**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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| **CHARLES DERECK ADAMS and MELINDA ELIZABETH ADAMS,** | ) | |
| **Petitioners - Appellants** | ) | |
| **v.** | ) | **No. 16-1043** |
| **COMMISSIONER OF INTERNAL REVENUE,** | ) | |
| **Respondent - Appellee** | ) | |

# MEMORANDUM BRIEF FOR THE APPELLEE

## STATEMENT

On April 8, 2013, the Commissioner of Internal Revenue ("Commissioner") issued a notice of deficiency to Charles Dereck Adams and Melinda Elizabeth Adams ("taxpayers")[1] asserting a deficiency in tax and penalty for their 2010 tax year. (Doc. 13, Ex. 2-J.)[2] On Monday, July 8, 2013, taxpayers filed a timely Tax Court petition (Doc. 1), subsequently amended (Doc. 3). *See* I.R.C. §§ 6213(a), 7503

[1] Melinda is party because she filed a joint return with Charles. References to "taxpayer" in the singular are to Charles.

[2] "Doc." references are to the documents in the original record on appeal as numbered by the Clerk of the Tax Court.

(26 U.S.C.). The Tax Court had jurisdiction under I.R.C. §§ 6213(a) and 7442.

The Tax Court entered its decision on August 26, 2015. (Doc. 22.) Taxpayers filed a notice of appeal on January 12, 2016. (Doc. 43.) The notice of appeal was untimely. *See* I.R.C. § 7482(a)(1). As discussed in Argument I, *infra*, this Court lacks jurisdiction over this appeal.

The relevant facts are as follows:

Taxpayer was terminated from his employment at the Department of Defense, and he commenced litigation challenging his termination as discriminatory. (Doc. 21 at 2.) Taxpayer's loss of his employment caused him financial hardship. (Doc. 21 at 2.) In 2010, taxpayer received distributions from his federal employee Thrift Savings Plan account and an IRA account in the following amounts (Doc. 13 at 2; Doc. 21 at 3):

| Source | Amount |
|---|---|
| TSP | $150,000 |
| TSP | 22,720 |
| IRA | 51,971 |
| Total | $224,691 |

On their 2010 return, taxpayers reported retirement income of $152,997, $71,694 less than the actual distributions from the retirement accounts. (Doc. 13, Ex. 1-J at 2; Doc. 21 at 3.)

Taxpayers claimed itemized deductions on their 2010 return including $78,955 in medical expenses. (Doc. 13, Ex. 1-J at 6; Doc. 21 at 3.)

The IRS computer detected the $71,694 discrepancy between the amounts of retirement distributions reported to the IRS by third parties and the amount reported by taxpayers on their return. (Doc. 21 at 3.) The IRS notified taxpayers of the discrepancy and further informed them that the full amount of the retirement distributions were subject to tax and that, in general, were also subject to the 10% additional tax under I.R.C. § 72(t), although several exceptions to that additional tax were available. The IRS provided taxpayers with a publication outlining the available exceptions, and invited taxpayers to provide information indicating that one or more of the exceptions might apply to them. Taxpayers did not respond to the IRS notice. The IRS did not examine the other items on their return. (Doc. 21 at 3.)

The IRS then issued a notice of deficiency to taxpayers, determining a deficiency in tax of $14,529 and an additional tax on early retirement distributions under I.R.C. § 72(t) of $20,197 for a total deficiency of $34,276. (Doc. 13, Ex. 2-J at 1, 9; Doc. 21 at 1.) The IRS

also asserted a $6,940 accuracy-related penalty under I.R.C. § 6662 against taxpayers. (Doc. 13, Ex. 2-J at 1, 9, 11; Doc. 21 at 2.)

Taxpayers petitioned the Tax Court for redetermination of the deficiency. (Doc. 1.) In their petition, taxpayers sought relief on the ground that the distributions alleviated financial hardship resulting from the allegedly discriminatory termination of Mr. Adams's employment with the Department of Defense. (Doc. 1 at 1.) Taxpayers alleged that medical expenses contributed to their financial hardship. (Doc. 1 at 1.)

At trial, taxpayer acknowledged that there was no legal basis for excluding the unreported retirement income or escaping the § 72(t) additional tax, but pleaded for equitable relief (Doc. 15 at 8):

> since there is no law regarding my unique situation, in order for justice to be served I need what they used to call in the 60s, a legislating judge, or a judge who does the right thing and makes rulings where no law exists, or rules contrary to the law * * *.

The Tax Court explained to taxpayer that it was bound to follow the law, and was not permitted to fashion equitable relief in this situation. (Doc. 15 at 16.)

Following a trial, the Tax Court issued its memorandum findings of fact and opinion upholding the deficiency and penalties. (Doc. 21.)

The court held that § 72(t) did not include a general financial hardship exception, and that equitable considerations were irrelevant. (Doc. 21 at 8.) The court found that, although taxpayers had suggested that part of the distributions were used to pay medical expenses, and that § 72(t)(2)(B) may provide an exception in that situation, taxpayers failed to provide any substantiating documentation of medical expenses incurred, despite having several opportunities to do so. (Doc. 21 at 10.) The court rejected taxpayers' proffered reason for failing to substantiate the claimed expenses as incredulous: "The only explanation petitioners have offered for their refusal to supply substantiation of the medical expenses underlying their claimed deduction is that receipts are allegedly voluminous and would be tedious and expensive to copy." (Doc. 21 at 6.) The court upheld the substantial-understatement penalty because the understatement exceeded the statutory thresholds, and taxpayers failed to demonstrate that there was reasonable cause for their understatement of their tax liability. (Doc. 21 at 12.)

Taxpayers now appeal. (Doc. 43.)

# ARGUMENT

## I

## This appeal should be dismissed for lack of jurisdiction because taxpayers' notice of appeal was untimely

### Standard of Review

Whether this Court lacks jurisdiction over this appeal is a question of law.

### A. The notice of appeal was untimely

The filing of a timely notice of appeal is mandatory and jurisdictional. *Bowles v. Russell*, 551 U.S. 205, 209, 213 (2007); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989). Courts lack authority to create any equitable exceptions to that jurisdictional deadline.[3] *Bowles*, 551 U.S. at 214; *In re Sealed Case (Bowles)*, 624 F.3d 482, 486-89 (D.C. Cir. 2010). "'A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.'" *Houston v. Lack*, 487 U.S. 266, 282 (1988) (quoting *United States v.*

[3] Although 28 U.S.C. § 2107(c) and Fed. R. App. P. 4(a)(5) authorize a *district court* to extend the appeal period under certain circumstances, those provisions do not apply to appeals from the Tax Court. *See* Fed. R. App. P. 14. Appeals from the Tax Court are governed by I.R.C. § 7483 and Fed. R. App. P. 13, which do not allow any exceptions to the 90-day appeal period set forth therein.

*Locke*, 471 U.S. 84, 100-01 (1985)). An untimely appeal must be dismissed for lack of jurisdiction. *Bowles*, 551 U.S. at 213; *Spencer Med. Assocs. v. Commissioner*, 155 F.3d 268, 269 (4th Cir. 1998).

A notice of appeal from a decision of the Tax Court generally must be filed with the Clerk of the Tax Court within 90 days after the decision is entered. I.R.C. § 7483; Fed. R. App. P. 13(a)(1)(A); Tax Ct. R. 190(a). *See Spencer Med. Assocs.*, 155 F.3d at 269; *Manchester Group v. Commissioner*, 113 F.3d 1087, 1088 (9th Cir. 1997). The Tax Court entered its decision in this case on August 26, 2015. (Doc. 22.) The appeal period ended 90 days later on November 24, 2015. I.R.C. § 6213(a). Taxpayers, however, did not file their notice of appeal until January 12, 2016. (Doc. 43.) Since taxpayers' notice of appeal was not timely filed, their appeal should be dismissed for lack of jurisdiction. *See Valdez v. Commissioner*, 441 Fed. Appx. 211, 212 (4th Cir. 2011) (appeal dismissed where notice of appeal filed one day late); *Herwit v. Deyhimy*, 970 F.2d 709 (10th Cir. 1992) (same); *Sprout v. Farmers Ins. Exch.*, 681 F.2d 587, 588 (9th Cir. 1982) (same); *Wyzik v. Employee Benefit Plan of Crane Co.*, 663 F.2d 348 (1st Cir. 1981) (same); *Brainerd v. Beal*, 498 F.2d 901 (7th Cir. 1974) (same).

### B. The running of the appeal period was not tolled by taxpayers' filing of a motion for reconsideration of the court's opinion

Tax Court Rule 162 provides that a motion to vacate or revise a decision may be filed within 30 days after it is entered. If a timely Rule 162 motion is filed, the appeal period begins on the date of the entry of the order denying it or entry of a new decision. Fed. R. App. P. 13(a)(1)(B). Taxpayers did not file a Rule 162 motion.

Tax Court Rule 161 provides that a motion for reconsideration of an opinion may be filed within 30 days after the opinion is issued. Taxpayers filed a timely Rule 161 motion on September 16, 2015, which the Tax Court denied on September 29, 2015. (Docs. 27, 30.) Fed. R. App. P. 13(a)(1)(B) does not purport to toll the appeal period upon the filing of Rule 161 motion.

The courts of appeals, however, are divided on whether a Rule 161 motion should be deemed to toll the running of the appeal period notwithstanding that Fed. R. App. P. 13(a)(1)(B) does not expressly provide for tolling in that situation. The Ninth Circuit in *Nordvik v. Commissioner*, 67 F.3d 1489, 1493 (9th Cir. 1995) held that a timely Rule 161 motion tolls the appeal period. The Tenth Circuit reached the

opposite conclusion in *Mitchell v. Commissioner*, 283 Fed. Appx. 641, 644 (10th Cir. 2008), observing that it "has never given tolling effect in a tax appeal to a motion for reconsideration, which is not mentioned in Rule 13." In *Spencer Med. Assocs.*, 155 F.3d at 270-71, this Court declined to address the issue whether a timely Rule 161 motion for reconsideration tolls the appeal period, because the motion for reconsideration there was untimely and thus would not have tolled the appeal period in any event. We submit that the better view is that a Rule 161 motion for reconsideration of the opinion does not toll the appeal period, because Fed. R. App. P. 13(a)(1)(B) does not provide for tolling in that situation.[4]

### C. Taxpayers' notice of appeal still would be untimely even if their Rule 161 motion tolled the running of the appeal period

At all events, even if taxpayers' Rule 161 motion were deemed to have tolled the running of the appeal period, taxpayers' notice of appeal still would be untimely. The Tax Court denied taxpayers'

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[4] Taxpayers filed a motion for a new trial on October 12, 2015 (Doc. 31), which the court summarily denied on October 16, 2015 (Doc. 32). Because that motion was untimely, it could not operate to toll the running of the appeal period. *See Spencer Med. Assocs.*, 155 F.3d at 270-71.

Rule 161 motion on September 29, 2015. (Doc. 30.) If tolled by the filing of that motion, the 90-day appeal period would have ended on December 28, 2015. Taxpayers, however, did not file their notice of appeal until January 12, 2016. (Doc. 43.)

### D. The notice of appeal that taxpayers attempted to file in this Court was ineffective

As discussed at page 7, *supra*, a notice of appeal from a decision of the Tax Court must be filed with the Clerk of the Tax Court within 90 days after the decision is entered. I.R.C. § 7483; Fed. R. App. P. 13(a)(1)(A); Tax Ct. R. 190(a). As indicated, the period for filing a notice of appeal in this case expired on November 24, 2015. Thereafter, on November 30, 2015, taxpayers attempted to file a notice of appeal in this Court. (*See* Doc. 43 at 6.) This notice was doubly defective; it was untimely and filed in the wrong court.

Rule 4(d), Fed. R. App. P., affords relief where a notice of appeal is filed in the wrong court, but not with respect to appeals from the Tax Court. Rule 4(d) provides that:

> If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Fed. R. App. P. 14, however, provides that Fed. R. App. P. 4 does not apply to Tax Court appeals. And, even if Rule 4 did apply, the notice was untimely in any event.[5]

### E. That taxpayers attempted to file their notice of appeal electronically in the Tax Court on September 2, 2015 and November 22, 2015 is irrelevant

As the Tax Court informed taxpayers in its orders of September 4, 2015 (Doc. 25) and November 24, 2015 (Doc. 35), a notice of appeal is one of the documents that the court does not allow to be filed electronically, and an attempt to file it electronically does not extend its due date. *See* Tax Ct. R. 26(b)(1); *Practitioners Guide to Electronic Case Access and Filing* (electronic filing guidelines), U.S. Tax Court (May 2015), at pp. 31-32, 79. Generally, electronic filing in the Tax Court is mandatory for represented parties. Tax Ct. R. 26(b). The Tax Court's website (www.ustaxcourt.gov) states that, although

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[5] Although it is possible that the notice of appeal that was sent to this Court was *mailed* before the expiration of the appeal period, that is irrelevant here. I.R.C. § 7502(a) provides that if a taxpayer mails a notice of appeal to the Tax Court in an envelope properly addressed to that court bearing a U.S. postmark falling within the time for appeal, and the notice is received by the Tax Court, the appeal will be considered timely. I.R.C. § 7502(d) makes clear that this rule does not apply to the filing of a document in any court other than the Tax Court.

practitioners generally must file electronically, "eFiling is available, but not required, for *pro se* petitioners (taxpayers)." Here, taxpayers elected to use electronic filing.

It is well settled that a *pro se* litigant is required to abide by the court's rules and regulations. *Theede v. Dep't of Labor*, 172 F.3d 1262, 1267 (10th Cir. 1999); *Carter v. Commissioner*, 784 F.2d 1006, 1008 (9th Cir. 1986). Tax Court Rule 26(b)(1) expressly provides that certain papers are not eligible for electronic filing, as listed in the electronic filing guidelines on the court's website. Those guidelines clearly state, at page 31, that not all papers filed in the Tax Court are eligible for electronic filing, and that the table on page 71 (of the guidelines) should be consulted to determine whether a particular document is eligible. In that table, at page 79 of the guidelines, a notice of appeal is listed and, in answer to whether it is eligible for electronic filing, the last column of the table states "NO" in bold print. Moreover, page 32 of the electronic guidelines, under the subheading "Timeliness of eFiled documents," states that "**petitions and notices of appeal may not be eFiled**."

Apparently, because taxpayers were unable to locate a category in the Tax Court's electronic-filing system for the filing of a notice of

appeal, they chose to e-file it on September 2, 2015 as an attachment to a memorandum entitled "Memorandum Memorandum [sic] Question Regarding Appeal of Decision." (*See* Doc. 25.) The Tax Court ordered that filing stricken from the record and informed taxpayers that "[a] notice of appeal should be filed with the Tax Court in paper form (not electronic)." (Doc. 25.) Taxpayers had more than two months remaining in which to file a proper notice of appeal. Choosing to ignore the court's admonition, however, taxpayers did not file a notice of appeal in paper form.

Instead, they made another back-door attempt to file a notice of appeal electronically. Thus, on November 22, 2015, taxpayers attempted to file the notice of appeal as an attachment to a memorandum, this one entitled "Memorandum Nov 22, 2015 Notice of Appeal to the Court of Appeals for the 4th Circuit." (*See* Doc. 35.) On November 24, 2105, the Tax Court ordered that filing stricken from the record, and once again informed taxpayers that "[n]otices of appeal may not be electronically filed and must be submitted to the Court in paper form." And it warned them that "an attempted electronic filing does not extent the statutory period for filing a notice of appeal."

(Doc. 35.) As electronic filers, taxpayers received notice of that order on November 24, 2015, the last day for filing a timely notice of appeal. Taxpayers could have mailed a paper copy of the notice to the Clerk of the Tax Court on November 24, 2015 and the notice would have been timely under I.R.C. § 7502(a). Taxpayers, however, chose once again to ignore the Tax Court's warning as well as its clear rules.

In short, as demonstrated herein, taxpayers failed to timely file a notice of appeal and, consequently, this Court is constrained to dismiss their appeal for lack of jurisdiction.

## II

## If this Court determines that it has jurisdiction, it should affirm the Tax Court's decision

### Standard of review

The Tax Court's determination that taxpayer's retirement distributions were includable in his gross income and subject to the I.R.C. § 72(t)(1) additional tax on early distributions is a ruling of law subject to *de novo* review. The Tax Court's finding that taxpayers are liable for an accuracy-related penalty under I.R.C. § 6662 is reviewed for clear error. *Toberman v. Commissioner*, 294 F.3d 985, 991 (8th Cir. 2002).

### A. The Tax Court correctly held that the distributions that taxpayer received from his Thrift Savings Plan account and IRA in 2010 were subject to income tax and to the I.R.C. § 72(t)(1) additional tax on early distributions from qualified retirement plans

An amount distributed from a qualified retirement plan[6] or an IRA[7] is includable in the distributee's gross income. I.R.C. §§ 402(a), 408(d).[8] The federal employee Thrift Savings Plan is treated as a qualified retirement plan. I.R.C. § 7701(j)(1). Early distributions from qualified retirement plans are subject to a 10% additional tax (I.R.C. § 72(t)(1)), subject to certain exceptions (§ 72(t)(2)). The most common exception is for distributions made on or after the date the employee attains age 59½. I.R.C. § 72(t)(2)(A)(i). That exception is inapplicable here. (*See* Doc. 21 at 2.) Section 72(t)(2) does not include a general financial hardship exception. *Dollander v. IRS*, 383 Fed. Appx. 932, 932-33 (11th Cir. 2010).

Taxpayers' central argument on appeal appears to be that, since the Internal Revenue Code provisions requiring the inclusion in taxable

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[6] I.R.C. § 401 sets forth the requirements for qualified plans.

[7] I.R.C. § 408 sets forth the requirements and treatment of IRAs.

[8] I.R.C. § 72 provides an exclusion for after-tax contributions to a retirement plan. That exclusion is inapplicable here.

income of distributions from retirement plans does not provide an express exception for distributions necessitated by financial distress, the courts should fashion some form of equitable relief. (Br. 3; *see* Doc. 15 at 8-11.) Taxpayers' plea for equitable relief from taxation was properly rejected by the Tax Court and should similarly be rejected by this Court. As the Tax Court correctly held (Doc. 21 at 8), it is well settled that tax liabilities must be determined on the basis of the applicable provisions of the Internal Revenue Code, and it is not the province of the courts to disregard the mandate of such provisions in order to provide equitable relief in particular circumstances. Rather, exceptions to the laws enacted by Congress must come from Congress. *See United States v. Brockamp*, 519 U.S. 347, 352 (1997); *Webb v. United States*, 66 F.3d 691, 694 (4th Cir. 1995); *Koerner v. United States*, 550 F.2d 1362, 1364 (4th Cir. 1977); *Alexander v. IRS*, 72 F.3d 938, 947 (1st Cir. 1995); *Stockwell v. Commissioner*, 736 F.2d 1051, 1053 (5th Cir. 1984).

Taxpayers attempt to invoke the exception for medical expenses in § 72(t)(2) to the additional 10% tax on early distributions from qualified retirement plans imposed by § 72(t)(1). (Br. 2-3.) As the Tax Court

correctly found, however, taxpayers failed to substantiate the amount, if any, of their allowable medical expense deductions for 2010 despite being offered several opportunities to do so. (Doc. 21 at 10.)

As the Tax Court correctly found, taxpayers had several opportunities to provide documents establishing that they had allowable medical expense deductions, but they failed to take advantage of those opportunities. (Doc. 21 at 4-6, 10.) First, when the IRS initially notified taxpayers of the adjustment to the amount of their retirement distributions, it informed them of the availability of exceptions to the § 72(t) additional tax and referred them to the relevant IRS publication. (Doc. 21 at 4.) Taxpayers, however, did not respond. (Doc. 21 at 4.) Second, in preparing for trial, counsel for the Commissioner responded to taxpayers' assertion that some of the money was spent for medical expenses by inviting them to provide documentation supporting that assertion. (Doc. 21 at 5.) Taxpayers declined this invitation. Third, during a pretrial conference call with the parties, the Tax Court noted that the claimed medical expenses could affect the amount of the § 72(t) additional tax, but taxpayers "nevertheless persisted in declining to provide any substantiation of

those expenses to respondent's counsel." (Doc. 21 at 5.) Fourth, at trial, taxpayer alluded to his family's medical problems in 2010, but he offered no evidence to support such a claim. (Doc. 21 at 6.) According to taxpayer, the substantiating documentation would be too voluminous to produce. (Doc. 21 at 6.) Taxpayers' failure to provide any substantiating documentation of their claimed medical expenses was fatal to their claim to the exception in I.R.C. §72(t)(2)(B) for allowable medical expenses. *See Halle v. Commissioner*, 83 F.3d 649, 652 (4th Cir. 1996); *Talley Indus., Inc. v. Commissioner*, 116 F.3d 382, 387-88 (9th Cir. 1997); *Amey & Monge, Inc. v. Commissioner*, 808 F.2d 758, 761 (11th Cir. 1987).

Contrary to taxpayers' contention (Br. 3), the $73,571 of itemized deductions for medical expenses that they claimed on their return is not evidence of the fact or amount of their allowable medical expenses. It is well settled that amounts reported by a taxpayer on his return, devoid of supporting documentation, is not evidence of his correct tax liabilities. *Gould v. Commissioner*, 139 T.C. 418, 444 (2012); *Wilkinson v. Commissioner*, 71 T.C. 633, 639 (1979). Taxpayers' assertion that the IRS "allowed" them a medical-expense deduction of that amount (Br. 3)

is incorrect. As the Tax Court correctly observed, the IRS did not examine the deductions claimed by taxpayers on their return. (Doc. 21 at 3-4, 10.) Rather, the audit was a limited document-matching audit that detected the omitted retirement distributions. (Doc. 21 at 3-4, 10.) As the Tax Court correctly held, taxpayers bore the burden of establishing the amount allowable as a deduction for medical expenses under I.R.C. § 213 for purposes of the § 72(t)(2)(B) exception, and that they did nothing whatever to discharge that burden. (Doc. 21 at 10.)

In their opening brief, taxpayers also suggest that part of the distributions was used to pay for higher-education expenses and first-home purchases. (Br. 2.) Section 72(t)(2)(E) allows an exception for distributions from an IRA "to the extent such distributions do not exceed the qualified higher education expenses * * * of the taxpayer for the taxable year." Section 72(t)(7), in turn, provides that "qualified higher education expenses" includes expenses of higher education furnished to the taxpayer, his spouse, or any child or grandchild at an eligible educational institution. Section 72(t)(2)(F) provides an exception for distributions from an IRA "which are qualified first-time homebuyer distributions," which § 72(t)(8) defines as:

> any payment or distribution received by an individual to the extent such payment or distribution is used by the individual before the close of the 120th day after the day on which such payment or distribution is received to pay qualified acquisition costs with respect to a principal residence of a first-time homebuyer who is such individual, the spouse of such individual, or any child, grandchild, or ancestor of such individual or the individual's spouse.

Taxpayers, however, did not claim entitlement to either of those exceptions in their petition. Nor did they mention them at trial. Instead, they alluded to them, in cursory fashion, for the first time in responses to the Commissioner's post-trial brief. (Doc. 18 at 4.)

The Tax Court Rules require that a taxpayer's petition set forth clear and concise statements of error in the Commissioner's deficiency determination (Rule 34(b)(4)) and clear and concise factual allegations in support thereof (Rule 34(b)(5)). These rules require more detailed pleadings than are required under the Federal Rules of Civil Procedure (which do not apply in the Tax Court) and *pro se* litigants are subject to these stricter requirements. *Lefebvre v. Commissioner*, 830 F.2d 417, 419 (1st Cir. 1987); *Carter v. Commissioner*, 784 F.2d 1006, 1008 (9th Cir. 1986); *Taylor v. Commissioner*, 771 F.2d 478, 479-80 (11th Cir. 1985); *Scherping v. Commissioner*, 747 F.2d 478, 480 (8th Cir. 1984). Any issue not clearly raised in the petition is deemed conceded. Tax Ct.

R. 34(b)(4); *Bob Wondries Motors, Inc. v. Commissioner*, 268 F.3d 1156, 1161 (9th Cir. 2001); *Lefebvre*, 830 F.2d at 419; *Factor v. Commissioner*, 281 F.2d 100, 122-23 (9th Cir. 1960) (generalized allegations insufficient); *Swain v. Commissioner*, 118 T.C. 358, 362 (2002); *Lunsford v. Commissioner*, 117 T.C. 183, 186 (2001). Taxpayers waived any claim to those exceptions by failing to raise them until after trial. *See Fox v. Commissioner*, 969 F.2d 951, 953 (10th Cir. 1992); *Parkinson v. Commissioner*, 647 F.2d 875, 876 (9th Cir. 1981).

In any event, taxpayers' vague claims are wholly unsubstantiated. Their bare assertions of entitlement to the exceptions fall far short of satisfying their burden of proving that they have satisfied all of the statutory requirements. *See Telfeyan v. Commissioner*, 56 T.C.M. (CCH) 96, 102 (1988); *Swayze v. Commissioner*, 45 T.C.M (CCH) 1104, 1111 (1983).

Moreover, taxpayer's claim the he used part of the distributions to save his home from foreclosures (Br. 2), on its face, falls outside the exception for first-time home purchases. That exception does not cover funds used to protect a home from foreclosure, but rather covers costs of acquiring a first home. I.R.C. § 72(t)(2)(F)

### B. The Tax Court correctly upheld the I.R.C. § 6662 substantial-understatement penalty

I.R.C. § 6662(a) imposes an accuracy-related penalty equal to 20% of the portion of an underpayment of tax that is attributable to, among other things, a substantial understatement of income tax (§ 6662(b)(2)). A substantial understatement of income tax exists "if the amount of the understatement for the taxable year exceeds the greater of * * * 10 percent of the tax required to be shown on the return for the taxable year, or * * * $5,000." § 6662(d)(1)(A).

Taxpayers do not challenge the imposition of the penalty in their opening brief on appeal. They have therefore waived any challenge to the penalty, and the penalty may be affirmed on that basis alone. *See United States v. Hudson*, 673 F.3d 263, 268 (4th Cir. 2012); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 329 n.21 (4th Cir. 2006).

At all events, the Tax Court correctly found that taxpayers are liable for the penalty. (Doc. 21 at 11-13.) As the Tax Court correctly found, taxpayers understated their tax liability by more than $34,000, which exceeds both $5,000 and 10% of the total tax liability required to be shown on their return. (Doc. 21 at 11.) *See* § 6662(d)(1)(A). As the Tax Court further found, taxpayers did not attempt to establish

that there was reasonable cause for the underpayment. (Doc. 21 at 12-13.) *See* I.R.C. § 6664(c).

## CONCLUSION

For the reasons stated above, this appeal should be dismissed for lack of jurisdiction. If this Court determines that it has jurisdiction, the Tax Court's decision should be affirmed.

Respectfully submitted,

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FEBRUARY 2016

## CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of February 2016, I electronically filed a PDF version of the foregoing memorandum brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. On this 26th day of February 2016, I mailed the foregoing memorandum brief by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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