UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KELLER TANK SERVICES II, INC., Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Appellee.	)	No. 16-9001

APPELLEE'S MOTION TO AMEND OPINION TO CLARIFY AUTHORITY OF IRS OFFICE OF APPEALS OVER RESCISSION OF I.R.C. § 6707A PENALTIES

On February 21, 2017, this Court issued a published opinion affirming the Tax Court's final order granting summary judgment to the Commissioner of Internal Revenue ("Commissioner"), appellee herein. The Commissioner fully agrees with the Court's decision, but submits this motion solely to request that the Court delete the underlined language in the following two sentences of the opinion:[1]

> Page 4: "The IRS Appeals Office hears a taxpayer's request to rescind [an I.R.C. § 6707A penalty]."

[1] In the alternative, this Court may consider this motion to be a petition for panel rehearing pursuant to Fed. R. App. P. 40. *See, e.g.*, *Taylor v. Norris*, 401 F.3d 883, 884 (8th Cir. 2005) (considering and granting petition for rehearing filed by prevailing party who sought correction of a technical point made in the initial opinion).

> Page 10: "The Appeals Officer may decide to abate the penalty, rescind a penalty for a reportable transaction that is not a listed transaction under § 6707A(d), or approve collection of the penalty. [Internal Revenue Manual] at 4.32.4.8, 4.32.4.9."

(Op. 4, 10 (emphasis and alterations added).)[2]

As explained below, the Commissioner submits that these statements are incorrect, because I.R.C. § 6707A gives the Commissioner authority to rescind Section 6707A penalties, and the Commissioner has *not* delegated that authority to the IRS Office of Appeals. We are concerned that this language could confuse taxpayers into failing to use the proper mechanism for requesting rescission of a Section 6707A penalty. Because the question whether the IRS Appeals Office has the authority to rescind a Section 6707A penalty was never briefed by the parties, and because it is not essential to the Court's holdings in this appeal, deleting this language from the opinion would in no way undermine the soundness of the opinion.

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[2] "Op." refers to the opinion. "Opp. Br." refers to the Commissioner's appellee brief.

BACKGROUND

Appellant Keller Tank Services II, Inc., ("Keller") participated in an employee benefit plan and took deductions for its contributions to the plan. (Op. 2, 14.) The IRS notified Keller of a tax penalty under I.R.C. § 6707A related to its participation in the plan. (Op. 2, 14-15.)[3] Keller challenged the proposed penalty in a pre-assessment protest before the IRS Office of Appeals. (Op. 2, 15-16.) After the Appeals Office rejected Keller's protest, Keller sought to challenge its liability for the penalty in a collection-due-process ("CDP") hearing. (Op. 2, 16.) The Appeals Office refused to consider Keller's liability challenges, because Keller had previously received the opportunity to challenge the penalty during its pre-assessment protest. (Op. 2, 16-17.) Keller appealed the CDP determination to the Tax Court, which granted summary judgment to the Commissioner on the ground that the administrative protest hearing constituted a prior opportunity to dispute liability, and that, therefore, I.R.C. § 6330(c)(2)(B) barred

[3] The IRS also determined that Keller was liable for income tax deficiencies and related penalties associated with its participation in the plan. (Op. 2, 14-15.) This petition for panel rehearing solely addresses the Section 6707A penalty.

consideration of Keller's liability challenges. (Op. 2, 17-18.) Keller appealed that decision to this Court. (Op. 2, 18.)

On appeal, the parties' briefs focused on whether Keller's liability challenges were barred by either I.R.C. § 6330(c)(2)(B), or a second provision, I.R.C. § 6330(c)(4), which precludes consideration in a CDP proceeding of any issue previously raised and decided in an administrative or judicial proceeding. (*See, e.g.*, Opp. Br. 34-64.) As the panel noted, although Keller's Tax Court petition asserted a constitutional challenge to I.R.C. § 6707A(d)(2), which precludes judicial review of the Commissioner's decision whether to rescind a Section 6707A penalty, "Keller has not raised this argument on appeal." (Op. 17 n.5.)

On February 21, 2017, this Court issued an opinion affirming the Tax Court decision on the basis of Section 6330(c)(2)(B), declining to rule on the Section 6330(c)(4) argument, and rejecting a mootness argument the Commissioner had raised. Prior to its analysis, the Court provided a thorough discussion of the legal background, which mentioned the possibility of rescission of a Section 6707A penalty

pursuant to I.R.C. § 6707A(d)(2). First, in its definition section, the opinion stated:

> Rescission Request: the taxpayer may request the Commissioner to rescind all or part of a penalty imposed under § 6707A for a non-listed reportable transaction if doing so would promote compliance with the tax laws and effective tax administration. The Commissioner, however, may not rescind a penalty for a listed transaction. The IRS Appeals Office hears a taxpayer's request to rescind. No judicial review is available for the decision to grant or deny rescission. 26 U.S.C. § 6707A(d)(2).

(Op. 4 (emphasis added).) Second, in describing the course of action for "contesting a § 6707A penalty," the opinion stated:

> The Appeals Officer may decide to abate the penalty, rescind a penalty for a reportable transaction that is not a listed transaction under § 6707A(d), or approve collection of the penalty. [I.R.M.] 4.32.4.8, 4.32.4.9.

(Op. 10 (emphasis added).)

The only other instances where the opinion mentions rescission of a Section 6707A penalty are (1) in the recitation of relevant statutes and regulations, which quoted I.R.C. § 6707A(d)(2) (Op. 6); (2) in the factual discussion, describing Keller's administrative protest (Op. 15); (3) in the factual discussion, describing the constitutionality argument made in Keller's Tax Court petition but not re-raised on appeal (Op. 17 n.5); and (4) in a description of a point made by the Commissioner in

support of his mootness argument, followed by the statement "But that issue is not before us" (Op. 24 n.8). The Court's legal analysis (Op. 19-38) did not rely on (or cite) the claim that the IRS Office of Appeals has authority to rescind a Section 6707A penalty.

ARGUMENT

A. Introduction

Although the Court properly affirmed the decision below, we respectfully submit that statements on pages 4 and 10 of the Court's opinion, indicating that the IRS Office of Appeals has the authority to rescind a Section 6707A penalty, are incorrect. As explained further below, the Appeals Office has *not* been delegated the authority to rescind such a penalty under I.R.C. § 6707A(d)(2). We are concerned that, in addition to being incorrect, the language could confuse taxpayers into seeking rescission of penalties from the IRS Office of Appeals, rather than using the correct process spelled out in Rev. Proc. 2007-21, 2007-1 C.B. 613, as updated by IRS Announcement 2016-01, 2016-3 I.R.B. 283. It could also lead to inconsistent treatment between taxpayers and could undermine efficient tax administration. The

statements in question are not necessary to the Court's legal analysis and holdings. We submit that they are dicta and should be deleted.

B. The statements regarding the IRS Office of Appeals' purported ability to rescind an I.R.C. § 6707A penalty are incorrect and could lead to confusion and harm to tax administration

On its face, Section 6707A(d)(1) delegates authority to the Commissioner to rescind any or all of a Section 6707A penalty (where the penalty was issued with respect to a reportable transaction other than a listed transaction), and does not delegate any such authority to the IRS Office of Appeals. I.R.C. § 6707A(d)(1) states:

> (d) Authority to rescind penalty.—
>
> (1) In general.—The Commissioner of Internal Revenue may rescind all or any portion of any penalty imposed by this section with respect to any violation if—
>
> (A) the violation is with respect to a reportable transaction other than a listed transaction, and
>
> (B) rescinding the penalty would promote compliance with the requirements of this title and effective tax administration.

Under this plain statutory text, Congress delegated discretion to the Commissioner, not to the IRS Office of Appeals, to rescind certain Section 6707A penalties. Additional legal provisions and legislative history further bolster the conclusion that the Commissioner, and not

the IRS Appeals Office, has authority to rescind certain Section 6707A penalties.

First, as we explained in our appellate brief (Opp. Br. 56), the IRS Office of Appeals performs a unique function in the IRS, providing independent hearing officers "who have held no role in examining the taxpayer's returns or in preparing the Commissioner's position." Pursuant to the Internal Revenue Service Restructuring and Reform Act, Pub. L. No. 105-206, 112 Stat. 685, 689, § 1001 (1998), the Commissioner was required to "ensure an independent appeals function within the Internal Revenue Service." (*See* Opp. Br. 55 & n.17 (discussing this requirement).) The IRS Appeals Office is therefore tasked with the mission of "'resolv[ing] tax controversies, without litigation, on a basis [that] is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the [Internal Revenue] Service." I.R.M. 8.1.1.1; *see generally* M. Saltzman & L. Book, IRS Prac. & Proc., ¶ 9.01 (2016) (discussing the IRS Office of Appeals). By contrast, "the Examinations division is the entity which conducts civil tax audits and proposes potential tax liability." (Opp. Br.

57, citing *United States v. Peters*, 944 F. Supp. 646, 648 (N.D. Ill. 1996), aff'd, 153 F.3d 445 (7th Cir. 1998)). And the Commissioner of Internal Revenue has been delegated the authority to administer the Internal Revenue Code. *See* I.R.C. §§ 7801(a)(1) (granting authority to administer the Code to the Secretary of the Treasury), 7803(a)(1)-(2) (permitting the Secretary to delegate authority to administer the Code to the Commissioner of Internal Revenue); T.D.O. 150-10 (delegating authority to administer the Code to the Commissioner).[4] Put simply, the Commissioner has authority to administer the Internal Revenue Code, including making policy decisions inherent in that role, while the Examinations division audits taxpayers and proposes potential liability, and the Appeals Office renders an independent administrative determination on taxpayer challenges to proposed liability and collections.

Second, the Conference Report accompanying the enactment of Section 6707A emphasizes that, under Section 6707A(d)(1), "the IRS Commissioner or his delegate" has discretion to rescind or abate a

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[4] T.D.O. 150-10 is available at https://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to150-10.aspx.

Section 6707A penalty as to reportable transactions. H.R. Conf. Rep. No. 108-755, at 597, *reprinted in* 2004 U.S.C.C.A.N. 1341, 1651 (2004). IRS published guidance likewise makes clear that the proper route for seeking rescission of a Section 6707A penalty is to submit a rescission request to the Office of Tax Shelter Analysis within 30 days of receiving notice and demand for payment of the penalty. *See* Rev. Proc. 2007-21, 2007-1 C.B. 613, *superseded in part by* 79 F.R. 44282-01, 1014-34 I.R.B. 382 (2014) (altering factors for rescission of a Section 6707 penalty, but not otherwise superseding the revenue procedure), *amended by* IRS Announcement 2016-01, 2016-3 I.R.B. 283 (updating mailing address for rescission request). Indeed, "[t]he method of requesting rescission that is provided in this revenue procedure [2007-21] is the exclusive method of requesting rescission. A person may not request rescission through a refund claim, in a collection due process hearing, or through any other avenue for approaching the Service." *Id.*, § 4.01. The Internal Revenue Manual likewise states that the sole means of seeking rescission is to submit a request for consideration by the Commissioner's delegate. I.R.M. 8.11.7.6.8.[5]

[5] One paragraph of the opinion that includes a statement which (continued)

Moreover, the statutory text makes clear that the decision to rescind requires a policy assessment, *i.e.*, a determination that "rescinding the penalty would promote compliance with the requirements of this title and effective tax administration." The Commissioner has decided not to delegate this policy determination to individual Appeals Office settlement officers, who could potentially make different calls in otherwise similar cases, leading to inconsistent treatment of taxpayers. The fact that rescission is inherently a policy decision is illustrated by the factors identified by Rev. Proc. 2007-21, §§ 4.04–4.06 as particularly relevant (such as evidence showing good

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we seek to have deleted (Op. 10) cites two Internal Revenue Manual provisions, neither of which supports the conclusion that the Appeals Office may rescind a Section 6707A penalty. I.R.M. 4.32.4.8 and 4.32.4.9 are found in the part of the Manual addressing examinations, and not the Appeals Office. The first provision, I.R.M. 4.32.4.8, addresses when Examination can abate a penalty, and specifically limits abatement to situations where "the penalty does not legally apply and was assessed in error." I.R.M. 4.32.4.8(1). Rescission under Section 6707A(d), by contrast, is based on policy concerns, and not the legal correctness of the penalty. The second provision, I.R.M. 4.32.4.9, describes the procedure for requesting rescission from the Commissioner's delegate. Its only mention of the Appeals Office is to state that "in order to request rescission, a taxpayer must have exhausted the administrative remedies available within the Office of Appeals regarding the proposed assessment of the penalty," unless the taxpayer has waived those remedies. I.R.M. 4.32.4.9(2).

faith attempts to report required information), or as irrelevant (such as doubt as to either liability or collectability), to the Commissioner's rescission decision.[6]

The two statements in the Court's opinion that we seek to have deleted risk confusing taxpayers, who might fail to submit timely rescission requests to the proper delegate of the Commissioner if they mistakenly believe that the Appeals Office could consider their requests. It may also lead to confusion in the Appeals Office itself or in the courts, which might mistakenly believe that the Appeals Office is obligated to consider a rescission request. Such confusion would be eliminated by deleting the sentences (or parts of sentences) identified above.

C. The two statements we have identified as incorrect should be deleted from the Court's opinion

Neither of the statements we seek to have deleted from the Court's opinion are essential to this Court's holdings. The Court's legal

[6] The policy-driven nature of rescission also likely explains why Congress decided to make the Commissioner's rescission decisions unreviewable. I.R.C. § 6707A(d)(2). However, as this Court noted (Op. 17 n.5), the propriety of precluding judicial review of rescission decisions is not at issue in this appeal.

analysis (Op. 19-38) did not rely on (or cite) the claim that the IRS Office of Appeals has authority to rescind a Section 6707A penalty. And, as the Court made clear, appellants did not argue that Section 6707A(d)(2) was unconstitutional, and the question of whether rescission was even available to Keller was "not before" the Court. (Op. 17 n.5, 24 n.8).

Although we submit that the interpretation of Section 6707A(d) set forth above is correct based on the plain text of the statute, as well as its legislative history and implementing published guidance, this Court need not adopt the Commissioner's reasoning to justify amending the opinion. By deleting what we submit is dicta, the Court would leave open any legal questions about the interpretation of Section 6707A(d), for resolution in a case where those questions are fully briefed and argued.

Based on the above reasoning, the Commissioner respectfully submits that this Court should delete the underlined language from the following portions of its opinion:

> Page 4: "The IRS Appeals Office hears a taxpayer's request to rescind [an I.R.C. § 6707A penalty]."

> Page 10: "The Appeals Officer may decide to abate the penalty, rescind a penalty for a reportable transaction that is not a listed transaction under § 6707A(d), or approve collection of the penalty. [Internal Revenue Manual] at 4.32.4.8, 4.32.4.9."

D. Statement of opposing party's position

Counsel for the Commissioner contacted Keller's counsel in an attempt to learn Keller's position on the matter, but have received no response. As such, we are unsure of Keller's position on this motion.

CONCLUSION

This Court should grant this petition and delete from its opinion the statements on pages 4 and 10 asserting that the IRS Office of Appeals has the authority to rescind a Section 6707A penalty.

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March 31, 2017

UNITED STATES COURT OF APPEALS
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KELLER TANK SERVICES II, INC., Appellant,	)	
v.	)	No. 16-9001
COMMISSIONER OF INTERNAL REVENUE, Appellee.	)	

DECLARATION OF JENNIFER M. RUBIN

Jennifer Marie Rubin of the Tax Division of the Department of Justice, Washington, D.C., states as follows:

1. I have been assigned primary responsibility for handling the above-entitled case on behalf of the Commissioner.

2. The facts in support of the foregoing motion are true and correct to the best of my knowledge.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed this 31st day of March, 2017, in Washington, D.C.

/s/ Jennifer M. Rubin
JENNIFER M. RUBIN
Counsel for the Appellee

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because:

[X] this motion contains 2,603 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and 32(a)(7)(B)(iii), or

[ ] this motion uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This motion 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:

[X] this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook, or

[ ] this motion has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

Date: March 31, 2017

/s/ Jennifer M. Rubin
JENNIFER M. RUBIN
Attorney for Appellee

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing motion has been made on counsel for the appellant on this 31st day of March, 2017, by filing it with the Court via CM/ECF, which will serve an electronic copy on all counsel who are registered for CM/ECF.

/s/ Jennifer M. Rubin
JENNIFER M. RUBIN
Attorney for Appellee