IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STARR INTERNATIONAL COMPANY, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. 1:14-cv-1593-CRC
UNITED STATES OF AMERICA, Counterclaim Plaintiff, v. STARR INTERNATIONAL COMPANY, INC., Counterclaim Defendant.	

BRIEF OF LESLIE BOOK, FRED MURRAY, AND SEAN AKINS AS AMICUS CURIAE IN SUPPORT OF COUNTERCLAIM DEFENDANT

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INTEREST OF AMICUS CURIEA[1]

The Amici are professors or practitioners of procedural federal tax matters. We have no personal interest in the outcome of this case, but do maintain a professional interest in seeing procedural tax issues resolved in a legal, rational, and equitable manner. We also frequently serve underrepresented tax communities (e.g., low-income taxpayers), for whom procedural tax matters often have disproportionately significant implications. The Amici consist of:

Sean Akins, partner in the tax practice of the law firm of Covington & Burling, LLP.[2] Mr. Akins is co-author of Kafka, Cavanagh, & Akins, Litigation of Federal Civil Tax Controversies, (revised second edition, 2017), the leading treatise on the litigation of tax cases in the United States. Mr. Akins writes and speaks frequently on procedural tax matters, including those affecting low-income taxpayers.

Leslie Book, Professor of Law at Villanova Law School. Professor Book is the author of Saltzman and Book, IRS Practice and Procedure, (revised second edition, 2017), the leading treatise on federal tax procedure in the United States. He is also a national authority on tax procedure, tax administration, and issues affecting the low-income taxpayer community.

Fred Murray, Professor of Law at the University of Florida. Professor Murray is the Director of the University of Florida's graduate tax program. His experience includes serving as a Deputy Assistant Attorney General in the Tax Division at the Department of Justice and as a Special Counsel to the Chief Counsel for the Internal Revenue Service. He writes and speaks frequently on procedural tax matters and issues affecting the low-income taxpayer community.

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[1] Other than the Amici, no persons participated in the writing of this brief.

[2] Although Mr. Akins, as a practitioner in private practice, may have existing or future clients who could theoretically be affected by a decision of this court in this matter, no clients made a financial contribution to, or participated in, the drafting of this brief.

SUMMARY OF ARGUMENT

The Government seeks the return of an approximately $21 million refund it alleges the Internal Revenue Service ("IRS") erroneously paid to Starr International Company, Inc. ("SICO") on March 22, 2011. The parties agree that the standard two-year period within which the Government may file an erroneous refund action seeking to recover this amount has expired.[3] Nonetheless, the Government asserts it is entitled to an extended five-year period to file such an action because, in the Government's view, the payment of the refund was induced by SICO's misrepresentation of material facts. The Amici urge the Court to reject the application of this extended five-year statutory period for two separate but related reasons.

First, in order to obtain the approximately $21 million of taxes SICO believed was owed to it, the Internal Revenue Code of 1986, as amended ("I.R.C." or "Code"), the regulations thereunder, and IRS guidance obligated SICO to file a refund claim (the "Refund Claim") in which was reported, as accurately as possible, the amount of taxes SICO believed was owed as a refund. When SICO filed the Refund Claim reporting a refund of approximately $21 million it did not misrepresent a material fact. The Government's argument that SICO should have filed a refund claim that, on its face, reported that SICO was entitled to a refund of $0 is fundamentally flawed. In addition to those reasons set forth in SICO's Briefs,[4] the Government's argument fails because: (i) it conflicts with the clear and straightforward requirements of the Form 1120-F

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[3] For simplicity and convenience, we refer throughout this brief to the "erroneous refund" or the "erroneously paid refund." The Amici, however, do not have a view as to whether or not SICO is entitled, as a substantive matter, to the refunded amount.

[4] We refer collectively to SICO's Motion for Summary Judgment on the United States' Counterclaim, filed June 4, 2017, and its Reply in Support of Starr International Company, Inc.'s Motion for Summary Judgment on the United States' Counterclaim and Opposition to the United States' Cross-Motion for Summary Judgment, filed October 5, 2017, as "SICO's Briefs."

on which SICO reported its refund claim, and (ii) it is contrary to the underlying principles of requiring taxpayers to file refund claims.

Second, the purportedly exceptional nature of the Refund Claim did not induce the IRS to issue a refund to SICO. The Government asserts that SICO's refund claim "was unique because unlike virtually all other refund claims, the Service Center did not have the jurisdiction to grant a refund to SICO." Government's Cross-Motion at p. 9.[5] But that is not true. IRS service centers frequently receive, review, and deny refund claims where further administrative review is unnecessary on account of prior IRS consideration of the claim, just like the Government alleges of SICO's Refund Claim. The IRS has procedures in place to handle such claims, or at a minimum should have had such procedures. Its unilateral failure to either provide for or adhere to those procedures with respect to SICO's Refund Claim should not entitle the Government to an extended period of limitations to file an erroneous refund claim.

[5] We refer to the United States' Memorandum of Law in Support of its Motion for Summary Judgment and Opposition to Starr International Inc.'s Motion for Summary Judgment on the Counterclaim as the "Government's Cross-Motion" and to the Reply in Support of the United States' Motion for Summary Judgment on the Counterclaim as the "Government's Reply."

ARGUMENT

I. **<u>SICO Did Not Misrepresent a Material Fact.</u>**

The Amici concur with the arguments presented in SICO's Briefs that when it filed its Refund Claim, SICO did not misrepresent a material fact. The Government's argument that SICO should have reported that it was owed a refund of $0 on the face of the Refund Claim is without merit. Without repeating SICO's arguments, we briefly highlight the most persuasive:

1. SICO was obligated, pursuant to the Code and the regulations promulgated thereunder, to report on the face of the Refund Claim the full amount of the refund to which it believed it was entitled. *See* I.R.C. § 6402; Treas. Reg. § 301.6402-3(a)(5).
2. The Government's position that SICO misrepresented a material fact by reporting a refund of greater than $0 would moot the two-year period of limitations of Code section 6532(b). Under the Government's logic, any taxpayer claiming any refund greater than $0 would be subject to the longer five-year erroneous refund period if the Government paid the refund and then later sought its return. Such a result is nonsensical and should be rejected.
3. Had SICO filed its Refund Claim reporting that it was owed a refund of $0, as the Government asserts SICO should have done, SICO would have exposed itself to a number of undesirable procedural issues. These include: (i) the IRS could have granted SICO's $0 refund claim, potentially foreclosing SICO's ability to seek court review; and (ii) the IRS could have ignored the refund

claim causing, at a minimum, a significant delay in SICO's ability to initiate a tax refund suit.

In addition to the foregoing, we write briefly to identify several additional troubling considerations related to the Government's position in this case.

A. SICO complied with the Form 1120-F and that form's instructions when it accurately reported the amount of tax it believed was owed as a refund.

When SICO filed its Refund Claim reporting that approximately $21 million was owed to it as a refund, it fully complied with the requirements of the Form 1120-F and that form's instructions. The first page of the Form 1120-F confirms that a taxpayer is obligated to include the actual amount of the refund the taxpayer believes is owed. Lines 8 and 9 of the Form 1120-F state that the taxpayer must "enter the amount overpaid" and "that portion" being claimed as a refund:

8a **Overpayment.** If line 5j is larger than the total of lines 4 and 6, enter amount overpaid 8a

b **Amount of overpayment on line 8a resulting from tax deducted and withheld under Chapters 3 and 4** (from Schedule W, line 7, page 8) 8b

9 Enter portion of line 8a you want **Credited to 2018 estimated tax** ▶ **Refunded** ▶ 9

Sign Here Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Signature of officer — Date — Title

May the IRS discuss this return with the preparer shown below (see instructions)? ☐ Yes ☐ No

Form 1120-F (emphasis added). The instructions to Form 1120-F further confirm that an actual amount must be reported, stating that to claim a refund of withheld taxes, the taxpayer must:

> Enter on lines 1 and 4, page 1, *the amount* from line 11, page 3. Enter on lines 5i and 5j *the amount* from line 12, page 3. Enter *the excess* of line 5j over line 4 on lines 8a and 9. This is the *amount* to be refunded to you.

Instructions to Form 1120-F (emphasis added).

These requirements are not to be taken lightly. Immediately below line 9, the Form 1120-F requires the taxpayer or its representative execute a penalties of perjury statement:

> Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Form 1120-F, p. 1.

The Government's assertion that SICO should have ignored the plain language of the Form 1120-F, that form's instructions, and the penalties of perjury statement, would establish a dangerous precedent if accepted by this Court. Singling out particular instances where such instructions should be disregarded, and an alternative approach taken, is confusing and should be rejected. *See Cohen v. United States*, 578 F.3d 1, 9 (D.C. Cir. 2009) (calling the IRS "mean" for putting taxpayers in a "virtual house of mirrors" by adopting convoluted telephone excise tax refund procedures distinct from the typical procedures required for other refund claims) *rev'd in part on other grounds*, 650 F.3d 717 (D.C. Cir.).

These concerns are particularly noteworthy for low and moderate-income taxpayers, who often lack access to competent tax advisors and who should not be expected to understand when the IRS has procedures in place that are not transparent and accessible to all taxpayers. Such advisors would be necessary if the Government's position in this case were adopted because taxpayers would be required to know those specific instances when they need to follow the IRS's rules and instructions for filing refund claims, and those instances when they should ignore them.

The better approach is not to punish taxpayers who adhere to the rules and instructions set forth by the IRS, which is what SICO did when it filed its Refund Claim. To suggest that by following the requirements and instructions in the Form 1120-F SICO misrepresented a material misrepresentation creates the possibility that taxpayers are at risk for failing to understand procedures that are not transparent or readily accessible. Following these instructions should not be deemed a material misrepresentation of fact.

B. The Government's position is contrary to the purpose of requiring taxpayers to file refund claims before pursuing refund litigation.

The Government's position is also contrary to the purpose of Code sections 6532 and 7422, which require taxpayers to file refund claims with the IRS before they file a tax refund suit. The purpose of this requirement is to permit the IRS a final opportunity to examine and consider a taxpayer's claim. This is important because it allows both the IRS and taxpayers to potentially avoid the trouble and expense of litigating claims that might otherwise be resolved.

The IRS would have had no cause or reason to further examine a refund claim that reported a refund of $0 on the face of the return itself. The most likely result when presented with such a claim would be for the IRS to simply ignore the return, without examination or consideration, let alone action.

Here, the Government argues that this is exactly their point—that SICO should have filed a return reporting a refund of $0 in order to prevent the IRS service center from further evaluating (and paying) the refund. This position is not only inconsistent with the policy behind the filing of refund claims prior to initiating a refund suit, but also ironic as it is contrary to the position the Government takes in many other cases.

For example, the Government aggressively (and often successfully) challenges courts' jurisdiction to entertain refund suits when taxpayers have failed to file refund claims. *See*, *e.g.*, *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008) ("The Internal Revenue Code provides that taxpayers seeking a refund of taxes unlawfully assessed must comply with tax refund procedures set forth in the Code. Under those procedures, a taxpayer must file an administrative claim with the Internal Revenue Service before filing suit against the Government."), *rev'g* 473 F.3d 1373 (Fed. Cir. 2007); *Bennett-Bey v. Shulman*, 688 F. Supp. 2d 7 (D.D.C. 2010) (dismissing taxpayer's request for refund of income taxes withheld for lack of

subject matter jurisdiction due to taxpayer's failure to file an administrative refund request under I.R.C. § 7422(a)), *aff'd* 404 Fed. Appx. 509 (D.C. Cir.). An originally filed tax return that, on its face, reports that $0 is owed as a refund is arguably not a refund claim, and any suit filed claiming otherwise would be susceptible to a jurisdictional challenge.

The Government also seeks to have tax refund cases dismissed (again, often successfully) where refund claims are submitted, but lack sufficient information to fully inform the IRS of the nature of the claim. *See*, *e.g.*, *Lindsey v. United States*, 448 F. Supp. 2d 37 (D.D.C. 2006) (holding that taxpayers were barred from pursuing refund claim because taxpayers did not file the claim in the manner required by Treas. Reg. § 301.6402-2(b)(1)). A refund claim that, on its face, reports that no refund is owed fails to inform the IRS of the nature of the claim, and the Government has successfully challenged the jurisdiction of courts to hear cases under these circumstances. *See*, *e.g.*, *Wagner v. United States*, 2003 WL 691029, at *5 (D.C. Florida 2003) (holding taxpayer's refund claim invalid because it failed to, among other defects, list an amount to be refunded).

Finally, a judicial doctrine—the Variance Doctrine—has developed to ensure that the IRS is provided sufficient (and accurate) information about a taxpayer's claim. The Government frequently challenges positions taken by taxpayers in refund litigation when they are at variance with the facts and grounds set forth in a refund claim. *See Cencast Servs., L.P. v. United States*, 729 F.3d 1352, 1367 (Fed. Cir. 2013) (holding that "new claims or theories raised subsequent to the initial refund claim are not permitted where they substantially vary from the theories initially raised in the original claim for refund"), *aff'g* 94 Fed. Cl. 425 (2010), *cert. denied* 134 S.Ct. 2841 (2014). Here, the Government asserts that SICO should have filed its refund claim reporting a

refund owed of $0, and then pursued an action in court seeking a refund of approximately $21 million. This seems at odds with the variance doctrine.

In short, the Government's position in this case would place SICO (and other taxpayers) between a rock and a hard spot—if a taxpayer files a refund claim reporting the full amount they believe they are owed, they are at risk of having materially misrepresented a fact if the IRS disagrees with the refund claim. Alternatively, if they file a return that on its face reports no refund is owed, they are almost assured to face a number of jurisdictional challenges should they ever file a refund action in court. This simply cannot be the right result, and it is a position this Court should reject.

II. SICO Did Not Induce the IRS to Issue a Refund When It Filed Its Refund Claim.

The Government asserts that "SICO's 2008 Form 1120-F was unlike any other Form 1120-F ever filed with an IRS Service Center seeking a refund of tax" because "neither the IRS Service Center nor any other component of the IRS had the authority to issue a refund to SICO." Government's Cross-Motion at p. 1; s*ee also id*. at p. 9. The Government then asserts that the unique nature of the refund claim contributed to the IRS Service Center granting SICO's claim. *Id*. at 45 ("the Service Center did not have authority to make a refund to [SICO]. As a result, [SICO] knew or reasonably should have known that putting anything other than zero on lines 8 and 9 (or leaving those lines blank) might induce the Service Center to make an erroneous refund to it.").

Contrary to the Government's assertion, there was nothing unique or extraordinary about SICO's refund claim. IRS service centers receive refund claims for which they lack authority to issue refunds on a frequent basis. The Internal Revenue Manual, an IRS agent's instruction manual for how to perform their duties, explains that in the context of employment tax refund claims, an

> examiner will dispose of the claim for refund without performing any audit actions, if one of the following criteria is met. The claim: a. Is not timely filed, b. Is based solely on alleged unconstitutionality of Revenue Acts, moral, religious, political, conscientious, or similar grounds, c. Is based on a return stamped "Waiver of Refund" . . ., d. Relates to a return closed on the basis of a final court order. . ., e. Covers a taxable period in which the tax liability or specific issues were the subject of a final closing agreement . . . f. Is the subject of a request for withdrawal by the claimant, g. Requests the examiner to reconsider issues previously considered by Appeals, or h. Requests examiner to reconsider a previously disallowed claim, if no additional facts are submitted.

I.R.M. 4.23.13.3.1.1 (revised Jan. 8, 2016). The Internal Revenue Manual contains a nearly identical provision instructing its agents how to handle excise tax refund claims. *See* I.R.M. 4.24.8.18 (revised Aug. 5, 2014). Prior iterations of the Internal Revenue Manual contained similar provisions related to more general refund claims. *See* I.R.M. 4512.1(1) (Jan. 30, 1987). Notably, many of the instances where an IRS examiner is instructed to "dispose of the claim" are where the issues associated with the claim have been previously considered. This is precisely what happened in this case when the United States Competent Authority previously considered the issues associated with SICO's Refund Claim.

More telling, when the IRS receives these types of refund claims, it has procedures in place to handle them. Upon receipt of such claims:

> The examiner will inform the taxpayer that the issues have already been considered and will not be considered if the [refund claim] [1] Is based solely on an issue considered in previously examined returns of the claimant who requests in writing the immediate issuance of a statutory notice of claim disallowance, or [2] Raises the same issues that were previously considered in the closing of the case.

I.R.M. 4.23.13.3.1.1(2) (revised Jan. 8, 2016). These safeguards have protected the IRS's interests to date, and there is no reason why they should have failed in this case. The fact that

they did fail is not a sufficient justification to impose on SICO an extended five-year erroneous refund period of limitations.

Finally, SICO's refund claim contained considerable factual detail and disclosures, including a copy of the USCA's letter to SICO denying discretionary relief, a review of which would have informed a Service Center agent that the refund claim should likely have been denied. If anything, this was a case of over-disclosure rather than under-disclosure, yet the Government uses this point against SICO, arguing that "SICO had no basis to have 'reasonably expected' that the Service Center would review the over 100-pages of attachments" to SICO's return. Government's Reply at p. 7. This position strains credulity. SICO went to great lengths to inform the Service Center that the USCA had already considered the merits of its claim. A cursory review of even a portion of the documentation attached to the return would likely have resulted in the refund claim being denied. Moreover, and ironically, had SICO failed to make these disclosures, and had the Service Center paid the refund, SICO would likely be facing an argument by the Government that it had misrepresented material facts by failing to include those disclosures. SICO appears to have appropriately disclosed the facts necessary for the Service Center to make an informed decision whether to grant or deny the refund claim. SICO should not be subject to an extended five-year erroneous refund period of limitations because the Service Center failed to review those disclosures.

CONCLUSION

Between March 21, 2011 and February 16, 2014, the IRS had nearly three years to claw back the refund it paid to SICO. During that period the IRS could have initiated an erroneous refund action *or* assessed SICO for a deficiency in taxes. The IRS failed to take either of these actions. To remedy its multiple oversights, the Government now takes the unorthodox and unprecedented position that SICO misrepresented a material fact when it filed a refund claim

requesting a refund of greater than "$0". Most charitably, this is an overreach on the part of the Government that is inconsistent with the Code, its regulations, and other IRS guidance. More realistically, it is a position that threatens to establish a dangerous precedent that would upend the manner in which refund claims are considered and filed by all manner of taxpayers. The Court should refuse to follow the Government down that path, and should reject in this case the application of the extended five-year erroneous refund statutory period.

Dated: December 21, 2017

/s/ Michael J. Desmond

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Brief Of Leslie Book, Fred Murray, And Sean Akins As Amicus Curiae In Support Of Counterclaim Defendant** was lodged with the Clerk of the Court on December 21, 2017, using the CM/EMF system which will send notification of such filing to parties in said system.

Dated: December 21, 2017

/s/ Michael J. Desmond

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