund for someone else. *Id.* at 881. In the instant case, Appellants, not their agent, are collecting the refund. Appellants' authorized agent, as in *Miller,* signed on their behalf so they could collect their refund. This is quite a difference in scenarios.

The Lower Court further relies on the decision of the Tenth Circuit in *Olpin v. C.I.R.,* for the proposition that the taxpayer signature requirement is statutory and therefore could not be waived, stating "[t]he Code clearly states that, in order to be valid, a tax return must be signed. The duty to sign a tax return is on the taxpayer." Appx7; *Olpin v. C.I.R.,* 270 F.3d 1297, 1299-1300 (10th Cir. 2001). *Olpin* involves a return in which neither taxpayer nor tax preparer signed under penalties of perjury. *Id.* (The tax return was filed married filing jointly and neither plaintiff signed the tax return. The tax preparer only signed on the tax preparer line). This is certainly not the case here and should not be persuasive authority. The Fifth Circuit in *Miller*

distinguishes between a return having a faulty signature (the issue in the present case) verse no signature at all. *Miller,* 237 F.3d at 837. This rationale is confirmed in *Doll v. C.I.R.,* 24 T.C.M. (CCH) 995 (T.C. 1965, *aff'd*, 358 F.2d 713 (3d Cir. 1966)("*Miller*… involves a case where a return was signed in the taxpayer's name by his wife at his request. [This case does] not help the petitioners herein where neither of them has signed the return.")

The Lower Court has found waiver applied in the case of *Blue v. U.S.,* 108 Fed. Cl. 61 (2012). In this case, petitioner filed IRS Form 12203, Request for Appeals Review. *Id.* at 69; Appx445. The court found that the IRS waived formal administrative refund claim requirements of Section 7422(a) with respect to this appeals form filed by petitioner because they treated the form as a claim for refund, and administratively processed it even though the claim was not made on IRS Form 1040X. *Id.* ("The IRS Office of Appeals processed Plaintiff's Request For Appeal in the same manner as it would have if the claim had been presented on form 1040X, thereby evidencing that the IRS waived formal requirements as to Plaintiff's refund claim.") Notably, IRS Form 12203, Request for Appeals Review does not contain a verification signature paragraph where the taxpayer is to sign, the direct argument of the Government on why Appellants' claim for refund should not be accepted as a 'duly filed' administrative claim for refund. If waiver can apply to an IRS Form 12203 that does not include a verification under penalties of perjury by the taxpayer,

then it is not logical that an amended return with a faulty verification could not also qualify as an administrative claim for refund if the IRS treated it as such.

Similarly, the Lower Court has also vetted the doctrine of waiver against a signature issue in a case very similar to this one. *See Clark v. U.S.,* 149 Fed. Cl. 409 (2020)(In this case, the tax preparer also signed the verification line for the petitioners and did not attach a power of attorney to the claim.) The IRS initiated an audit after receiving the claim, had phone interviews with petitioners, and gathered a plethora of documentation from petitioners. The court notes, "The Supreme Court's decision in *Angelus Milling*… is instructive." *Id.* at 413. The court went through an entire analysis on whether waiver applied to petitioners' case noting the IRS can waive regulatory requirements. *Id; see also Hall v. U.S.,* 148 Fed. Cl. 371, 378 (2020)(remarking that with regard to the signature issue "The IRS can choose 'not to stand on [its] own formal or detailed requirements' and proceed to investigate the merits of a claim.") Ultimately, the Court found waiver was not established because petitioners did not show an "unmistakable intent on the IRS's part to waive compliance with them based solely on the fact that it initiated an examination." *Id* at 414. The Court also reached the same conclusion in *Hall v. U.S.,* while scrutinizing the signature issue finding that waiver did not exist because the IRS never considered the petitioners' claim on the merits. *Hall,* 148 Fed. Cl. at 378.

As illustrated above, Sections 6061 and 6065 grant authority to the Secretary concerning the signature and verification requirements. The Secretary promulgated rules for how one should sign and verify their returns for submission. These rules are regulatory provisions to which the Secretary can waive.

II. THE COURT OF FEDERAL CLAIMS COMMITTED REVERSIBLE ERROR WHEN IT GRANTED APPELLEE'S MOTION TO DISMISS ON A BASIS OF LACK OF SUBJECT MATTER JURISDICTION.

A. The doctrine of waiver satisfies the administrative claim requirement in I.R.C. § 7422.

It is well established that the Tucker Act, 28 U.S.C. § 1491(a)(1), grants the COFC jurisdiction over tax refund suits against the Treasury. *See Ledford v. U.S.,* 297 F.3d 1378, 1382 (Fed. Cir. 2002); *see also Ont. Power Generation v. U.S.,* 369 F.3d 1298, 1301 (Fed. Cir. 2004); *Shore v. U.S.,* 9 F.3d 1524 (Fed. Cir. 1993). As mentioned above, the taxpayer has two prerequisites to exhaust prior to filing suit. I.R.C. §§ 7422(a), 6532(a).

There are several ways to satisfy the administrative claim requirements within Section 7422(a), one being the doctrine of waiver. *Martti,* 121 Fed. Cl. at 101 ("A fourth exception to the requirement to file a formal claim is the waiver doctrine."). Since the verification requirement is regulatory, waiver applies to Appellants' case.

B. Appellants Meet The Burden of Establishing Waiver under Angelus.

The 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 dispensed with the formal requirements and examined the claim, and (3) the Commissioner took action upon the claim. *Angelus,* 325 U.S. at 297-98. Appellants have satisfied the three requirements needed in order to establish waiver.

First, it must be shown that the Commissioner investigated and understood the merits of the claim. *Angelus,* 325 U.S. at 297-98 ("The Commissioner's attention should have been focused on the merits of the particular dispute.") Such evidence that the IRS understood the claim submitted might include substantive responses to the taxpayer claims, *Goulding v. U.S.,* 929 F.2d 329, 333 (7th Cir. 1991), and, a notice of a final decision on the merits. *Cencast Servs., L.P. v. U.S.,* 729 F.3d 1352, 1368 (Fed. Cir. 2013); *Hall,* 148 Fed. Cl. at 378. In the letter dated April 26, 2019, from the IRS to Appellants, the IRS demonstrates a clear understanding that Appellants were claiming the foreign earned income exclusion, the merits of Appellants' 2015 and 2017 amended returns. Appx96-98. The IRS goes into a lengthy substantive response on their rationale for denying Appellants' claims to said exclusion discussing a purported Closing Agreement that was signed waiving Appellants' right to said exclusion, the Australian government entering into an agreement with the

United States, etc. *Id.* There is no question that IRS Agent Ted Roach understood the basis of Appellants' amended returns.

Next, Appellants must show there is an unmistakable intent that the Commissioner is fit to dispense with his formal requirements. *Angelus,* 325 U.S. at 297-98; *Hall,* 148 Fed. Cl. at 378-79 ("the IRS must at least be aware a violation has occurred before it can intentionally dispense with its own regulations."); *Clark,* 149 Fed. Cl. at 414. In the IRS substantive response letter dated April 26, 2019, IRS Agent Ted Roach states, "On 02/22/2019 you filed Form 1040X or *an informal claim* for refund… for tax year 2015 and… for tax year 2017." Appx96-98 (emphasis added). Here, IRS is acknowledging Appellants filed informal claims for tax years 2015 and 2017 by stating in its' response that Appellants filed informal claims for both years showing they unmistakably intended to dispense with their regulations.

Last, the Commissioner must take action upon the claim. Action taken on a claim does not need to be a final action. *Clark,* 149 Fed. Cl. at 414 ("The government contends that a taxpayer can never establish waiver unless the IRS has made a decision on the merits of their claim or taken other final action. The Court disagrees.") "Action short of a final decision on the merits may be sufficient to prove waiver of a regulatory requirements, so long as it clearly reflects the IRS's intent to do so. *Id.* citing *Cencast Servs,* 729 F.3d at 1368 (rejecting waiver argument where the IRS "neither 'consider[ed]' nor made a 'determination of the merits'" of the

claim (emphasis supplied))(quoting *Computervision Corp. v. U.S.,* 445 F.3d 1355, 1365 (Fed. Cir. 2006) and *Goulding,* 929 F.2d at 332; *see also Cudahy Packing Co. v. U.S.,* 152 F.2d 831, 836 (7th Cir. 1945) (explaining that while "there [was] no doubt that [the IRS] had waived any defect in the claim," it "need not pass upon the merits of the claim to establish waiver"). It is "not essential for establishment of waiver that the Commissioner communicate his ruling on the merits to the taxpayer." *Angelus,* 325 U.S. at 298; *Hall,* 148 Fed. Cl. 378 (finding action can include substantive responses to the taxpayer's claim *or* a final determination).

Here, the IRS indisputably took action upon Appellants' claims by issuing a substantive proposed full disallowance for both 2015 and 2017. Then, on July 30, 2019, the IRS issued a final disallowance with respect to tax year 2015. Appx377. The fact that 2017 was not included in the final disallowance is immaterial.

C. Appellants' claims satisfy the purpose of filing an administrative refund claim and fit the scenario of why the doctrine of waiver was created.

An administrative refund claim is meant to ensure the IRS is given adequate notice of the nature of the claims, and the specific facts upon which it is predicated, permitting an administrative investigation and determination. *See Computervision Corp.,* 445 F.3d at 1363 (citing *Alexander Proudfoot Co. v. U.S.,* 197 Ct. Cl. 219, 454 F.2d 1379, 1383 (Ct. Cl. 1972); *Pennoni v. U.S.,* 86 Fed. Cl. 351, 362 (2009)("The purpose of the formal claim requirement is to give the IRS an

opportunity to respond to the taxpayer's objections."). The intention is to prevent an element of surprise. *Computervision Corp.* 445 F.3d at 1363.

The filing of Appellants' informal claims clearly accomplished this goal. The IRS agent understood Plaintiffs were trying to claim the foreign earned income exclusion for both 2015 and 2017, investigated whether Appellants were eligible for such deduction, and made a conclusion that they did not qualify because of a purported closing agreement being signed. There is absolutely no surprise for the IRS with this current litigation. The IRS had an opportunity to complete their due diligence with respect to Appellants' claims and were put on alert as to the nature of Appellants' claims. So, the need for a taxpayer to file an administrative claim for refund prior to filing suit is met.

The Supreme Court founded the doctrine of waiver finding that it is not a practical safeguard for the Commissioner to invoke technical objections after he investigated the merits of a claim. *Angelus,* 325 U.S. at 297. "Even tax administration does not as a matter of principle preclude considerations of fairness." *Id.* Accordingly, waiver was created to not only protect the Commissioner and his rules, but to protect the taxpayer too.

Following, courts have interpreted waiver further as a means to prevent IRS agents from lulling taxpayers into missing the limitations deadline for filing a claim for refund. *Blue,* 108 Fed. Cl. at 69 (quoting *Computervision Corp.,* 445 F.3d at

1366("The central purpose of the waiver doctrine is 'to prevent IRS agents from lulling taxpayers into missing the [limitations] deadline…'")).

Here, the statute of limitations deadline for Appellants to file a claim for refund for tax year 2015 ended on April 15, 2019. *See* I.R.C. § 6011. Appellants believed that their 2015 Form 1040X was a sufficient claim for refund because they received a full substantive response on their claim with a proposed disallowance, and later a final disallowance. Appellants had no reason to file another claim for refund correcting the formal errors made because the IRS acknowledged the informality, chose to dispense with the formality and entirely vetted the merits of their informal 2015 1040X. The precise purpose of waiver. It would be fundamentally unfair and trickery on Appellants to now allow the IRS to invoke an objection after they already understood both of Appellants' informal claims and investigated the merits of those claims.

Thus, if the Commissioner is found to have waived their formal requirements of Treasury Regulation §§ 301.6402-2(b) and (e) for a claim for refund and investigated the merits of the taxpayer's informal claim for refund, then a taxpayer need only have submitted an informal claim for refund in order to satisfy the requirement of I.R.C. § 7422. *See Computervision Corp. v. U.S.,* 445 F.3d 1355, 1364 (Fed. Cir. 2006) (finding that an informal claim, as long as it is timely with

purely formal defects is permissible if it fairly apprises the IRS of the basis for the claim within the limitations period.)

D. In the alternative, the claim filing requirement is not a jurisdictional requirement of a tax refund suit; so, Appellants' failure to comply with the formal claim filing requirements cannot result in a dismissal.

In *Walby v. U.S.,* 957 F.3d 1295 (Fed. Cir. 2020), plaintiff filed suit in the COFC based on several refund claims she previously filed. However, for tax year 2014, her refund claim was untimely under Section 6511(a). The COFC dismissed the 2014 tax year for lack of subject matter jurisdiction based on Section 7422(a). On appeal, this Court held that an argument for the timeliness of the 2014 refund claim was waived since plaintiff did not make that challenge. However, this Court wrote in *dicta*:

> There is one aspect of the court's conclusion regarding this claim, however that warrants additional examination. The Claims Court concluded that, because Walby's 2014 administrative refund claim was untimely, pursuant to 26 U.S.C. § 7422(a), it lacked subject matter jurisdiction over that claim. Although this conclusion is correct under our existing case law, *see, e.g., Stephens v. United States*, 884 F.3d 1151, 1156 (Fed. Cir. 2018), it may be time to reexamine that case law in light of the Supreme Court's clarification that so-called "statutory standing" defects—i.e., whether a party can sue under a given statute—do not implicate a court's subject matter jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 128 n.4 (2014); *see also Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1235 (Fed. Cir. 2019) (recognizing that, following *Lexmark*, it is incorrect to classify "so-called" statutory-standing defects as jurisdictional).

The Tucker Act grants the Claims Court jurisdiction to render judgment "upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Additionally, 28 U.S.C. § 1346(a) provides that the Claims Court shall have original jurisdiction (concurrent with the district courts) of "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." As such, Walby's failure to meet the § 7422(a) statutory requirement of a timely administrative claim for her 2014 tax claim would not seem to implicate the Claims Court's subject matter jurisdiction; rather, it appears to be a simple failure to meet the statutory precondition to maintain a suit against the government with respect to those taxes.

The Supreme Court has not addressed § 7422(a) following *Lexmark*. We note, however, that the Court's most recent discussion of § 7422(a) does not describe it as "jurisdictional." *See Clintwood Elkhorn Mining Co.*, 553 U.S. 1 at 4-5, 11-12. And, although our court has continued to refer to this statute as jurisdictional following *Lexmark*, we have not yet addressed the implications of that case and the many Supreme Court cases applying it.

In view of the Supreme Court's guidance in *Lexmark* , it may be improper to continue to refer to the administrative exhaustion requirements of § 7422(a) and § 6511 as "jurisdictional pre-requisites."

In reaching this conclusion, the Court relied on *Arbaugh v. Y&H Corp.*, where, finding Title VII's numerical employee threshold nonjurisdictional, the Supreme Court stated:

> 'If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.'

546 U.S. 500, 515–16, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). This "clear statement" rule "does not mean Congress must incant magic words. But traditional tools of statutory construction must plainly show

> that Congress imbued a procedural bar with jurisdictional consequences." *Kwai Fun*, 575 U.S. at 410, 135 S.Ct. 1625 (internal quotation marks omitted). There is no such clear statement apparent in the statutes at issue here, 28 U.S.C. § 7422(a) and § 6511(a). Other courts also have begun to question whether the time limits and administrative exhaustion requirements in these and other tax provisions should continue to be deemed jurisdictional. *See Gillespie v. United States*, 670 F. App'x 393, 394–95 (7th Cir. 2016) (whether § 7422(a) is jurisdictional); *Bullock v. I.R.S*, 602 F. App'x 58, 60 n.3 (3d Cir. 2015) (whether I.R.C. § 7433 is jurisdictional). As to at least one administrative exhaustion requirement, one court has held that it should not be deemed jurisdictional. *See Gray v. United States*, 723 F.3d 795, 798 (7th Cir. 2013) (I.R.C. § 7433 "contains no language suggesting that Congress intended to strip federal courts of jurisdiction when plaintiffs do not exhaust administrative remedies"); *cf. Duggan v. Comm'r of Internal Revenue*, 879 F.3d 1029, 1034 (9th Cir. 2018) (I.R.C. § 6630(d)(1)'s 30-day filing deadline "expressly contemplates the Tax Court's jurisdiction ... the filing deadline is given in the same breath as the grant of jurisdiction.").
>
> Accordingly, although the Claims Court properly dismissed Walby's 2014 refund claim because she did not meet the prerequisite for bringing such a claim, we think that, under *Lexmark*, *Arbaugh*, and their progeny, the court likely did not lack subject matter jurisdiction over this claim.

Id. at 1299-1301 (footnotes omitted)(emphasis added). As laid out above, "A statutory condition that requires a party to take some sort of action before filing a lawsuit is not automatically 'a jurisdictional prerequisite to suit.'" *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 166 (2010)(quoting *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982)). In order for Section 7422(a) to be a jurisdictional limitation, Congress must clearly state that it is. *U.S. v. Kwai Fun Wong,* 575 U.S. 402, 409 (2015); *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 515 (2006); *Sevelius v.*

Auburn Regional Medical Center, 568 U.S. 145, 153 (2013). "[A]bsent such a clear statement,… 'courts should treat the restriction as nonjurisdictionl.'" *Auburn Regional,* 568 U.S. at 153 (quoting *Arbaugh,* 546 U.S., at 516). There is a high bar that must be established in order to prove a statute is jurisdictional. *Kwai Fun Wong,* 575 U.S. at 4019.

The language in Section 7422 details the requirement to file an administrative claim for refund, or rather a tax refund claim, before bringing suit. However, Congress mentions nothing about "jurisdiction" in its' wording directly or indirectly. Accordingly, Section 7422(a) "[can] not fairly be read to 'speak in jurisdictional terms or in any way refer to the jurisdiction of the district courts.'" *Reed Elsevier,* 559 U.S. at 162 (quoting *Zipes,* 455 U.S. at 394). Thus, Section 7422(a) is non-jurisdictional and is just simply a threshold claim processing requirement to complete.

In the same way, the Supreme Court has interpreted comparable administrative exhaustion prerequisites as non-jurisdictional requirements. *Reed Elsevier,* 559 U.S. at 157 (holding that the Copyright Act's registration requirement is a precondition to filing a copyright infringement claim that does not restrict a federal court's subject-matter jurisdiction with respect to infringement suits); *Kwai Fun Wong,* 135 S. Ct. 1632-33 (holding that the administrative exhaustion requirement in the Federal Tort Claims Act is a non-jurisdictional requirement);

Jones v. Bock, 549 U.S. 199, 211 (2007) (treating the administrative exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA) – which states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner… until such administrative remedies as are available are exhausted."); *Woodford v. Ngo,* 548 U.S. 81, 93 (2006)(same); *Arbaugh v. Y & H Corp.,* 546 U.S. at 504 (holding the statutory minimum of 50 workers for employer to be subject to Title VII of Civil Rights Act of 1964 is non-jurisdictional.)

Similarly, in *dicta,* the 7th Circuit states doubt on a line of cases coming out of their court suggesting that Section 7422(a) is jurisdictional. *Gillespie v. U.S.,* 670 Fed. Appx. 393, 395 (7th Cir. 2016)("*See e.g., U.S. v. Dalm,* 494 U.S. 596, 601-02(1990); *Green-Thapedi v. U.S.,* 549 F.3d 530, 532-33 (7th Cir. 2009); *Nick's Cigarette city, Inc. v. U.S.,* 531 F.3d 516, 520-21 (7th Cir. 2008)").

The COFC gets their jurisdiction over tax refund suits from the jurisdictional grants in Section 1346(a)(1) and Section 1491(a)(1). Because there is no clear statement regarding jurisdiction contained in the administrative exhaustion requirements in Section 7422(a), the requirements are non-jurisdictional claim-processing prerequisites to filing suit subject to waiver. Not only did Defendant waive the Section 7422(a) argument by filing an Answer and waiting nearly a year

before filing their Motion to Dismiss, the IRS also waived their formal claim requirements laid out above.

CONCLUSION

For the reasons states above, Appellants respectfully requests this Court to (1) reverse the Court of Federal Claim's decision dismissing the suit for lack of subject matter jurisdiction, (2) hold that the signature and verification requirements are regulatory provisions, and (3) hold that the IRS waived their formal requirements with respect to Appellants' 2015 and 2017 refund claims.

/s/ Tiffany Michelle Hunt
Tiffany Michelle Hunt
BARNES & HUNT, PLLC
4209 McKinney Avenue
Unit 415
Dallas, TX 75205
(352) 682-3948

Counsel for Appellants

ADDENDUM

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In the United States Court of Federal Claims

No. 19-848
Filed: December 15, 2020

GEORGE P. BROWN, *et al.*, Plaintiff, v. THE UNITED STATES, Defendant.	)	Taxpayer Signature Requirement; Waiver Doctrine; 26 U.S.C. § 7422; Treas. Reg. § 301.6402-2; 26 U.S.C. § 6061; 26 U.S.C. § 6065; Subject Matter Jurisdiction; RCFC 12(b)(1).

Kathryn Nicole Magan, Magan Law, PLLC, North Richland Hills, TX, for plaintiff.

Courtney Metz Hutson, U.S. Department of Justice, Tax Division, Washington, DC, for defendant.

OPINION AND ORDER

***SMITH*, Senior Judge**

This matter is before the Court on defendant's Motion to Dismiss. Plaintiffs, George P. Brown and Ruth Hunt-Brown, assert a tax refund claim for tax years 2015 and 2017 against defendant, seeking recovery of "federal income tax and interest erroneously paid . . . or erroneously assessed and collected by the Internal Revenue Service" during the course of plaintiffs' employment in Australia, pursuant to the Foreign Earned Income Exclusion under 26 U.S.C. § 911(a). Second Amended Complaint at 1–2, ECF No. 14 [hereinafter 2nd Am. Compl.]. In response, defendant filed a motion to dismiss, arguing that this Court lacks subject matter jurisdiction over plaintiffs' Second Amended Complaint because plaintiffs failed to "verify, under the penalties of perjury, the 2015 and 2017 administrative claims for refund on which they base this suit" and failed to properly authorize a representative to sign on their behalf. Motion of the United States to Dismiss the Complaint with Respect to the 2015 and 2017 Tax Years and Memorandum in Support Thereof at 3, ECF No. 34 [hereinafter Def.'s MTD]. For the reasons set forth below, defendant's Motion to Dismiss is granted.

I. Background

On March 7, 2016 and January 23, 2018, plaintiffs filed their original joint federal income tax returns, Form 1040, with the Internal Revenue Service ("IRS") for the 2015 and 2017 tax years respectively, after signing both returns electronically. *See generally* Def.'s MTD, Ex. 1; Def.'s MTD, Ex. 2. On October 3, 2018, the IRS received plaintiffs' first amended tax return,

Form 1040X, for the 2015 tax year ("2015 First Amended Tax Return"), claiming a refund in the amount of $7,636.00. Def.'s MTD, Ex. 3 at 1. The 2015 First Amended Return did not contain the plaintiffs' signatures, but, rather, was signed by plaintiffs' tax-preparer, John Anthony Castro, without the requisite Form 2848 ("power of attorney"). *See generally id*. That same day, the IRS received plaintiffs' amended tax return, Form 1040X, for the 2017 tax year ("2017 Amended Return"), claiming a refund in the amount of $5,061.00. Def.'s MTD, Ex. 5 at 1. Again, the 2017 Amended Tax Return was not signed by plaintiffs, but by Mr. Castro, and was not accompanied with a Form 2848. *See generally id*.

On November 15, 2018, the IRS issued a Letter 916C, indicating that the IRS could not consider plaintiffs' refund claim for the 2015 tax year because "[their] supporting information was not complete." Def.'s MTD at 5 (citing 2nd Am. Compl., Ex. D). That same day, Mr. Castro faxed the IRS a Form 2848, intending to give three individuals—himself, Tiffany Michelle Hunt, and Kasondra Kay Humphreys—the authority to represent plaintiff George Brown before the IRS for the 2014 through 2018 tax years.[1] Def.'s MTD, Ex. 6 at 1. The Form 2848 was not signed by plaintiff George Brown but, instead, by Tiffany Michelle Hunt. *Id*. at 2. On January 14, 2019, the IRS received plaintiffs' second amended tax return, Form 1040X, for the 2015 tax year ("Second 2015 Amended Tax Return"), claiming a refund in the same amount as initially requested. Def.'s MTD, Ex. 4 at 1. Once more, the Second 2015 Amended Tax Return contained Mr. Castro's, not plaintiffs' signatures, and it was not accompanied by a Form 2848. *See generally id*. On April 26, 2019, the IRS issued a Letter 569 (DO), proposing to disallow the 2015 and 2017 refunds based on plaintiffs' purported waiver of the Foreign Earned Income Exclusion. Def.'s MTD, Ex. 7 at 4. Thereafter, on May 28, 2019, Mr. Castro submitted a Request for Appeals Review, Form 12203, for tax year 2017 on plaintiffs' behalf.[2] Def.'s MTD, Ex. 8 at 1.

On June 10, 2019, plaintiffs filed their original Complaint with this Court, asserting a tax refund claim for tax year 2015 pursuant to the Foreign Earned Income Exclusion. *See generally* Complaint, ECF No. 1. On June 25, 2019, plaintiffs filed their First Amended Complaint, covering the same tax year. *See generally* First Amended Complaint, ECF No. 6. On September 5, 2019, plaintiffs filed their Second Amended Complaint, expanding their refund suit to tax years 2016 and 2017.[3] *See generally* 2nd Am. Compl. On May 15, 2020, defendant filed its Motion to Dismiss, pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"), arguing that this Court lacks jurisdiction over plaintiffs' Complaint because plaintiffs failed to "verify, under the penalties of perjury, the 2015 and 2017 administrative claims for refund on which they base this suit" and failed to properly authorize a representative to sign on their behalf. Def.'s MTD at 3. On June 12, 2020, plaintiff filed its Response to defendant's

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[1] The Form 2848 did not purport to apply to plaintiff Ruth Hunt-Brown. *See generally* Defendant's Motion to Dismiss, Ex. 6, ECF No. 34 [hereinafter Def.'s MTD, Ex. 6].

[2] The Form 12203 did not contain plaintiffs' signatures, but only that of John Anthony Castro. Def.'s MTD, Ex. 8 at 1.

[3] On August 3, 2020, the parties filed a stipulation of dismissal without prejudice for tax year 2016. *See generally* Stipulation for Dismissal Without Prejudice with Respect to the Tax Year 2016, ECF No. 40. Consequently, a tax refund claim for the above tax year is no longer before the Court.

Motion to Dismiss, asserting that the IRS waived the taxpayer signature requirement by fully investigating the merits of plaintiffs' claims. Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss the Complaint at 3–4, ECF No. 35 [hereinafter Pl.'s Resp.]. On June 29, 2020, defendant filed its Reply, contending that the doctrine of waiver is inapplicable to the taxpayer signature requirement and that, even if it were, plaintiffs have not satisfied its requisite elements. Reply in Further Support of the United States' Motion to Dismiss the Complaint with Respect to the 2015 and 2017 Tax Years at 1–2, ECF No. 38 [hereinafter Def.'s Reply]. The Court held oral argument on October 20, 2020. Defendant's Motion to Dismiss is fully briefed and ripe for review.

II. Standard of Review

This Court's jurisdictional grant is found primarily in the Tucker Act, which gives this Court the power "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, . . . or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2018). Though the Tucker Act expressly waives the sovereign immunity of the United States against such claims, it is "merely a jurisdictional statute and does not create a substantive cause of action" enforceable against the United States for money damages. *Rick's Mushroom Serv. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008) (citing *United States v. Testan*, 424 U.S. 392, 398 (1976)); *Quimba Software, Inc. v. United States*, 132 Fed. Cl. 676, 680 (2017) (citing the same). Instead, "a plaintiff must identify a separate source of substantive law that creates the right to money damages," such as a money-mandating constitutional provision. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (citing *United States v. Mitchell*, 463 U.S. 206, 216 (1983)); *Loveladies Harbor. Inc. v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Jurisdiction is a threshold issue that "must be resolved before the Court can take action on the merits." *Remote Diagnostic Techs. LLC v. United States*, 133 Fed. Cl. 198, 202 (2017) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). When a "motion to dismiss 'challenges the truth of the jurisdictional facts,'" this Court "'may consider relevant evidence in order to resolve the factual dispute'" and may make factual findings that are decisive of the jurisdictional issue. *Freeman v. United States*, 875 F.3d 623, 627 (Fed. Cir. 2017) (quoting *Banks v. United States*, 741 F.3d 1268, 1277 (Fed. Cir. 2014)); *Hedman v. United States*, 15 Cl. Ct. 304, 306 (1988). When considering a motion to dismiss for lack of subject-matter jurisdiction, the Court will treat factual allegations in the complaint as true and will construe those allegations in the light most favorable to the plaintiff. *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014); *Oakland Steel Corp. v. United States*, 33 Fed. Cl. 611, 613 (1995) (citing *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988)). However, the plaintiff must still establish that this Court has jurisdiction over its claims by a preponderance of the evidence. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

III. Discussion

A. Jurisdictional Prerequisites to Bring a Tax Refund Claim

In order for this Court to have jurisdiction over a tax refund claim, 26 U.S.C. § 7422(a) requires that it first be "duly filed" in accordance with the following Treasury Regulation:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a); *see, e.g.*, *Waltner v. Unites States,* 679 F.3d 1329, 1333 (Fed. Cir. 2012) ("[W]hether this Court has jurisdiction over . . . refund claims depends on whether the taxpayers' submissions to the IRS constitute a claim for refund. While a tax return can itself constitute an administrative claim for refund, the tax return must first satisfy various Treasury Regulations."). To be "duly filed," a claim, in relevant part

> must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. ***The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury.*** A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

Treas. Reg. § 301.6402-2(b)(1) (emphasis added). The taxpayer signature requirement emphasized above may be excepted "when a legal representative certifies the claim and attaches evidence of a valid power of attorney." *Gregory v. United States*, 149 Fed. Cl. 719, 723 (2020) (citing Treas. Reg. § 301.6402-2(e)) ("A claim may be executed by an agent of the person assessed, but in such case a power of attorney must accompany the claim.").

In this case, plaintiffs failed to sign the amended returns upon which they base this suit, as required by Treasury Regulation § 301.6402-2(b)(1).[4] *See generally* Def.'s MTD, Ex. 4; Ex. 5. Moreover, plaintiffs' amended returns were not accompanied by a power of attorney, demonstrating that Mr. Castro had the authority to sign on plaintiffs' behalf and as required by Treasury Regulation § 301.6402-2(e). Instead, Mr. Castro later submitted an improperly executed power of attorney but failed to include plaintiffs' signatures within that document. Def.'s MTD, Ex. 6 at 1. Based on the above, defendant argues that plaintiffs' claims were not "duly filed" within the meaning of 26 U.S.C. § 7422(a), and that, as such, this Court lacks jurisdiction over plaintiffs' Second Amended Complaint. Def.'s MTD at 14. In response, plaintiffs concede that they failed to comply with the taxpayer signature requirement but contend that the IRS waived that requirement when it investigated the merits of the amended returns. Pl.'s Resp. at 3–4, 9. In its Reply, defendant asserts that the doctrine of waiver is inapplicable to

[4] Plaintiffs' suit is based on the 2017 Amended Return and the Second 2015 Amended Return. Second Amended Complaint at 8–9, ECF No. 14.

the taxpayer signature requirement and that, even if it did apply, the elements of waiver have not been met. Def.'s Reply at 1–2.

B. The Doctrine of Waiver and the Taxpayer Signature Requirement

Under the doctrine of waiver, the IRS may waive compliance with its regulatory requirements by "investigat[ing] the merits of a claim and tak[ing] action upon it." *Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 297 (1945). Notably, the Supreme Court explicitly differentiated between regulatory and statutory requirements, holding that the waiver doctrine only applies to regulatory requirements and not statutory requirements. *Id*. at 296 ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials."). The Supreme Court expanded on the purpose behind this distinction, stating the following regarding regulatory requirements:

> Congress has given the Treasury this rule-making power for self-protection and not for self-imprisonment. If 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 upon it.

Id. at 297. Nevertheless, where the doctrine applies, the following three requirements must be met: (1) the IRS must have "investigated the merits of [the refund] claim," (2) the IRS must have "taken action upon" the refund claim, and (3) the IRS' determination to "dispense with" the formal regulatory requirements and "to examine the merits of the claim" must be "unmistakable." *Gregory*, 149 Fed. Cl. at 723 (citing *Angelus Milling Co.*, 325 U.S. at 297*)*.

Although the taxpayer signature requirement is outlined in the Treasury Regulations, it is also addressed in two statutes that require the Court's attention. Under 26 U.S.C. § 6061, "any *return*, statement, or other document required to be made under any provision of the internal revenue laws or regulations *shall be signed in accordance with forms or regulations prescribed by the Secretary*." (emphasis added). Under 26 U.S.C. § 6065, "*[e]xcept as otherwise provided by the Secretary, any return*, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations *shall contain or be verified by a written declaration that it is made under the penalties of perjury*." (emphasis added).

In its Response, despite the above referenced statutes, plaintiffs maintain that the taxpayer signature requirement can be waived because it is a regulatory requirement outlined in the Treasury Regulations.[5] Pl.'s Resp. at 7. Specifically, plaintiffs allege that 26 U.S.C. § 6061

[5] In their briefs, plaintiffs cite to *Angelus Milling Co. v. Comm'r* and *Goulding v. United States* in support of their waiver argument. *See generally Angelus Milling Co. v. Comm'r*, 325 U.S. 293 (1945); *Goulding v. United States*, 1929 F.2d 329 (7th Cir. 1991). During oral argument, plaintiffs additionally cited to *Blue v. United States*, *Martti v. United States*, and *Clark v. United States*. *See generally Blue v. United States*, 108 Fed. Cl. 61 (2012); *Martti v. United States*, 121 Fed. Cl. 87 (2015); *Clark v. United States*, 149 Fed. Cl. 409 (2020). The Court finds

and § 6065 do not create a statutory *taxpayer* signature requirement because "Congress does not mandate the signature of the *taxpayer*." *Id*. Accordingly, plaintiffs posit that the "requirement that the taxpayer . . . personally signs his returns, and if they are signed by an *agent*, then a power of attorney must accompany the return" is a creation of the Secretary in Treasury Regulation § 301.6402-2(b)(1) and (e), and therefore can be waived. *Id*. In its Reply, defendant counters that 26 U.S.C. § 6061 and § 6065 plainly "create a default rule that refund claims . .. must be signed by the *taxpayer* under the penalties of perjury" and that "[t]he Secretary can [only] relax the default rule by regulation[,] as in Treas. Reg § 301.6402-2(e)," which "allows a refund claim to be signed on a taxpayer's behalf by the taxpayer's agent if it is accompanied by a valid power of attorney." Def.'s Reply at 5 (emphasis added). Moreover, defendant maintains that "the [taxpayer signature] requirement is statutory in the critical sense that, absent regulatory modification, the default rule applies—the taxpayer himself or herself must sign under penalties of perjury." *Id*. at 6. Although the Court sympathizes with plaintiffs' financial hardships, after careful review of the parties' arguments, relevant statutes, and case precedent, the Court finds that the taxpayer signature requirement is statutory and, therefore, cannot be waived.

In *Turks Head Club v. Broderick*, the United States Court of Appeals for the First Circuit ("First Circuit") was faced with the issues presently before the Court. *See generally Turks Head Club v. Broderick*, 166 F.2d 877 (1st Cir. 1948). In that case, a private club sought tax refunds on behalf of its members but did not accompany the refund claims with a power of attorney. *Id*. at 881. Like the plaintiffs in this case, the Club argued that the IRS waived the taxpayer signature requirement because the IRS issued final disallowances on the claims, relying on the Supreme Court's decision in *Angelus Milling*. *Id*. at 882. Ultimately, the First Circuit rejected the club's argument, holding that the taxpayer signature requirement could not be waived. *Id*. (citing *Angelus Milling Co.*, 325 U.S. at 296) ("Candor does not permit one to say that the power of the Commissioner to waive defects in claims for refund is a subject made crystal-clear by the authorities. The Commissioner may effectively waive certain requirements of his regulations as to the form and content of claims for refund."). Similarly, in *Oplin v. C.I.R.*, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") addressed the taxpayer signature requirement and the applicability of the doctrine of waiver when a married couple failed to include a spouse's signature on a joint refund claim. *Oplin v. C.I.R.,* 270 F.3d 1297, 1299–1300 (10th Cir. 2001). Utilizing 26 U.S.C. § 6061 and § 6065, the Tenth Circuit held that the taxpayer signature requirement is statutory and therefore could not be waived, stating that "[t]he Code clearly states that, in order to be valid, a tax return must be signed. ***The duty to sign a tax return is on the taxpayer***." *Id*. at 1300 (emphasis added) (citations omitted).

Moreover, this Court recently addressed the taxpayer signature requirement and the doctrine of waiver in two seminal cases.[6] In *Dixon v. United States*, the Court determined that "26 U.S.C. §§ 6011, 6061, 6065, 6402 and 7422 . . . ***require the taxpayer personally to sign***

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all of plaintiffs' citations unpersuasive as the taxpayer signature requirement and the applicability of the doctrine of waiver was not before the Court in any of the above cases.

[6] In addition to the case at bar, Mr. Castro was the tax preparer in *Dixon v. United States* and in *Gregory v. United States*. *See generally Dixon v. United States*, 147 Fed. Cl. 469 (2020); *Gregory v. United States*, 149 Fed. Cl. 719 (2020).

every return or other document required to be filed with the IRS, unless a regulation allows otherwise." *Dixon v. United States*, 147 Fed. Cl. 469, 476 (2020) (emphasis added) (citations omitted). Based on that finding, the Court held that the taxpayer signature requirement could not be waived. *Id.* at 477 (citing *Angelus Milling Co.*, 325 U.S. at 296) ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials."). Similarly, in *Gregory v. United States*, applying the statutory framework outlined in *Dixon*, the Court held that "[t]he taxpayer signature requirement is statutory in nature and thus the waiver doctrine is inapplicable." *Gregory*, 149 Fed. Cl. at 724 (citing 26 U.S.C. §§ 6061, 6065; *Angelus Milling*, 325 U.S. at 296).

Upon careful review of the above referenced statutes and case precedent, the Court finds that the taxpayer signature requirement is statutory and, therefore, cannot be waived. Accordingly, the Court need not address the arguments related to whether the elements of waiver have been met. Additionally, while not dispositive, it is important to note that to rule otherwise would be inconsistent with the tax code's purpose as the "IRS's requirement that taxpayers sign under penalties of perjury enables the IRS 'to enforce directly against a rogue taxpayer.'" *Id.* (citing *Dixon*, 147 Fed. Cl. at 476 n.5) (citations omitted); *See also Borgeson v. U.S.*, 757 F.2d 1071, (10th Cir. 1985) ("The perjury charge based on a false return has been deemed 'one of the principal sanctions available to assure that honest returns are filed.'" (internal citations omitted)). Consequently, the Court finds that plaintiffs' amended returns cannot constitute a "duly filed" refund claim under 26 U.S.C. § 7422(a), and as a result, the Court lacks jurisdiction over plaintiffs' Second Amended Complaint.

IV. Conclusion

For the reasons set forth above, defendant's Motion to Dismiss is hereby **GRANTED.** Accordingly, plaintiff's claims are hereby **DISMISSED** for lack of subject-matter jurisdiction. The Clerk is directed to enter judgment in favor of defendant, consistent with this Opinion and Order.

IT IS SO ORDERED.

s/ *Loren A. Smith*
Loren A. Smith,
Senior Judge

In the United States Court of Federal Claims

No. 19-848 T
Filed: January 7, 2021

GEORGE P. BROWN and
RUTH HUNT BROWN

v. **JUDGMENT**

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed December 15, 2020, granting defendant's motion to dismiss, and the parties' stipulation of dismissal as to defendant's counterclaim,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' claims are dismissed for lack of subject-matter jurisdiction, and defendant's counterclaim with respect to Tax Year 2016 is dismissed, without prejudice, with each party to bear its own costs, including any attorney's fees and other expenses of this litigation with respect thereto.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on August 13, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

Respectfully submitted,

Dated: August 13, 2021

/s/ Tiffany Michelle Hunt
Tiffany Michelle Hunt
BARNES & HUNT, PLLC
4209 McKinney Avenue
Unit 415
Dallas, TX 75205
(352) 682-3948

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2) because:

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Respectfully submitted,

Dated: August 13, 2021

/s/ Tiffany Michelle Hunt
Tiffany Michelle Hunt
BARNES & HUNT, PLLC
4209 McKinney Avenue
Unit 415
Dallas, TX 75205
(352) 682-3948

Counsel for Appellants