Nos. 18-3256 & 18-3259

United States Court of Appeals for the Eighth Circuit

JUDITH S. COFFEY,

PETITIONER-APPELLEE,

GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS
("V.I. GOVERNMENT"),

INTERVENOR-APPELLEE,

V.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT-APPELLANT

ESTATE OF JAMES COFFEY,
JUDITH COFFEY EXECUTRIX,

PETITIONER-APPELLEE,

V.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT-APPELLANT

COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND
RULE 35(B) STATEMENT

Intervenor-Appellee the Government of the U.S. Virgin Islands ("Virgin Islands" or "USVI") petitions under Federal Rules of Appellate Procedure 35 and 40 for rehearing or rehearing *en banc* of the panel's December 15, 2020 decision reversing the Tax Court's judgment.

This proceeding raises issues of exceptional importance implicating Congress' carefully designed tax regime for the United States and the U.S. Virgin Islands, which both contemplates and requires a thoroughly integrated approach to income taxation. By holding that only a taxpayer who *correctly* takes the position that she is a "bona fide" resident of the USVI may file her federal tax returns with the Virgin Islands under §932(c) of the Internal Revenue Code ("IRC") and gain the benefit of the statute of limitations, the panel's decision fundamentally misapprehends the Congressional taxation scheme for the Virgin Islands. In so doing, it renders superfluous an express provision of a federal statute, namely 26 U.S.C. §932(c)(4); would invalidate the IRS's own longstanding regulations under Section 932, which is flatly contrary to the panel's interpretation of the statute; and yields absurd results that are inconsistent with Congress' intent in designing a regime for Virgin Islands income taxation characterized by "choreographed interplay" with the federal tax system. *Appleton v. Comm'r*, 140 T.C. 273, 281 (2013).

These errors of interpretation carry serious consequences for the unique tax relationship between the United States and the USVI—a relationship that Congress created as a matter of national policy and that the courts have no standing to disrupt. Panel rehearing or rehearing *en banc* is warranted to correct them.

BACKGROUND

The USVI is an unincorporated territory of the United States, subject to plenary control by Congress under Article IV of the Constitution. Exercising that control, Congress governs the Territory by federal statute, the Revised Organic Act of 1954 (48 U.S.C. §§1541 *et seq*). Under the Organic Act, Congress has granted the Virgin Islands significant indicia of sovereignty, establishing a local government and endowing it with general powers of governance, including the power to tax. Those powers, however, are creatures of federal statute subject to Congressional control.

Most Virgin Islands taxes are assessed by the Virgin Islands and collected by the Virgin Islands Bureau of Internal Revenue (VIBIR), without federal involvement. But for *income* taxes, Congress went a different way. Congress established the Internal Revenue Code as the Virgin Islands' income tax code law under a "mirror code" system, under which the IRC applies in the Virgin Islands with "Virgin Islands" substituted for "United States" where it appears in the Code. *See* 48 U.S.C. §1397; *Bizcap, Inc. v. Olive*, 892 F.2d 1163, 1165 (3d Cir. 1989); *Coffey v. Comm'r*, 663 F.3d 947, 949 (8th Cir. 2011).

Virgin Islands residents thus pay U.S. federal income tax, with several important differences. First, they pay their federal tax "into the treasuries of such islands," rather than the U.S. Treasury. 48 U.S.C. §1397. And second, the Virgin Islands government is empowered to promote economic development by "reduc[ing] or remit[ting]" federal tax liabilities that are "attributable to income derived from sources within the Virgin Islands or income effectively connected with the conduct of a trade or business in the Virgin Islands." 26 U.S.C. §934(a), (b). That is, uniquely among American jurisdictions, the Virgin Islands is authorized to reduce its residents' federal income tax rates. The USVI implements that authority via its Economic Development Program ("EDP").

To effect this hybrid system of income taxation, Congress established an integrated tax regime that allows Virgin Islanders to satisfy their *federal* income tax obligations by filing returns with and paying tax to the *local* Virgin Islands tax authority.

Section 932 of the Internal Revenue Code ("Coordination of United States and Virgin Islands Income Taxes") establishes distinct but parallel mechanisms for filing and paying income tax: one for U.S. residents who are *not* bona fide Virgin Islands residents (§932(a)), and a separate one for those who are (§932(c)).

A resident of the United States "*other than* a bona fide resident of the Virgin Islands" who has income that derives from or is effectively connected to Virgin Islands sources files her return "with *both* the United States and the Virgin Islands" under §932(a). Such taxpayers pay income to both jurisdictions: tax liabilities relating to Virgin Islands income are paid to the Virgin Islands, while liabilities relating to all other income are paid to the IRS. 26 U.S.C. §932(b).

By contrast, "a bona fide resident of the Virgin Islands" files her tax return under §932(c), which requires her to file only once, with the USVI. That single filing with the USVI under §932(c) is sufficient to satisfy the taxpayer's federal filing obligation—it is "the return required to be filed" that triggers the statute of limitations. 26 U.S.C. §6501(a); *see Appleton*, 140 T.C. at 286-287. It is also sufficient to satisfy her federal income tax liability, but only if she satisfies three tests: she must be "a bona fide resident of the Virgin Islands"; her filing with VIBIR must "report[ ] all income from all sources" and "identif[y] the source of each item shown on [the] return"; and she must "fully pay[] [her] tax liability to the Virgin Islands with respect to such income." §932(c)(4).

This "choreographed interplay" between the federal and Virgin Islands income tax filing systems inevitably creates the risk that some taxpayers will file with the wrong agency or pay taxes to the wrong treasury. To mitigate that risk, when Congress enacted §932 it required the IRS and VIBIR to execute a formal "implementing agreement … with respect to establishment of rules under which the evasion or avoidance of United States income tax shall not be permitted or facilitated" by the new regime. Tax Reform Act of 1986, §1277, 100 Stat. 2085. The resulting Tax Implementation Agreement, executed in 1989, provided for "mutual assistance in tax matters, including exchanges of information, for purposes of administering the tax laws of the respective Governments and specially to prevent avoidance or evasion" of tax. Tax Implementation Agreement Between the United States of America and the Virgin Islands, 1989-1 C.B. 347 (IRS FIA), 1989 WL 1646581 (1989) ("TIA"). In the TIA, the Virgin Islands agreed to "routinely supply" the IRS with "information about any taxpayer subject to Virgin Islands tax with non-Virgin Islands source income who files an income tax return with the Virgin Islands claiming for the first time to be a Virgin Islands resident"—that is, taxpayers like Judith Coffey. *Id.* §2(b)(iii). Such information has been routinely shared between the two agencies since 1989.

This case arose because Judith Coffey, who moved her business and residence to the Virgin Islands and received Economic Development Program tax benefits authorized by §934(b), filed a single income tax return under §932(c) with the Virgin Islands. This was the logical course of action for any person filing tax returns with a Virgin Islands address. For the tax years at issue, a taxpayer attempting to satisfy her filing obligations under §932 could find IRS guidance in only three places: Regulation 1.6091-3, which instructed her to look to the instructions on Form 1040; Form 1040, which instructed Virgin Islands "permanent residents" to file only with VIBIR; and Publication 570, which stated that Virgin Islands "permanent residents" "*must* file [their] return on Form 1040 with Government of the Virgin Islands and pay the entire tax due to the Virgin Islands." As the Tax Court has explained (in a decision the IRS did not appeal), for a "meticulous taxpayer researching his/her filing requirements," the guidance in Publication 570 is consistent with the Form 1040 instructions' "explicit" command to Virgin Islands residents to file with VIBIR. *Appleton*, 140 T.C. at 287 & n.18.

Moreover, as an Economic Development Program beneficiary, Coffey had no choice but to file under §932(c): the income tax reductions authorized by §934 are available only to persons filing as "bona fide" residents of the Virgin Islands.[1] 26 U.S.C §934(b)(2); 29 V.I.C. §708(b).

[1] Section 934 is a tortuous statute even by Internal Revenue Code standards, but its import is clear. Section 934(b)(1) establishes that the Virgin Islands can reduce or remit federal tax liability on income that is

A dual filing under §932(a) would have amounted to an admission that Mrs. Coffey was someone "other than" a bona fide resident and precluded her receipt of EDP benefits.

Years later—well after the three-year statute of limitations for audits had run—the IRS issued notices of deficiency for tax years 2003 and 2004. The Coffeys challenged those notices in Tax Court, asserting that the notices were barred by the statute of limitations under 26 U.S.C. §6501(a). In the Tax Court, the IRS took the position that Judith Coffey was not a "bona fide" resident of the Virgin Islands for purposes of §932(c); that she was therefore required to file a second return with the IRS under §932(a); and that her failure to do so meant that she had not filed "the return required to be filed" sufficient to trigger the statute of limitations. In effect, the IRS took the position that Mrs. Coffey—and hundreds of other taxpayers filing under

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sourced in or effectively connected to the USVI. Section 934(b)(2) then provides that this authority "shall not apply to any liability payable under section 932(b)"—that is, any liability payable by a taxpayer "other than" a bona fide Virgin Islands resident. Since all recipients of Virgin Islands income must file either as nonresidents under §932(a), (b) or as bona fide residents under §932(c), the prohibition of §934(b)(2) effectively limits the USVI's tax-reduction authority to liabilities "payable to the Virgin Islands under" Section 932(c), that is, liabilities of bona fide residents.

§932(c)—were unprotected by the statute of limitations unless and until either (1) the IRS affirmatively conceded bona fide residency, or (2) the taxpayer proved bona fide residency in a court proceeding, which in most cases would not even begin until long after the three-year statute of limitations would have expired.

Mrs. Coffey sought summary judgment that the statute of limitations barred the IRS deficiency assessments, because her filing with the Virgin Islands under §932(c) was "the return required to be filed" for purposes of §6501.

The full Tax Court granted her motion in a divided opinion. *Coffey v. Comm'r*, 150 Tax Court 60 (2018). A five-judge lead opinion held that the statute began to run when the IRS received a copy of the Form 1040 Mrs. Coffey filed with the Virgin Islands. *Id*. at 61-97. An eight-judge concurrence would have found that the statute began to run when Coffey filed her return with the Virgin Islands, noting that Coffey could not have known at the time she filed that the IRS would later challenge her residency, and that her filing with the Virgin Islands under §932(c) represented an honest and genuine attempt to comply with the statute and so was sufficient to trigger the statute under

Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934) and progeny. *Id*. at 98-105. A four-judge dissent rejected the lead opinion's analysis and did not address the concurring opinion. *Id*. at 105-108.

The IRS appealed to this Court, which reversed. In the part of the decision relevant here, the panel rejected the Tax Court concurrence. The panel essentially held that notwithstanding the Coffeys' filings with VIBIR under §932(c), for purposes of the statute of limitations their case should be treated as a complete failure to file. Under the panel's interpretation of the statute, only a filer who is *actually is* a bona fide resident of the Virgin Islands—a status that cannot be definitively known at the time she files—is entitled to file a return under §932(c) such that a filing with VIBIR is "the return required to be filed" that triggers the statute of limitations.

REASONS FOR GRANTING THE PETITION

The panel's decision is rooted in factual and legal error that infects its entire decision and fundamentally distorts Congress' carefully constructed regime for an integrated system of U.S. Virgin Islands income taxation.

A seemingly minor factual mistake exemplifies the panel's basic error. Noting that "the Coffeys stress that the returns they filed with VIBIR are identical to federal tax forms," the panel casually dismissed the relevance of that similarity, asserting that "although the VIBIR *chooses* to use the same forms [as the IRS], returns filed with the VIBIR are not returns filed with the IRS." Slip. Op. at 9 (emphasis added).

The panel's claim that VIBIR merely "chooses" to use (for example) Form 1040 is flatly wrong—and reflects a fundamental misunderstanding of the Virgin Islands' role in the federal income tax structure. Although the Virgin Islands maintains its own revenue authority, its administration of the mirror code income tax is closely integrated with federal tax administration. Section 932 is a *federal* statute, the purpose of which is expressed in its title: "Coordination of United States and Virgin Islands Income Taxes." It establishes a coordinated taxation regime involving both the IRS and VIBIR and contemplating close coordination between them. Unlike the revenue agencies of any State or foreign jurisdiction, under §932(c) VIBIR is a valid recipient of federal tax returns. As the revenue agency of a mirror code territory, VIBIR does not—contrary to the panel opinion—"choose" to use the same tax return forms as the IRS. It is *required by federal law* to use and accept those forms. *See* IRS Pub. 570; *see also* 26 CFR 1.6012-1(a)(6). The Mirror Code by its nature requires that the two tax systems be identical. As a practical matter, the dual-filing regime required for non-bona fide residents by §932(a) could not work if the two revenue agencies used different reporting forms: its plain language calls for a single "income tax return" to be filed with both agencies.[2]

As its factual error shows, the panel's decision rests on the misapprehension that the U.S. and U.S.V.I. income tax systems are entirely separate and distinct, with only incidental overlap. That understanding cannot be squared with the statutory text and structure, which establish an integrated system for filing and paying income tax in which VIBIR serves an explicitly federal function. And it led directly to the misinterpretation of Section 932 that prompted this petition.

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[2] The Virgin Islands statute cited by the panel (at 9) to support its assertion, 33 V.I.C. §681(i), says nothing about VIBIR's purported power to "choose" its income tax forms. Nor could it, in light of the federal statute providing that "the income-tax laws in force in the United States … shall be held to be likewise in force in the Virgin Islands." 48 U.S.C. §1397. "[T]he income-tax laws of the United States" require taxpayers to file on Form 1040.

A. The panel's decision is inconsistent with the plain text and structure of Congress' Virgin Islands tax regime.

The panel essentially held that only taxpayers who are *undisputedly* bona fide Virgin Islands residents are permitted (and required) to file a single return with the Virgin Islands under Section 932(c). That ruling cannot be squared with the text and structure of the statute, which both require the conclusion that any taxpayer *taking the position that* she is a bona fide resident is required to file under that provision, and so is entitled to the protection of the statute of limitations upon so filing.

1. The panel's decision improperly reads Section 932(c)(4)(A) out of the statute.

It is "an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Metzer v. Lyng*, 864 F.2d 75, 77 (8th Cir. 1988). The panel's decision violates that canon. Under its interpretation of §932, only a taxpayer who is undisputedly a bona fide Virgin Islands resident is permitted to file a single return with the Virgin Islands under §932(c). This means that a lawful return under §932(c) can only be filed by someone who is *actually is* a de jure bona fide Virgin Islands resident—even though residency status requires a complex determination and cannot be definitively known at the time of filing.

That conclusion, however, makes no sense in the structure of §932. That section uses bona fide residency for two distinct purposes. First, in §932(a)(1) and (2) and §932(c)(1) and (2) it uses residency to determine where the taxpayer should file—with both IRS and VIBIR, or only with VIBIR. Second, in §932(c)(4)(A), it uses residency to determine whether a taxpayer who files under §932(c)(2) and pays tax to VIBIR has satisfied her federal income obligation. A person who files a single return with VIBIR under §932(c)(2) is relieved of her federal tax obligation *only* if she satisfies three criteria—including that she is "a bona fide resident of the Virgin Islands." §932(c)(4)(A).

If the panel were correct in holding that only undisputedly bona fide Virgin Islands residents may file under §932(c)(2), then there would be no need to re-confirm their residency in §932(c)(4). The requirement of bona fide residency in §932(c)(4)(A) would be wholly superfluous. The panel's interpretation is thus presumptively incorrect, at least if there is an alternative interpretation that avoids the redundancy. Here, there is. If one interprets §932(c)(2) to apply to taxpayers *taking the* *position* that they are bona fide USVI residents, then the residency requirement of §932(c)(4) serves an independent function—ensuring that a filer who *incorrectly* claims bona fide residency by filing with VIBIR under §932(c)(2) cannot avoid her federal tax liabilities by paying tax to the Virgin Islands. Because this is the only interpretation of §932(c)(2) that gives meaning to §932(c)(4)(A), it is necessarily correct.

2. The panel's decision is inconsistent with the IRS's own interpretation of §932, as embodied in the implementing regulations.

Interpreting §932(c) to permit filing with the Virgin Islands by taxpayers who take the position that they are "bona fide" residents does not just eliminate statutory redundancy. It also comports with the IRS's own interpretation of the statute, as implemented by its own regulations.

The current regulation implementing §932 is 26 C.F.R. §1.932-1. Promulgated in 2008, the current version of §1.932-1(c)(2)(ii) provides that "an income tax return filed with the Virgin Islands by an individual who *takes the position* that he or she is a bona fide resident of the Virgin Islands … will be deemed to be a U.S. income tax return" for purposes of the statute of limitations.[3] As we have explained, this is a plausible reading of the statute—one that gives meaning to both §932(c)(2) and §932(c)(4)(A)— and is the position the taxpayers and the USVI have advanced in this litigation. But it is irreconcilable with the panel's decision, under which only a taxpayer who *correctly* takes the position that she is a bona fide resident is entitled to file under §932(c) and receive the benefit of the statute of limitations. If the panel is correct that Congress intended to make the statute of limitations available only for undisputedly bona fide residents, then the IRS was not free to make it available to anyone else: a regulation that is

[3] Prior to 2008 the IRS had not promulgated any regulation to implement §932, even though it had been instructed by Congress to do so in 1986. *See* 26 U.S.C. §7654(e) (instructing the Secretary of the Treasury to "prescribe such regulations as may be necessary to carry out the provisions of section[ ] … 932." Prior to 2008, IRS implemented §932 via less formal publications. In 2007, the agency stated that for Virgin Islands residents who "take the position" that they are bona fide residents may trigger the statute of limitations by filing with VIBIR under §932(c), but only if their gross income was less than $75,000. IRS Notice 2007-19. Later the same year, IRS extended that same treatment to all filers taking the position that they were bona fide residents, but only for tax years after 2007. IRS Notice 2007-31. Both those official positions are incompatible with the panel's interpretation of §932(c).

incompatible with the statute it purports to implement is invalid. *United States v. Mead Corp.*, 533 U.S. 220, 227 (2001).

The better conclusion—the one more consistent with both the statutory text and a dozen years of Congressional acquiescence in §1.932(c)(2)(ii)—is that the panel is wrong. Correctly interpreted, §932(c) does not create a trap for unwary taxpayers who file their taxes where both the statute and all available IRS guidance suggest they are required to file—that is, with VIBIR. The panel's decision to the contrary should be revisited and reversed.

B. The panel's decision leads to absurd results.

There is no dispute that if the IRS had not elected to challenge the Coffeys' residency years later, their submissions for tax years 2003 and 2004 would have qualified as "the returns required to be filed" that triggered the statute of limitations. *See Appleton*, 140 T.C. at 286. Thus, according to the panel's decision, whether the Coffeys' submissions were "the returns required to be filed" for purposes of the limitations period depended not on what the Coffeys filed but on whether the IRS later decided, in its sole discretion, to challenge their residency claim.

That outcome is absurd. To illustrate the absurdity, consider this: under the panel's decision, there is no way to know whether a particular taxpayer submission is "the return required to be filed" under §6501 unless and until the IRS makes an affirmative decision to challenge residency. Until that happens, the submission is effectively both "the return required to be filed" (because IRS has not yet challenged residency) and *not* "the return required to be filed" (because the IRS could always challenge residency in the future). But a tax return is not Schrödinger's cat,[4] and a limitations period whose application depends entirely on the IRS's whim is not a limitations period at all.

The panel's decision yields absurd results for another reason. In §934, Congress gave the Virgin Islands unique authority to reduce its residents' federal income tax burden. That unique benefit is available only to taxpayers who are bona fide Virgin Islands residents—that is, taxpayers who file under §932(c). *See supra* n.1. Under the panel's

[4] "Schrödinger's cat" is a paradox involving a hypothetical cat who is considered simultaneously both alive and dead.

interpretation of the statute, however, any taxpayer filing under §932(c) risks losing the protection of the statute of limitations, which the IRS can effectively vitiate simply by challenging the taxpayer's residency *at any time*—many years or decades after a return is filed. No rational taxpayer would take such a risk. Nor is there any evidence that Congress intended them to: nothing in the statute or the legislative history even arguably suggests that Congress intended to create both a single-filing regime (§932(c)) and a special tax-reduction program for Virgin Islands residents (§934(b)) only to surreptitiously withdraw the protection of the statute of limitations from anyone who attempts to use them.

Finally, under the panel's interpretation of §932(c), the IRS could lawfully initiate audits for *every tax return ever filed with VIBIR*, simply by challenging the residency of the filer. Virgin Islanders who filed their returns with VIBIR more than 30 years ago would be surprised to learn that Congress gave the IRS such unfettered power over a small, politically disadvantaged minority. So too would Congress.

CONCLUSION

This Court should grant rehearing to correct the panel's misinterpretation of §932 and restore Congress' carefully planned statutory scheme for Virgin Islands income taxation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: January 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2021, I caused the foregoing document to be electronically filed with the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 29, 2021

/s/ Geoffrey P. Eaton
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