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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Under the Tucker Act, the United States has waived sovereign immunity to allow taxpayers, such as Appellants George P. Brown and Ruth Hunt-Brown ("The Browns") to bring a cause of action seeking a refund of taxes that were erroneously or unlawfully assessed or collected. 28 U.S.C. § 1491; *see also United States v. Navajo Nation*, 556 U.S. 287, 289-90 (2009). In addition, the Supreme Court has formed the doctrine of waiver, which allows taxpayer relief in situations when the "Commissioner chooses to not stand on his own formal or detailed requirements" and investigates the merits of the taxpayer's claim anyway. *Angelus Milling Co. v. C.I.R.*, 325 U.S. 293, 297-98 (1945). The Browns filed a suit seeking relief from the denial of the foreign earned income exclusion. Appellee, the United States (the "Government") seeks to deny that relief and enjoy the windfall by arguing that the Court of Federal Claims lacks jurisdiction to hear the Browns' claim. The Court of Federal Claims had jurisdiction because the Browns met the requirements under the doctrine of waiver. Furthermore, I.R.C. § 7422(a) is not jurisdictional and cannot bar a claim. The Brown brought a valid, well-plead complaint that is actionable under the Tucker Act. 28 U.S.C. § 1491 and this Court should reverse the trial court's judgment.

ARGUMENT

I. Dismissal under Rule 12(b)(1) was improper because the trial court committed clear error in misapplying the doctrine of waiver in *Angelus Milling Co.* and concluding that the Brown did not "duly file" the return

A. The signature and declaration requirement are regulatory and not elevated to an explicit statutory requirements beyond the risk of waiver.

The signature and verification requirements are regulatory, and therefore, the *Angelus'* waiver doctrine is applicable to the Browns' case.

Nevertheless, the Government relies on I.R.C. §§ 6061 and 6065 to assert that these sections impose a default statutory rule that an individual taxpayer must personally sign and verify their income tax return. (Resp. Br. 20). Thus, resulting in the Government's faulty analysis that the *Angelus'* waiver doctrine is inapplicable to the Browns' case, and thereby eliminating the IRS' ability to waive such issue. (Resp. Br. 20).

The Government's reliance on I.R.C. §§ 6061 and 6065 to state that the IRS cannot waive signature issue on the Browns' amended returns because the issue is statutory as opposed to regulatory is without merit.

The language of both sections is quite clear. According to I.R.C. § 6061 "any return…shall be signed in *accordance with forms or regulations prescribed by the Secretary*."

I.R.C. § 6065 states "*[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 penalties of perjury."

The Government is stretching the fact that I.R.C. §§ 6061 and 6065 reference a signature and declaration on refund claims to conclude that this creates a default statutory rule relieving the signature issue from its regulatory nature. (Resp. Br. 21). However, Congress is leaving the details of the signature and declaration to the Treasury per regulations. Such delegation does not create a waiver-immunity of the signature and declaration on refund claims. Congress simply directs the Treasury to implement measures and details on how a taxpayer should handle the signature and declaration on refund claims. This delegation from Congress to the Secretary does not elevate I.R.C. §§ 6061 and 6065 to an explicitly non-waivable statutory requirement.

A basic reading of the statutes proves that Congress expressly delegated rulemaking authority to the Treasury to promulgate signature and declaration rules and regulations. "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,*

U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984); *see also EEOC v. ArabianAmerican Oil Co.*, 499 U.S. 244, 257 (1991)(no *Chevron* deference to agency guideline where congressional delegation did not include the power to "promulgate rules or regulations"). "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 Coal v. F.C.C.*, 816 F.2d 785, 788 (D.C. Cir. 1987). Even if it is found that Congress may have not expressly delegated rulemaking authority, "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." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

The Government also references I.R.C. §§ 6012 and 6511 to support its argument that any income tax refund claim triggers a statutory command. The Government concludes that a taxpayer must make their own return and must do so in writing.

Neither I.R.C. § 6012 nor I.R.C. § 6511 supports the Government's argument. I.R.C. § 6012 merely states when a taxpayer has a filing requirement. *See* § 6012 ("Returns with respect to income taxes under subtitle A shall be made by the following…Every individual having for the taxable year gross income which equals

or exceeds the exemption amount, except that a return shall not be required of an individual…"). In its Response Brief, the Government includes the following statement "and individual taxpayers must make their own returns. (*See* I.R.C. § 6012(a)(1)(A)." (Resp. Brief. 20). It is crucial to highlight that I.R.C. § 6012(a)(1)(A) does not contain the word *own*. In fact, the word *own* does not appear at all in the entire text of the referenced section. *See* I.R.C. 6012.

I.R.C. § 6511 prescribes the time period in which a taxpayer can request a claim or refund of the tax paid. *See* I.R.C. 6511 ("Claim for credit or refund of an overpayment of any tax … shall be filed… within 3 years from the time the tax was paid"). In sum, I.R.C. § 6012 states who has a filing requirement, and I.R.C. § 6511 states when such filing is proper; the sections do not support the finding that there is a purely statutory command for how the tax filing should be handled.

Both I.R.C. §§ 6061 and 6065 expressly delegate rulemaking authority by giving power to the Treasury to promulgate rules and regulations surrounding the signature and declaration needed on a refund claim. *See* I.R.C. § 6061 ("in accordance with forms or regulations prescribed by the Secretary"); *see also* I.R.C. § 6065 ("[e]xcept as otherwise provided by the Secretary"). Thus, Treas. Reg. § 301.6402-2 is given controlling weight and no such "default rule" in I.R.C. §§ 6061 and 6065 exists. *See Nat'l Latino Media*, 816 F.2d at 788; *Mead Corp.*, 533 U.S. at 229. This makes the signature and declaration rules in Treas. Reg. § 301.6402-2(b)

and (e) regulatory provisions. It then follows that these regulatory rules, although controlling, are the exact rules that can also be waived by the Commissioner if he does not choose to stand by his created rules. *Angelus Milling Co. v. C.I.R.*, 325 U.S.at 297.

Even if the signature requirement in I.R.C. §§ 6061 and 6065 does amount to be an explicit statutory requirement that cannot be waived, Treas. Reg. § 301.6402-2(b) and (e) provide the details on how a refund claim should be signed and declared. These details of how a refund claim should be signed and verified by the taxpayer are regulatory and Treasury can waive its regulatory rules regardless of the statutory requirement that a refund claim contain a signature and declaration.

The Government's "statutory" signature requirement and "default rule" argument further fail because it would be illogical for Congress to delegate the rule-making authority to the Treasury if creating such default rule was their intention. *See Chevron*, 467 U.S. at 843-44 (expressly delegated rules and regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.).

Furthermore, the Government cites three cases in support of its argument that the statutes not the regulation dictate *how* the taxpayer must sign the tax return. (Resp. Br. 21, *see Diamond v. United States*, 107 Fed. Cl. 702 (2012); *Olpin v. Commissioner*, 270 F.3d 1297 (10th Cir. 2001); *Mohamed v. Commissioner*, 106 T.C.M. 537 (2014).

In *Diamond v. United States*, the taxpayer submitted tax returns that lacked crucial information, such as their social security numbers, wages, and foreign income. *Diamond,* 107 Fed. Cl. at 706. While the signature was also at issue in that case, the court found that the taxpayer did not execute the return under penalty of perjury because taxpayers altered the jurat. *Id*. *See Watson v. Commissioner*, 93 T.C.M. (CCH) 1332 (2007), *aff'd*, 277 Fed. Appx. 450 (5th Cir.2008) (holding that alteration of the language of the jurat invalidates a return); *see also Williams v. Commissioner*, 114 T.C. 136, 140–41 (2000) (holding that either deleting text from the jurat or adding text to the jurat invalidates 1040 forms); *Sloan v. Commissioner*, 102 T.C. 137, 143 (1994) ("[A]lterations of portions of the jurat ... invalidate an otherwise complete and accurate return."). The Federal Appellate affirmed the ruling finding that taxpayer did not provide sufficient information concerning income and deductions to make a valid claim of refund. *Diamond v. United States*, 530 F. App'x 943, 944 (Fed. Cir. 2013) (per curiam).

In *Olpin v. Commissioner*, the court stated that per I.R.C. § 6061, a return must be signed but then cited to Treas. Reg. § 1.6013–1(a)(2) to determine how the tax return should be signed. *Olpin*, 270 F.3d at 1300. Here, the tax return lacked a signature entirely, and therefore did not adhere to the statutory requirement under I.R.C. § 6061. *Id*. at 1301.

In *Mohamed v. Commissioner,* the taxpayer did not sign his tax return in question personally. The Tax Court analyzed the issue of whether the tax return is valid under the Treas. Reg. § 1.6061-1(a), not whether the return is valid under a statutory provision *Mohamed,* 2013 WL 5988943, at *4.

The Government has not provided a single case that supports its argument that I.R.C. § 6061(a) imposes a statutory requirement that the taxpayer must sign the tax return personally.

As previously referenced, Treas. Reg. § 301.6402-2(b) provides that "[t]he statement of the grounds and facts must be verified by a written declaration that it is made under penalties of perjury." Treas. Reg. § 301.6402-2(e) provides that "[a] claim may be executed by an agent of the person assessed, but in such case a power of attorney must accompany the claim."

Browns' refund claims were both signed and verified. However, they were signed and verified by Browns' agent.

Treas. Reg. § 301.6402-2(e) provides that when a return is signed and verified by the taxpayer's agent, the return *must* be accompanied by a power of attorney authorizing such signature. Therefore, because both of Browns' amended returns were signed by Browns' agent. Thus, Treas. Reg. § 301.6402-2(e) is triggered as the regulatory provision at issue. Treas. Reg. § 301.6402-2(e) requires these returns be accompanied by a power of attorney authorizing such signature of Browns' agent on

behalf of the Browns to be in formal compliance with the controlling regulatory provision promulgated by the Treasury. However, they were not. This is precisely the portion of the signature requirement that can be waived by the Commissioner if he chooses not to stand on this requirement.

The Government is correct in asserting that these statutes do mandate refund claims shall be signed and verified. However, they also direct the Treasury to promulgate the rules and regulations surrounding such signature and verification, which gives Treas. Reg. § 301.6402-2 controlling weight and no "default rule" exists outside of the regulations

B. The Browns' "duly filed" their refund since the Commissioner waived the regulatory requirements of the Browns' formal signature requirement under Treas. Reg. § 301.6402-2(e)

The waiver doctrine under *Angelus* applies when: (1) there is clear evidence that the Commissioner understood the claim that was made, (2) it is unmistakable that the Commissioner dispended with the formal requirement and examined the claim, and (3) the Commissioner took action upon the claim. *Angelus Milling Co.*, 325 U.S. at 297-98. (Br. 20)

The Government in its Response Brief merely focused on whether the Commissioner dispended the formal requirements and examined the claim. (Resp. Br. 39). It is essential to clarify that while the Appellees included that prong as their third prong, Appellants in their Brief includes it as the second prong. This Reply

Brief will follow the order of prongs as indicated in the Appellants' Brief and the paragraph above. In a footnote, the Government asserts that they are not conceding to the other two prongs. Therefore, the Reply Brief restates the analysis of all three prongs under the *Angelus'* doctrine of waiver.

The first prong under *Angelus* focused on whether the Commissioner understood the claim even though there was a departure in form in the submission. *Angelus*, 325 U.S at 297 – 98. Below, the Government argued that the IRS did not investigate the merits and "merely proposed" to disallow the claim and that the plaintiffs "may have entered into a closing agreement. (Appx396). In contrast to what the Government asserted below, the IRS, in fact, fully understood the claim. The IRS agent stated in his response that IRS records indicate that taxpayer is an employee of Raytheon in Australia, that claim involves the foreign earned income exclusion, and a closing agreement. Further, the IRS agent then explains his finding on the effect of taxpayers' rights to claim the foreign earned income exclusion in light of the closing agreement and the agreement between the United States and Australia. (Appx98, Appx101, Appx347). The IRS agent, therefore, had a clear understanding of the claim.

The second prong, which is contested in the Appellee's Brief focuses on whether the Commissioner dispended the formal requirement and examined the claim. *Angelus Milling Co.*, 325 U.S. at 297-98. Appellants asserted that the IRS

acknowledge that Appellants filed an informal claim. In its Response Brief, the Government argues that the usage of the term informal claim "merely acknowledges that the IRS had received some refund claim." (Resp. Br. 41). Contrary to the Government's argument, the Internal Revenue Manual ("IRM") is quite clear when a claim is a formal claim and when it is an informal claim.

The IRM states that a "claim is a request for refund….Formal Claims are request prepared by or for the taxpayer…and are submitted on amended returns. Informal claims can include a letter or other document…requesting changes to obtain the correct and accurate reflection of his/her tax liability." *See* IRM § 21.5.3.2(1) (Oct. 1, 2020).[1]

Furthermore, IRM § 4.10.11.2.1.1(3) asserts that "a claim for refund may be an "informal claim" if it meets all claim requirements of IRM § 4.10.11.2.1, but otherwise fails to satisfy some formality. *See* IRM 4.10.11.2.1.1(3) (Sept. 4, 2020).

IRM § 4.10.11.2.1(1) states that IRM § 25.6.1.10.2.6 sets forth that a claim for refund must abide by Treas. Reg. § 301.6402-2(b)(1). *See* IRM § 25.6.1.10.2.6.1(1) (May 2017, 2004). In fact, the IRM states that "[a] claim which

[1] In Appellee's Response brief, the Government cites to the 2018 version of IRM § 21.5.3.2(1). Appellants are citing to the updated 2020 version. Per the IRS manual transmittal, which is dated September 17, 2020, the only material change in the updated version are added examples of refund and abatement claims and an additional example explaining that an informal claim includes oral statements made by the taxpayer.

does not comply with this requirement will not be considered for any purposes as a claim for refund or credit." *Id*.

Treas. Reg. § 301.6402-2(b)(1) states the claim "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." *See* Treas. Reg. § 301.6402-2(b)(1) (emphasis added).

In summary, per the IRM a formal claim is considered an informal claim if it fails to abide by the formal requirement under Treas. Reg. § 301.6402-2(b)(1).

Per the IRS' own IRM, an IRS agent, believing that the amended return submitted on the proper form, Form 1040X, abides by all required formalities, should not refer to an amended return as an "informal claim."

Therefore, the IRS agent using the term "informal claim" clearly establishes that the IRS agent was aware that the claim lacked formality; otherwise, calling it an informal claim would go against the agent's own manual. Thus, proving that the IRS dispends with the formal requirement and examined in the claim.

The third prong under *Angelus* applies when the Commissioner took action upon the claim. *Angelus Milling Co.*, 325 U.S. at 297-98. As Appellants' stated in their Brief, the IRS took action upon Appellants' claim by issuing a substantive proposed full disallowance. (Br. 21 - 22). While the in-depth argument is laid out in the Brief, it is important to note that a final determination is sufficient to meet this

prong. *Hall v. United States*, 148 Fed. Cl. 371, 378 (2020) (citing *Cencast Servs., L.P. v. United States*, 729 F.3d 1352, 1368 (Fed. Cir. 2013)).

Appellants are able to show that they have met all three prongs under Angelus, and therefore, are entitled to the waiver.

C. The *Angelus* waiver doctrine does not solely apply to the specificity requirement of Treas. Reg. §301.6402-2(b) and can be applied to the entire regulations

The Supreme Court has concluded that the Commissioner can waive its own regulation. *Angelus,* 325 U.S. at 297. *Angelus'* waiver doctrine applies to the signature issue under Treas. Reg. § 301.6402-2 because the signature issue is regulatory under the Treasury's own promulgated regulations. However, the Government argues that *Angelus'* waiver doctrine only applies to a portion of Treas. Reg. § 301.6402-2(b). (Resp. Br. 32). However, this argument is also without merit because *Angelus* speaks to the entirety of the regulations promulgated by the Treasury, which would include the signature of the taxpayer and declaration of the taxpayer. This is confirmed by *Angelus*:

> Petitioner's claim for recovering processing taxes paid by it was properly rejected by the Commissioner if it did not satisfy the conditions which Congress directly and through the rule-making power given to the Treasury laid down as a prerequisite for such refund…. We conclude that there is nothing in what Congress has explicitly commanded to bar the claim. The effective administration of these modern complicated revenue measures inescapably leads Congress to authorize detailed administrative regulations by the Commissioner of Internal Revenue. He may insist upon full compliance with his regulations.

Angelus, 325 U.S. at 296-97. *Angelus,* is simply stating that Congress' explicit delegation to the Treasury through the rulemaking authority for the Treasury to create rules and regulations in whole surrounding refund claims is given controlling weight. Treasury, then, can determine not to stand on any of its regulation that were delegated to him by Congress. *Id* at 297-98. This language is not in any way limited to only the "specificity requirements" on a refund claim as the Government suggests.

By trying to argue that *Angelus'* waiver exception is limited to only a portion of Treas. Reg. § 301.6402-2(b)(1), the Government interestingly cherry-picks a sentence of subsection (b) that single handedly fits their narrative as the only issues that the IRS can waive. Such argument should not stand as the paragraph in subsection (b) continues to read, "The statement of the grounds and facts must be verified by a written declaration that is made under penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund." Treas. Reg. § 301.6402-2(b)(1). Further, subsection (e), also delegated to the Treasury by Congress, builds on subsection (b)(1) as it carves out exceptions and alternatives. This highlights the understanding that Congress explicitly delegated this power to the Treasury to promulgate regulations providing for the rules and details of the signature and verification requirement and would indicate that the regulation in whole can be waived. *See* Treas. Reg. § 301.6402-2(b)(1).

The Government references a number of cases to show that the *Angelus Millings'* waiver doctrine only applies to the specificity requirement. Appellants are not contending that there are number of cases that analyze the waiver doctrine in regards to the specificity requirement. However, Appellants are contending these cited cases should limit the waiver of doctrine to specificity. In fact, the Supreme Court in *Angelus* merely stated that "[t]he basis of this claim of waiver is that the Commissioner through his agents dispensed with the formal requirements of a claim by investigating its merits. *Angelus,* 325 U.S. at 296.

The Government's Response Brief contains a quote from *Sicanoff Vegetable Oil Corp.* (Resp. Br. 33). The quote, as stated in the Response Brief indicates that the *Angelus* doctrine is only applicable to the specificity requirement. However, when reading the passage without the citations omitted, it becomes clear the court in *Sicanoff* only cited to *Angelus* in a historical context and mentioned the specificity requirement merely as a holding of another case. *See Sicanoff Ve*getable *Oil Corp*. *v. United States*, 181 F. Supp. 264 (Ct. Cl. 1960) ("In *United States Pipe & Foundry Co. v. United States*, 155 F. Supp. 231, 140 Ct. Cl. 132, this court held that there might be a waiver by the Commissioner of a lack of specificity in a claim for refund, if he considered the claim on its merits…. The Supreme Court of the United States in the case of *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296, 65 S. Ct. 1162, 89 L. Ed. 1619, recognized that the precedents are by no means clear on the subject of the power of the Commissioner to waive defects in claims for refund.")

Several cases, when discussing the rule of the *Angelus* waiver doctrine, state that the Commissioner can waive regulatory requirements. These cases might also focus on the specificity requirement in their analysis but only because that was the issue presented in those cases. "The United States Supreme Court, however, has explained that while the Treasury may not waive the congressionally mandated requirement that a formal claim be filed, the Treasury can waive its own formal requirements." *Goulding v. United States*, 929 F.2d 329, 332 (7th Cir. 1991) (citing *Angelus Milling Co. v. Comm'r of Internal Revenue*, 325 U.S. 293 (1945)). "[T]he Commissioner may waive the requirements of the Treasury regulations and examine a claim that departs from the proper form[.]" *Angle v. United States*, 996 F.2d 252, 255 (10th Cir. 1993) (citing *Tucker v. Alexander*, 275 U.S. 228, 231 (1927). "The informal claim doctrine, which allows the Commissioner to waive the requirements of the treasury regulations where there remains the opportunity for substantive review of the claim notwithstanding a departure from proper form in its submission, has long been held valid citing." *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 863 (4th Cir. 1990) (citing *United States v. Kales*, 314 U.S. 186, 62 S. Ct. 214, 86 L. Ed. 132 (1941)). "It is clear from decisions of the Supreme Court that formal requirements of Treasury Regulations as to claims for refund of taxes may be waived by the Commissioner through his agents by investigating the merits of the claim." *Dale Distrib. Co. v. Commissioner*, 269 F.2d 444, 446 (2d Cir. 1959). "The Supreme

Court has held that while the Treasury may not waive the congressionally mandated requirement that a claim be filed, the Treasury can waive its own formal requirements." *Kikalos v. United States*, 479 F.3d 522 (7th Cir. 2007). (citing *Angelus Milling Co. v. Comm'r of Internal Revenue,* 325 U.S. 293, 296 (1945).

These cases are stating the rule of waiver as applicable to regulations in general, not limiting to the application of the doctrine to the specificity requirement as the Government is arguing.

The holding in *Angelus* indicates that the waiver doctrine applies to all regulations. Despite the issue in *Angelus* being specifically related to insufficient information on a refund claim, *Angelus* is addressing Treasury regulations as a whole upon creating the doctrine of waiver:

> If the Commissioner of Internal Revenue chooses not to stand on his own formal or detailed requirement, it would be making an empty abstraction, and not a practical safeguard, or a regulation to allow the Commissioner to invoke technical objections after he has investigated merits of a claim and taken action upon it.

Angelus, 325 U.S. at 297. This is a very broad statement encompassing the issue of waiver on all of the Commissioner's regulations.

The detailed and formal requirement of submitting a proper refund claim would be for the Browns to submit a power of attorney with their refund claim authorizing the agent's signature on Browns' behalf. This did not occur and would be a technical objection after the investigation of the IRS on Browns' claims.

Treas. Reg. §301.6402-2(b) and (e) in whole make it a requirement that the taxpayer needs to personally sign his returns, and if they are signed by an agent, then a power of attorney must accompany the return authorizing such by the taxpayer. *See* Treas. Reg. § 301.6402-2(b) and (e). Therefore, the regulatory provision requiring an original taxpayer signature or a power of attorney being attached to the return if an agent signs is the portion that can be waived by the Commissioner. Because *Angelus* provides for waiver of all conditions that are delegated to the Treasury for further details by Congress, this would include the requirement of a power of attorney needing to be attached to the refund claim if the taxpayer's agent signed on his behalf. A claim for refund of processing taxes is not barred by explicit commands of Congress, *as result of claimant's failure to give information required by Treasury form and regulations*, but Commissioner of Internal Revenue could reject the claim for such failure. *Angelus,* 325 U.S.at 293; *see also* Revenue Act 1936, § 902 *et seq.*, 7 U.S.C. § 644 *et seq*. In order for the Browns to have complied with the requirements of Treas. Reg. § 301.6402-2, the Browns would have needed to attach a power of attorney to the refund claims since their agent signed on their behalf. The Browns did not follow the Treasury Regulations and as noted above, IRS waived that requirement. Thus, the doctrine of waiver does in fact apply this case since the Browns did not sign and verify their returns in compliance with Treas. Reg. § 301.6402-2(b) and (e).

II. The claim filing requirement under I.R.C. § 7422(a) is not jurisdictional and a jurisdictional question must be resolved prior to determining the merits of the waiver

Appellants maintain that any alleged failure to comply with the formal filing requirement cannot result in a dismissal since the claim filing requirement is not a jurisdictional requirement of a tax refund suit.

The Government erroneously relies on *California Ridge* to assert that the Browns cannot argue the jurisdictional question for the first time on appeal and forfeited such argument. (Resp. Br. 43). The Appellant in *California Ridge* attempted to make an economic substance argument on appeal for the first time; and while such argument might be forfeited (or waived) if not raised below; such holding does not apply to jurisdictional requirements. *Cal. Ridge Wind Energy LLC v. U.S.*, 959 F.3d 1345, 1351 (Fed. Cir. 2020); *Dolan v. U.S.*, 560 U.S. 605, 610 (2010). In fact, the Supreme Court has stated that a jurisdictional condition cannot be waived or forfeited. *Dolan*, 560 U.S. at 605.

Furthermore, the Government also erroneously concludes that the trial court could have dismissed suit even if the "duly filed" requirement under I.R.C. § 7422(a) is not jurisdictional. (Resp. Br. 43).

In reaching such conclusion, the Government attempts to assert that the characterization of I.R.C. § 7422(a) is immaterial since, according to the Government's position, the results would not change. (Resp. Brief 44). The

Government is attempting to create a hypothetical jurisdiction to reach the merit issue of waiver. It would be improper to assume, for purposes of discussing whether the waiver applied, that jurisdiction existed so that the merits issue could be reached. The Supreme Court prohibits lower courts from using such a hypothetical jurisdiction. When presented with the issue, the court must first decide whether the lower court had jurisdiction before deciding whether the waiver applied. The Supreme Court in *Steel Co v. Citizens for a Better Environment* stated:

> In addition to its attempt to convert the merits issue in this case into a jurisdictional one, Justice Stevens concurrence proceeds to argue the bolder point that jurisdiction need not be addressed first anyway. Even if the statutory question is not "fram[ed] ... in terms of 'jurisdiction,' " but is simply "characterize[d] ... as whether respondent's complaint states a 'cause of action,' " "it is also clear that we have the power to decide the statutory question first." This is essentially the position embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. The Ninth CI.R.C.uit has denominated this practices - which it characterizes as "assuming" jurisdiction for the purpose of deciding the merits—the "doctrine of hypothetical jurisdiction. We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.

Steel Co v. Citizens for a Better Environment, 523 U.S. 83, 93-94 (1998) (citations omitted). The Supreme Court clearly states that when presented with a jurisdictional question, a court must first determine the jurisdictional issue before reaching the merits. In fact, the Supreme Court declines to endorse the approach of

creating a hypothetical jurisdiction to reach other issues in a case. Therefore, the Government's assertion that the jurisdictional question under I.R.C. § 7422(a) is immaterial is in incorrect. Thus, this Court should not decide the issue of waiver before determining whether the lower court had jurisdiction.

A. It would be improper to rely on lower courts holdings of classifying I.R.C. § 7422(a) as jurisdictional in the absence of a stare decisis exception and the clear statement rule

The Government relied on lower courts' opinions to assert that I.R.C. § 7422(a) is jurisdictional. The Supreme Court in *Reed Elesevier* found that "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)).

A statutory condition is only jurisdictional if Congress makes a clear statement in the statute that the statue it is jurisdictional or if the Supreme Court consistently treated the rule as jurisdictional. *United States 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).

The Government did not address in its response the "clear statement rule" and only argued that I.R.C. § 7422(a) is jurisdictional under *Dalm* and various lower courts' opinions.

While we are not contesting that the Supreme Court in *Dalm* interpreted I.R.C. § 7422(a) as jurisdictional, we do not agree that such ruling was affirmed in *United States v. Clintwood Elkhorn Mining Company*, 553 U.S. 1, 4-5 (2008), *United States v. Dalm*, 494 U.S. 596, 609-10 (1990)

The Supreme Court in Clintwood reaffirmed what *Dalm* stated regarding the requirement of filing a timely refund claim to maintain a refund suit. *Clintwood Elkhorn Mining Company*, 553 U.S. at 4-5. However, the opinion does not cite the assertion in *Dalm* that I.R.C. § 7422 is jurisdictional. In fact, the terms 'jurisdiction" or "jurisdictional" do not appear once in the entire opinion. *United States v. Clintwood Elkhorn Mining Company*, 553 U.S. 1 (2008).

The 7th Circuit in *Gillespies* agrees that *Clintwood* does not state that I.R.C. § 7422(a) is jurisdictional. The court stated that "[t] he Gillespies do not respond to the government's renewed argument that [I.R.C.] § 7422(a) is jurisdictional, though we note that the Supreme Court's most recent discussion of [I.R.C.] § 7422(a) does not describe it in this manner" *Gillespies v. United States*, 670 Fed. App'x 393, 395 (7th Cir. 2016)(citing *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4–5, 1 (2008)).

The court in *Gillespies* then references various Supreme Court holdings that also classify prerequisites that are similar to I.R.C. § 7422(a) as claim processing rules and not jurisdictional requirements. *Id*. In *Kwai Fun Wong,* the Supreme Court

held that an administrative exhaustion requirement of Federal Tort Claims Act is not jurisdictional. *Id.* (citing *Kwai Fun Wong*, 575 U.S. 402, 402 (2015)). In *Reed Elsevier, Inc.,* the Supreme Court held that the Copyright Act's registration requirement is not jurisdictional. *Id*. (citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010)). In *Arbaugh*, the Supreme Court held that a statutory minimum of 50 workers for employer to be subject to Title VII of the Civil Rights Act of 1964 is also not jurisdictional. *Id*. (citing A*rbaugh v. Y&H Corp.*, 546 U.S. 500, 504, (2006)). The court in *Gillespies* then concludes that the line of cases may suggest that I.R.C. § 7422(a) is also not jurisdictional. Id.

The court in *Walby* has also stated "that the [Supreme] Court's most recent discussion of I.R.C. § 7422(a) does not describe it as a jurisdictional. *See Clintwood Elkhorn Mining Co.*, 553 U.S. 1 at 4-5, 11-12." (Br. 26; *Walby v. United States*, 957 F.3d 1295, 1299-1301(Fed. Cir. 2020)).

The Government's generally cites to *John R. Sand* and state that the Supreme Court in that case included *Dalm* "in a list of cases involving statutes that serve "broader system related" goals and that are therefore jurisdictional." (Resp. Br. 47). However, in *John R. Sand*, the Supreme is not calling *Dalm* jurisdictional. The Supreme Court states that "[t]he Court has often read the time limits of these statutes as more absolute, say, as requiring a court to decide a timeliness question despite a waiver…As convenient shorthand, the Court has sometimes referred to the time

limits in such statutes as "jurisdictional". *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008). Arguably, the Supreme Court is saying that there cannot be equitable tolling of a "shorthand" jurisdictional statute. Thus, the "shorthand" described by the Supreme Court does not properly belong in what it today considers truly "jurisdictional".

Despite the holding in *Dalm*, and even if this court finds that *John R. Sand* holds I.R.C. § 7422(a) as jurisdictional, the stare decisis exception to the rule that mandatory claim processing rules are not jurisdictional is not met.

Only when a long line of Supreme Court opinions determines that a requirement is jurisdictional is the stare decisis exception met. *Fort Bend County v. Texas*, 139 S. Ct. 1843, 1849 (2019). A stare decisis exception only applies when the Supreme Court for over 100 years in multiple opinions treated a rule as jurisdictional. Therefore, one, arguably two, inconsistent holdings does not give rise to the stare decisis exception.

To assert that I.R.C. § 7422(a) is jurisdictional; the Government cites an array of cases in its support. (Resp. Brief 47). Not a single case cited is a Supreme Court case. Justice Ginsburg in *Fort Bend* highlighted that only a long line of Supreme Court decisions are entitled to the stare decisis exception. *Id.*

Since neither the language of the statute nor the Supreme Court for over 100 years in multiple opinion held that I.R.C. § 7422(a) is jurisdictional, such claim

processing requirement is non jurisdictional and should have not resulted in dismissal.

B. A finding that I.R.C. § 7422(a) is jurisdictional would impose additional burden on the adversarial system

In *Henderson ex. Rel. Henderson v. Shinseki*, a veteran failed to appeal is denial of federal benefits by the Board of Veterans' Appeals within 120 days to the United States Court of Appeal for Veterans Claims. The Supreme Court held that the 120 day period under 38 U.S.C. § 7266(a) is not jurisdictional. *Henderson ex. Rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011).

In its opinion, the Supreme Court stated that determining whether a procedural rule is jurisdictional is a question of considerable practical importance for judges and litigants. *Henderson*¸ 562 U.S. at 434. Under the current adversarial system, a court is generally limited to address the claims and argument brought by the litigants. *Id. (*citing *Sanchez–Llamas v. Oregon*, 548 U.S. 331, 356 (2006)).

However, once a rule is determined to be "jurisdictional" the Court must raise and decide jurisdictional question in order to adhere the federal courts' obligation not to exceed scope of their own jurisdiction even if either party fail to raise such argument. *Id.*at 34. This means that a court must inquire on its own in every refund suit for evidence that the claim was properly signed and verified, even if the IRS never even considered whether there was a problem on this score.

Furthermore, labeling a statute as jurisdictional could potentially result in waste of judicial resources since objections to jurisdiction can be brought even after trial and even if the parties acknowledged the subject matter jurisdiction. *Id*. at 34-35.

The Supreme Court explained that due to the drastic consequences that come with labeling a statute jurisdictional, the Supreme Court urges that a rule should not be considered jurisdictional "unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Id.*at 35.

The Supreme Court stated "[a] mong the types of rules that should not be described as jurisdictional are what we have called "claim-processing rules." These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 35. (citation omitted).

In *Henderson*, The Supreme Court determined that if Congress wanted the 120 day time limit to be jurisdictional, it could have includes such phrasing in the language of the statute and absent such clear language, the Supreme Court will not impose jurisdictional attribute to the applicable statute. *Id.* at 438.

The Supreme Court reiterated the burden placed on the adversarial system if a court holds a statute to be jurisdictional in *Sibelius v. Auburn Regional Med. Center. Sibelius v. Auburn Regional Med. Center*, 568 U.S. 145, 153 (2013). The

Supreme Court stated again that since objection to jurisdiction can be raised at any time, it could create waste of adjudicatory resources. *Id*. In order to bring "discipline to the use of the term jurisdiction", the Supreme Court adopted a "readily administrable bright line rule" to determine whether a rule is jurisdictional. *Id*.

The rule stated by the Supreme Court determines whether Congress has "clearly state[d]" that the rule is jurisdictional; absent such a clear statement, per the Supreme Court, courts should treat the restriction as nonjurisdictional in character. *Id.*

Here, Congress did not include clear language mandating that I.R.C. § 7422(a) is jurisdictional. The Supreme Court has held that absence such language, finding that a statue is jurisdictional places undue burden on our adversarial system. Therefore, I.R.C. § 7422(a) should not be considered jurisdictional by this Court. Thus, Appellant's failure to comply with the formal claim filing requirements cannot result in dismissal.

CONCLUSION

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 that the IRS waived their formal requirements, and (3) find that I.R.C. § 7422(a) is non jurisdictional.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on August 6, 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 6, 2021

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CERTIFICATE OF COMPLIANCE

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