No. 2022-1564

In The

United States Court Of Appeals For The Federal Circuit

ALAN C. DIXON

Plaintiff - Appellant,

v.

UNITED STATES,

Defendant - Appellee.

APPEAL FORM THE UNITED STATES COURT OF FEDERAL CLAIMS

ORIGINATING CASE NO.: 1:20-CV-01258-DAT

HONORABLE DAVD. A TAPP

REPLY BRIEF OF APPELLANT

TIFFANY MICHELLE HUNT

Hunt Tax Law, PLLC
PO Box 4099
Dallas, TX 75208
Tel. (305) 619 - 9157

Counsel for Appellant

CERTIFICATE OF INTEREST

Pursuant to Fed. Cir. R. 47.4(a) and Fed. R. App. P. 26, counsel for Petitioner-Appellant Alan C. Dixon certifies the following:

1. The full name of every party represented by me is Alan C. Dixon.

2. There are no other real parties in interest represented by me.

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the parties I represent are as follows:

None.

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me in the trial court or that are expected to appear in this court are:

Magan Law, PLLC: Kathryn Hernandez

5. 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:

None.

6. 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): Not Applicable.

Dated: October 12, 2022

/s/ Tiffany M. Hunt
Tiffany M. Hunt

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

To bring a civil action for refund of income tax, a taxpayer must first duly file a refund "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." I.R.C. § 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax… until a claim for refund or credit has been duly filed with the Secretary"). *See* 26 U.S.C. § 7422(a).

A tax return not filed within the statutory limitation of I.R.C. § 6511 is a not a duly filed return. *Root v. United States*, 294 F.2d 484, 486 (9th Cir. 1961). Similarly, a tax return that is not verified and signed by the taxpayer fails to meet the statutory verification requirements and is, therefore, not duly filed. *Brown v. United States*, 22 F.4th 1008, 1013 (Fed. Cir. 2022).

When determining whether a claim for refund abides by regulations, the courts, like this Court in *Lua* and this Court's predecessor in *Cooks*, have looked to Treas. Reg. § 301.6402–2(b)(1). *See Lua v. United States*, 843 F.3d 950, 957 (Fed. Cir. 2016); *Cook v. United States*, 599 F.2d 400, 406 (Ct. Cl. 1979). That regulation requires "the claim must set forth in detail each ground upon which a credit or a refund

is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Reg. § 301.6402–2(b)(1).

This Court's predecessor court explained that the substantial variance rule is based on adherence of the requirements under I.R.C. § 7422(a) to maintain suit. *See Cook*, 599 F.2d at 406; *see also Computervision Corp. v. United States*, 445 F.3d 1355, 1372 (Fed. Cir. 2006) (citing *Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) ("the Federal Circuit is bound by decisions of the Court of Claims "announced before the close of business on September 30, 1982.")).

When such adherence is lacking, it bars the taxpayer's claim in federal court. *Cook*, 599 F.2d at 406. Prior to this Court's recent decision in *Brown*, compliance with I.R.C. § 7422(a) was a jurisdictional requirement. *Brown*, 22 F.4th at 1012.

To mitigate the harsh effects of the substantial variance rule, the Courts created doctrines to provide judicial equitable relief. As this Court explained in *Computervision*, the exception to the rigid substantial variance rule are "identified as separate doctrines." *Computervision Corp.*, 445 F.3d at 1364.

The four doctrines are known as the informal claim doctrine, the *Angelus Milling* waiver doctrine, the general claim doctrine, and the germaneness doctrine. *Id.* at 1364-70.

Which doctrine provides the adequate judicial remedy depends on whether the taxpayer filed a formal or informal claim. If it was an informal claim, the Court must look to whether statutory or regulatory compliance is lacking and whether the judicial doctrine independently renders claim formal or whether taxpayer action is required. *See generally*, *Id.*

As the Federal Circuit correctly pointed out in *Computervision*, other circuits have failed to uniformly apply the judicial doctrines. To ensure that such inconsistency does not creep its way into the Federal Circuit, the Federal Circuit explained all four judicial doctrines in detail in *Computervision*. *Id*. at 1363-64.

This case presents another example where a lower court convolutes the informal claim doctrine and the *Angelus Milling* waiver doctrine. (Appx. 6-7.)

The United States clings to the lower court's misconstructions of the doctrines and is simultaneously attempting to acknowledge the

difference between the informal clam doctrine and the *Angelus Milling* waiver doctrine while trying to convince this Court that the application of the doctrines are nearly identical. (U.S. Br. 21-23.) This is a mistake of law.

ARGUMENT

I. The informal claim doctrine is not a waiver doctrine; thus, it is irrelevant whether the noncompliance is statutory or regulatory.

The United States raised the hypothetical question that if the informal claim doctrine is not viewed as a dispensation of statutory requirements by Treasury officials, what else can it be? (U.S. Br. 28.)

As Dixon and the *Amicus* explained in detail in their respective briefs, the IRS is not waiving any requirements, whether statutory or regulatory, under the informal claim doctrine.

Arguably, the confusion of whether the informal claim doctrine is a waiver doctrine is rooted in the fact that both judicial doctrines begin with an informal claim.

An informal claim puts the IRS on notice that a taxpayer is seeking a refund for specific tax years, contains sufficient information for the IRS

to examine the claim, and contains a written component. *See W. Co. Of N. Am. v. United States*, 323 F.3d 1024, 1034 (Fed. Cir. 2003).

As this Court most recently clarified in *Brown*, an informal claim can only seek relief under the *Angelus Milling* waiver doctrine if the informal claim lacks regulatory compliance. Under the *Angelus Milling* waiver doctrine, the IRS, by waiving the requirement of taxpayer's compliance with Treasury regulation, transform an otherwise unenforceable, informal claim into a formal claim. *Brown*, 22 F.4th at 1013. To effectuate a waiver, the IRS needs to be aware of the noncompliance yet still take action upon the claim for refund despite its lack of compliance. *Id.* (*citing Angelus Milling Co.* v. C.I.R, 325 U.S. 293, 297–98 (1945)). Because the IRS cannot waive statutory requirements, an informal claim for refund lacking statutory adherence cannot be rendered valid under the *Angelus Milling* waiver doctrine. *Id.*

In contrast to the *Angelus Milling* waiver doctrine, the informal claim doctrine does not require an IRS waiver. Instead, the informal claim doctrine provides relief of the rigid *time* filing requirement of I.R.C. § 6511 as long as the taxpayer puts the IRS on notice prior to the expiration of the limitation period. Because no waiver is required, this

doctrine provides equitable relief if the informal claim lacks statutory or regulatory adherence. *Computervision Corp.*, 445 F.3d at 1364 ("First, formal compliance with *the statute and regulations* is excused when the informal claim doctrine is applicable. Under the informal claim doctrine, a timely claim with purely formal defects is permissible if it fairly apprises the IRS of the basis for the claim within the limitations period.") (Emphasis added).

Despite the United States' attempt to convince this Court of the limited application of the informal claim doctrine, courts have favored a broad application.

In *Kales*, the exemplifying case of this doctrine, the Supreme Court found that a *mere* letter stating a possibility of a taxpayer filing a claim for refund upon the happening of the contingency can form the foundation of the informal claim doctrine. *United States v. Kales*, 314 U.S. 186, 195-96 (1941).

This Court found that a taxpayer-representative's telephonic requests for a penalty explanation and meeting with the IRS served as the informal claim. The taxpayer, either on his own or through his representative, never made a written request. *W. Co. Of N. Am.*, 323 F.3d

at 1034-35. However, this Court found that the IRS's own documentation in writing regarding the tax representative's first telephonic request satisfies the written component requirement of the informal claim doctrine. *Id.*

The Eastern District of California recently disagreed with the argument that an informal claim needs to be signed under penalty of perjury. As such, that court found that a fax sent by taxpayer's counsel to the IRS Taxpayer Advocate Service fulfills the written component requirement. *Johnson v. United States*, 562 F. Supp. 3d 1026, 1029 (E.D. Cal. 2021), *amended on reconsideration*, 2022 WL 1524602 (E.D. Cal. May 13, 2022).

The Seventh Circuit held that a petition to the United States Tax Court can serve as an informal claim. *Greene-Thapedi v. United States*, 549 F.3d 530, 532 (7th Cir. 2008).

The United States clearly errs in its description of the application of the informal claim doctrine. The United States is primarily arguing that because the IRS cannot accept a statutorily deficient tax return, a subsequent, procedurally correct return cannot cure the initially filed informal claim doctrine. (U.S. Br. 22.) An argument of such limited

application of the informal claim doctrine cannot be reconciled with the approach and application of multiple district and appellate courts, including this circuit.

In fact, the United States' own argument cannot be reconciled with itself. The United States attempts to distinguish Dixon's informal claims with the informal claim at issue in *Commercial National Bank of Peoria* by stating that, while the case did not discuss the signature requirement, it was clear that the claim was made on behalf of the taxpayer. (U.S. Br. 26.) It appears that the United States is indirectly carving out an exception to their own rigid signature requirement by acknowledging that taxpayer's signature is not paramount to the informal claim doctrine.

To reiterate, the Seventh Circuit explicitly addressed the signature requirement. The Seventh Circuit outright rejected the notion that a written component sent by taxpayers' counsel *during the negotiation of pending litigation* could not serve as valid informal claim. *United States v. Com. Nat. Bank of Peoria*, 874 F.2d 1165, 1172 (7th Cir. 1989) (Emphasis added). To be clear, the Seventh Circuit stated:

> "We agree that a refund "claim" must be submitted by the taxpayer who is entitled to the refund. However, we are not

> convinced that the "written component," as distinguished from the "claim" as a whole, must be specifically designated as correspondence from a certain entity." *Id.*

And ultimately found that "in any event, we believe the June 16 letter itself satisfies any requirement that the taxpayers themselves were required to file a written document of some sort to fulfill the notice requirement." *Id.*

Dixon and the *Amicus* included cases in their respective briefs that involved informal claims signed by the taxpayers, which the United States mistakenly believes support its argument. However, the wide range of cases included in both briefs support the sweeping application of the informal claim doctrine instead of limiting it. Whether the signature requirement is statutory or regulatory has no bearing on the application of the informal claim doctrine. The case law surrounding the informal claim doctrine is broad. At times, courts considered official IRS forms containing the taxpayer's signatures as an informal claim, a check containing the taxpayer's signature, or a *pro se* petition. *See Kaffenberger v. United States*, 314 F.3d 944, 955 (8th Cir. 2003); *Night Hawk Leasing Co. v. United States*, 18 F. Supp. 938, 941 (Ct. Cl. 1937); *Greene-Thapedi*, 549 F.3d at 532.

At other times, the courts applied the informal claim doctrine when the informal claim did not contain the taxpayer's signature, such as when this Court found that an internal IRS note can serve as the written component of the informal claim. *W. Co. Of N. Am.*, 323 F.3d at 1034. The Seventh Circuit found that a taxpayer's counsel letter can serve as the informal claim. *Com. Nat. Bank of Peoria*, 874 F.2d at 1172.

In *Kaffenberger*, the Eight Circuit considered the taxpayer's signature under the penalties of perjury line as a factor in favor of the application of the informal claim doctrine. However, it was not the sole determinative factor. The Eight Circuit, throughout the case, highlighted that "[t]he sufficiency of an informal claim depends on the individual facts of each case, "with a view towards determining whether under those facts the Commissioner knew, or should have known, that a claim was being made." *Kaffenberger*, 314 F.3d at 955.

The Fifth Circuit held a taxpayer's letter was not an informal claim in part due to the taxpayer's lack of verification under penalties of perjury. In support of the finding that the letters could not constitute an informal claim, the Fifth Circuit cited to the 1938 Fifth Circuit case *Livermore v. Miller*, 94 F.2d 111 (5th Cir. 1938), which predates the

Supreme Court decision in *Kales*. *Tobin v. Tomlinson*, 310 F.2d 648, 652 (5th Cir. 1962). The *Livermore* case was in fact abrogated by *Kales,* which the dissenting Judge must have realized as he cites *Kales* in his assertion that letters *can* serve as informal claims. *Id*. at 653 (5th Cir. 1962) (Jones, *dissenting*).

The United States' assertion that an out-of-time correction of statutory noncompliance is not supported by case law is unfounded. (U.S. Br. 24). In *Kales*, the entire analysis of the case was regarding an amended claim for refund submitted outside of the statute of limitations. This was also recognized in *Computervision* when discussing *Kales*. *Computervision Corp.*, 445 F.3d at 1364. ("The informal claim doctrine is best described in the Supreme Court's decision in *Kales* [.] There within the limitations period the taxpayer submitted an informal letter claiming a refund of tax. The letter did not comply with the IRS's regulations because it was not filed on the correct form. The taxpayer later filed an untimely amendment that complied with the regulations.")

To be unequivocally clear, correcting statutory or regulatory noncompliance *within* the limitation period does not require a judicial doctrine. Any taxpayer can submit a superseding return, which is either

an amended or corrected return filed on or before the due date for that such return. IRM 21.6.7.4.10 (1) (03-18-2022).

The application of the informal claim doctrine as outlined in the United States' brief would essentially abrogate the informal claim doctrine. The informal claim doctrine is separate from the *Angelus Milling* waiver doctrine. A finding that the informal claim under the informal claim doctrine must adhere to statutory requirements goes against established case law and would reduce the distinction of the two separate doctrines to names only.

II. The informal claim doctrine does not impose a requirement that the IRS is unmistakably aware of the noncompliance.

The United States claims that the authorities that really matters here are *Memphis Cotton*, *Angelus Milling*, and *Brown*. (U.S. Br. 28.) Ignoring the obvious flaw of excluding the hallmark case of *Kales*, the United States continues on their incomplete premise of authorities when claiming that Dixon's amended claim for refunds cannot constitute informal claims.

The United States continues to conflate and confuse the requirements of the informal claim doctrine with the *Angelus Milling*

waiver doctrine. The *Angelus Milling* waiver doctrine requires that the IRS unmistakably dispensed with the formal requirement and examined the claim. *Angelus Milling Co.*, 325 U.S. at 298. Such heightened requirement is unique to the *Angelus Milling* waiver doctrine. Correspondingly, in *Brown*, this Court focused on the IRS's lack of knowledge that the Browns' tax preparer signed the amended claim for refund when deciding *Brown* under the *Angelus Milling* waiver doctrine. *Brown*, 22 F.4th at 1013.

In contrast, the informal claim doctrine applies distinctly and provides more leniency.

Often times, the IRS is not even aware that the first submitted notice or claim for refund is the foundation of the informal claim doctrine until the subsequent filing. As such, the court can impute the application of the informal claim doctrine after looking at all the facts and circumstances to determine whether the IRS was put on notice that a refund will be claimed and for which years. *Arch Eng'g Co. v. United States*, 783 F.2d 190, 192 (Fed. Cir. 1986) (citing *Am. Radiator & Standard Sanitary Corp. v. United States*, 318 F.2d 915, 920 (Ct. Cl. 1963)). While courts agree that a written component is required, the

guidelines of such requirement are vast. A narrow application that the informal claim doctrine does not apply when IRS officials are unaware of the noncompliance cannot be reconciled with established case law.

In *Kales*, the Supreme Court unambiguously held that a notice fairly advising the IRS of the nature of the claim will be treated as timely filed if noncompliance is later cured. Because the Supreme Court also stated that formal compliance is excused under this doctrine, the Supreme Court also focused on whether the context (or nature) of the claim mislead the IRS. Immediately after making such statement, the Supreme Court addressed the context of the informal claim. *Kales*, 314 U.S. at 194.

By asserting that the IRS needs to be aware of any noncompliance, the Government continues to mistakenly impose the requirements of the *Angelus Milling* waiver doctrine.

III. Any imposed adherence of an informal claim to Treas. Reg. § 301.6402-2(b)(1) is not supported by case law.

In *Computervision*, this Court first addressed what constitutes a valid claim for refund by highlighting that the requirements under Treas. Reg. § 301.6402-2(b)(1) have to be met. That Treasury regulation states that a valid refund claim is one that has "*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." *Computervision Corp.*, 445 F.3d at 1363. (Emphasis in Original.)

The specificity requirement has been strictly upheld by courts for formal claims. For example, a Form 1040X including a statement that the taxpayer is entitled to a deduction from an investment would not meet the requirement of the regulation. *Thomas v. United States*, 166 F.3d 825, 830 (6th Cir. 1999), *compare with*, *In re Ryan*, 64 F.3d 1516, 1521 (11th Cir. 1995) (finding that a refund claim that reports an overpayment, instructions to apply overpayment to other tax years, and specifying facts regarding the causation of the overpayment and the exact amount meets the requirement of this regulation.)

Courts have been reluctant to impose the same strict requirement on informal claims. A valid informal claim does not need set forth in detailed each ground for which a refund is sought. It merely needs to include enough information to alert the IRS that the taxpayer seeks a refund and indicating some grounds upon which a taxpayer claim is based. *See generally*, *PALA, Inc. Emps. Profit Sharing Plan and Trust Agreement v United States*, 234 F.3d 873, 877 (5th Cir. 2000); *Newport*

Indus. v. United States, 60 F. Supp. 229, 232 (Ct. Cl. 1945) ("a document relied upon to constitute an informal claim for refund must at least contain a statement that is sufficient to be regarded as an assertion by the taxpayer that he believes the tax has been overpaid.") The written component does not need to be the exclusive source of information. The written component "should not be given a crabbed or literal reading, ignoring all the surrounding circumstances which give it body and content. The focus is on the claim as a whole, not merely the written component." *Estate of Hale v. United States*, 876 F.2d 1258, 1262 (6th Cir. 1989).

An informal claim does not need to contain an express and specific detailed statement as required for a formal claim. Consequently, it is a logical fallacy to argue that, because the informal claim needs to abide by the specificity requirement, strict adherence to the verification requirement is unsurpassable. By its very nature, an informal claim is one that does not abide statutes or regulations.

IV. The jurisdictional limitations of the germaneness doctrine are not applicable to the informal claim doctrine.

As a last-ditch effort, the United States is attacking the jurisdictional ability of the IRS to accept Dixon's formal claim curing the informal claim. (U.S. Br. 34-38.)

The United States is drawing on a comparison of jurisdictional limits imposed on the germaneness doctrine and asserts that the same limitations should apply to the informal claim doctrine.

A short explanation of the germaneness doctrine is necessary to fully comprehend the distinctions. *Computervision Corp.*, 445 F.3d at 1370.

The germaneness doctrine comes into play when a taxpayer filed a statutory-compliant claim for refund that also adheres to the specificity requirement under the Treasury Regulations. This doctrine permits a taxpayer to file an amendment outside of the statute of limitation raising a new legal theory that is dependent upon the fact that the IRS is examining or should be examining. This doctrine is bound by strict time limits, it can only be asserted if the amendment was filed while the IRS was still considering the claims. Once the IRS allows, disallow, or taxpayer files a court petition, this doctrine is inapplicable as it would

extend the statute of limitations indefinitely. *Id*. If limits would not be imposed under this doctrine, a taxpayer could amend any return at any time as long as the amendment is contingent on the facts in the original filed return.

The informal claim doctrine itself imposes a limit that prevents indefinite statutes of limitations. The informal claim doctrine only tolls the statute of limitation until the formal claim is filed. The possibility of extending the statute of limitation is not a threat under the informal claim doctrine.

Imposing the limits of the germaneness doctrine on the informal claim doctrine is irreconcilable under *Kales*. In *Kales*, the taxpayer filed a protest letter, brought suit, collected the judgment, and then filed a subsequent claim for refund relating back to the initial letter. *Kales*, 314 U.S. 186 (1941). Furthermore it cannot be reconciled with court case decisions that found, for example, a petition can serve as the informal claim. *Greene-Thapedi*, 549 F.3d at 532.

CONCLUSION

The Government's misuse of the word "waiver" should not be given any regard. It is nothing more than an attempt to implant the same confusion in the Federal Circuit about the distinct application of the

different doctrines as exists in other circuits. Under no circumstances, is an IRS waiver any required under the informal claim doctrine.

As such, the informal claim doctrine applies to Dixon. He submitted informal claims that provided sufficient information regarding the tax requested and the tax year. He then later perfected his informal claims. For those reasons, Dixon respectfully requests this Court to (1) reverse the Claims Court decision dismissing the net investment income claim for lack of subject matter jurisdiction, (2) reverse the Claims Court alternative decision dismissing the net investment income claim for failure to state a claim for which relief can be granted, (3) hold that an informal claim lacking the signature and verification requirement can serve as the foundation of the informal claim doctrine, and (4) hold that Dixon met all the requirements to invoke the informal claim doctrine.

Dated: October 12, 2022

/s/ Tiffany Michelle Hunt

Tiffany Michelle Hunt
Hunt Tax Law, PLLC
PO Box 4099
Dallas, TX 75208
Telephone: (305) 619 - 9157

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(1) because this brief contains 3,648 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally space typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: October 12, 2022

/s/ Tiffany Michelle Hunt

Tiffany Michelle Hunt
Hunt Tax Law, PLLC
PO Box 4099
Dallas, TX 75208
Telephone: (305) 619 - 9157

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on October 12, 2022, 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.

Dated: October 12, 2022

/s/ Tiffany Michelle Hunt

Tiffany Michelle Hunt
Hunt Tax Law, PLLC
PO Box 4099
Dallas, TX 75208
Telephone: (305) 619 - 9157
Counsel for Appellant