21-1420

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KIRGIZIA I. GRAJALES,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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**ON APPEAL FROM THE DECISION OF THE
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BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

On July 10, 2017, the Internal Revenue Service issued a notice of deficiency of federal income taxes to Kirgizia I. Grajales ("taxpayer") for the year 2015. (A.31-32; SA.3.)[1] Taxpayer timely petitioned the Tax Court for review within ninety days of the notice by mailing the petition

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[1] "A." references are to the appendix filed with the taxpayer's opening brief. "SA." references are to the supplemental appendix filed with the Commissioner's answering brief. "Br." references are to taxpayer's opening brief.

on October 4, 2017, which the Tax Court then entered as filed on October 10, 2017. (SA.1, 35); Internal Revenue Code ("I.R.C.") (26 U.S.C.) §§ 6213(a) and 7502(a)(1) (timely mailing of Tax Court petition treated as timely filing). The Tax Court had jurisdiction under I.R.C. §§ 6213(a) and 7442. The Tax Court entered a final decision, which resolved all claims of all parties, on March 22, 2021. (A.9, 24-26.) Within ninety days of entry of the Tax Court's decision, taxpayer timely filed a notice of appeal to this Court on May 27, 2021. (A.27-29.) *See* I.R.C. § 7483. This Court has jurisdiction under I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUE

Whether the 10% additional tax imposed by Section 72(t) of the Internal Revenue Code is a tax, rather than a "penalty" as defined in Section 6751(c), for which supervisory approval under Section 6751(b)(1) is not required.

STATEMENT OF THE CASE

A. Overview of the proceedings and disposition of the case in the Tax Court below

In 2017, the IRS issued to taxpayer a notice of deficiency for the 2015 tax year, resulting from taxpayer's failure to pay the 10% additional tax on an early distribution she received from a qualified

retirement plan (as defined in Section 4974(c)), pursuant to Section 72(t). (A.13; SA.3.) Taxpayer petitioned the Tax Court for review. (A.13; SA.1-2.) After taxpayer obtained counsel, taxpayer and the Commissioner moved to submit the case to the Tax Court, without a trial, on the only disputed issue in the case: "application of section 6751"—which requires supervisory approval before the IRS assesses any penalty, addition to tax, or additional amount—"to section 72(t)." (A.13; SA.37-38); *see also* Tax Ct. Rule 122 ("Any case not requiring a trial for the submission of evidence (as, for example, where sufficient facts have been … stipulated …) may be submitted at any time after joinder of issue (see Rule 38) by motion of the parties filed with the Court."). Soon after, the parties filed a joint stipulation of facts. (A.31-33.)

The Tax Court, Judge Michael B. Thornton, held that the Section 72(t) exaction is a tax, the assessment of which does not require supervisory approval under Section 6751(b)(1), and that taxpayer was liable for the $90.86 of additional tax that she owed the IRS under Section 72(t). (A.11, 22-23); *Grajales v. Commissioner*, 156 T.C. 55 (2021). Taxpayer now appeals. (A.27-29.)

B. Legal framework

Two specific statutory provisions are at issue in this case: (1) the 10% exaction in Section 72(t) that generally applies when a taxpayer receives a distribution from a qualified retirement plan prior to age 59½;[2] and (2) the requirement in Section 6751(b)(1) that supervisory approval be obtained before certain civil tax penalties are assessed.

1. The exaction in Section 72(t) for early distributions from qualified retirement plans

Contributions to a qualified retirement plan receive favorable tax treatment. Specifically, the Internal Revenue Code generally defers taxation of such contributions, and of the income earned thereon, until the assets are withdrawn from the retirement plan. *See generally* I.R.C. § 402. Because some participants took advantage of these arrangements and "treat[ed] [their retirement plans] as general savings accounts with favorable tax features rather than as retirement savings arrangements," Congress enacted Section 72(t). S. Rep. No. 99-313, at 612 (1985). Pursuant to Section 72(t)(1), "[i]f any taxpayer receives any

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[2]Section 72(t)(2) sets forth numerous exceptions, including the exception for distributions made on or after the date on which the individual attains age 59½, to the 10% exaction in Section 72(t)(1).

amount from a qualified retirement plan (as defined in section 4974(c)), the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income." Section 72(t)(2) excepts certain distributions from the 10% exaction, including distributions "made on or after the date on which the [taxpayer] attains age 59½." I.R.C. § 72(t)(2)(A)(i). The exaction was designed "to discourage withdrawals and to recapture a measure of the tax benefits that have been provided." H.R. Rep. No. 99-426, at 728-29 (1985); *see also In re Cassidy*, 983 F.2d 161, 164 (10th Cir. 1992) ("the basic purposes of the Section 72(t) exaction was to prevent retirement plans from being treated as savings accounts, to recapture a measure of tax benefits that have been provided prior to the withdrawal, and to deter the use of retirement funds for nonretirement purposes").

2. The supervisory approval requirement in Section 6751(b)(1) for penalties

Pursuant to Section 6751, the IRS cannot assess any "penalty," which "includes any addition to tax or any additional amount," "unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such

determination or such higher level official as the Secretary may designate." I.R.C. §§ 6751(b)(1), (c). Certain types of penalties are excepted from this requirement. I.R.C. § 6751(b)(2). However, Section 6751(b)(1)'s approval requirement does not apply to a tax, which is not a "penalty" for purposes of Section 6751.

C. Statement of the facts

1. Taxpayer's deficient income tax return for 2015 and the resulting notice of deficiency

In 2015, when she was 42 years old, taxpayer took loans in connection with her New York State pension plan, which was a qualified retirement plan under the Internal Revenue Code. (A.12, 31-32.) As a result, the New York State and Local Employees Retirement System sent her a Form 1099-R, listing the distributions taxpayer received from her pension, and it also filed the Form 1099-R with the IRS. (A.12-13, 32, 44, 93.) The form reported that taxpayer received $9,025.86 in gross distributions for tax year 2015. (A.12-13, 32, 44.) Although taxpayer received this early distribution from her pension plan, she failed to report this amount on her federal income tax return. (A.13, 39.)

The Commissioner issued taxpayer a notice of deficiency, determining that she was required to include the early distribution as income in 2015 and that she was liable under Section 72(t) for a 10% additional tax, for a total tax deficiency of $3,030. (A.13, 36-38.)

2. The Tax Court proceedings

Taxpayer petitioned the Tax Court for a redetermination of the deficiency. (A.13; SA.1-2.) The parties fully stipulated to the relevant facts under Tax Court Rule 122, and they agreed that only $908.62 of the 2015 pension plan distributions was taxable as an early distribution. (A.13, 31-33; SA.37.) The parties also jointly moved to submit the case to the Tax Court, without a trial, on the issue of whether the supervisory approval requirement in I.R.C. Section 6751 applies to the exaction in Section 72(t). (A.13; SA.37-38.)

In the briefing before the Tax Court, taxpayer argued that Section 6751(b)(1) applies to the exaction imposed by Section 72(t) because it is a "penalty" or an "additional amount," as those terms are used in Section 6751, and, as such, written supervisory approval was required before the Commissioner could assess the 10% exaction. (A.13.) According to taxpayer, because supervisory approval was not

obtained, she was not liable for the Section 72(t) exaction. (A.13.) The Commissioner argued that the exaction under Section 72(t) was a tax, not a penalty or an additional amount, and that supervisory approval therefore was not required. (A.13-14.)

Agreeing with the Commissioner, the Tax Court held that Section 72(t) imposes a tax, not a penalty. (A.14, 22.) The Tax Court first turned to the text and statutory organization of Section 72(t). As the court found, Section 72(t), which is captioned "10-percent additional tax on early distributions from qualified retirement plans" and is located in the same chapter of the Internal Revenue Code as income taxes, states that "[i]f any taxpayer receives any amount from a qualified retirement plan …, the taxpayer's *tax* under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income." (A.15-16 (quoting I.R.C. § 72(t) and *El v. Commissioner*, 144 T.C. 140, 148 (2015)) (emphasis added).) The Tax Court also noted that, in other contexts, it repeatedly had held that Section 72(t) is a tax, not a penalty, and that other sections of the

Internal Revenue Code referred to Section 72(t) as a tax. (A.15-16 (collecting cases and citing *El*, 144 T.C. at 148).)

The Tax Court rejected taxpayer's argument that the Section 72(t) exaction was an "additional amount" within the meaning of Section 6751(c). (A.17.) The court reasoned that the phrase "additional amount" is "a term of art that refers exclusively to the civil penalties enumerated in chapter 68, subchapter A," especially when it is grouped with the words "tax" and "additions to tax," similar to how it appears in Section 6751(c). (A.17-18 (quoting *Whistleblower 22716-13W v. Commissioner*, 146 T.C. 84, 95 (2016)); *see* I.R.C. § 6751(c) ("For purposes of this section, the term 'penalty' includes any addition to tax or any additional amount.").[3] The court therefore concluded that because the exaction in Section 72(t) is not a penalty enumerated in chapter 68, it also was not an "additional amount," as that phrase is used in Section 6751(c). (A.18.)

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[3] The Tax Court similarly rejected taxpayer's contention that the Section 72(t) exaction was similar to the exaction in Section 72(q), which was labeled a "penalty," and it found no reason to disturb its conclusion that Section 72(t) is a tax just because Section 72(q)(2)(H) prohibits a double exaction under Sections 72(t) and 72(q). (A.18 n.5.) Taxpayer does not raise this argument on appeal, and it therefore is waived. *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 184 (2d Cir. 2006).

The Tax Court explained that its ruling was supported by the Supreme Court's opinion in *National Federation of Independent Business v. Sebelius* (*NFIB*), 567 U.S. 519, 561-69 (2012), in which the Court held that the tax imposed by the individual mandate of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 and codified at I.R.C. § 5000A, is constitutional. (A.18, 20.) The Supreme Court's constitutional analysis of the individual mandate looked to the function of the exaction and concluded that it was a tax. (A.19-20 (citing *NFIB*, 567 U.S. at 565)). But, as the Tax Court noted, for purposes of the Internal Revenue Code's Anti-Injunction Act in Section 7421(a), which prohibits lawsuits that aim to restrain "the assessment or collection of *any tax*," the Court looked to the text of the Affordable Care Act, rather than analyze the function of the exaction. (A.19 (citing *NFIB*, 567 U.S. at 543-44).) Because the Affordable Care Act labeled the individual mandate a "penalty," the Court treated it as such in concluding that the Anti-Injunction Act did not bar the lawsuit before it. (A.19 (citing *NFIB*, 567 U.S. at 543-44).)

As the Supreme Court had done with the Anti-Injunction Act, the Tax Court held that it need look only to the text of Section 72(t) to

resolve a question of statutory construction. (A.21 (citing *NFIB*, 567 U.S. at 544, 564).) The "best evidence of Congress's intent," the Tax Court concluded, was its labeling of Section 72(t) as a tax. (A.21 (quoting *NFIB*, 567 U.S. at 544).) The court found that, in any event, a functional analysis also would support its ruling that the exaction in Section 72(t) is a tax, since it "shares most of the characteristics that *NFIB* cited as supporting its treatment of the individual mandate as a 'tax' for constitutional purposes." (A.21 n.7.) Finally, the Tax Court held that the bankruptcy court cases on which taxpayer heavily relied, and which were "based on the application of bankruptcy policy," were of no avail to the Tax Court's strictly statutory analysis. (A.21-22.)

The Tax Court accordingly held that the exaction in Section 72(t) is a tax and that the written supervisory approval requirement of Section 6751(b) was inapplicable. (A.22.)

SUMMARY OF ARGUMENT

The Section 72(t) 10% exaction on taxpayer's early distribution from a qualified retirement plan is a tax, and because it is a tax, the IRS was not required to obtain written supervisory approval under Section 6751(b)(1), which applies only to penalties, additions to tax, and

additional amounts. The statutory language in Section 72(t) clearly provides that the exaction is a tax, and the section itself is labeled "10-percent additional tax on early distributions from qualified retirement plans." Given this clear evidence of Congress's intent, the Court need look no further than the text itself to resolve this case.

But even if the Court looks to the larger structure of the Internal Revenue Code, and at how other sections in the Code refer to Section 72(t), it will find that Congress has consistently treated the exaction in Section 72(t) as a tax, and not an "additional amount" or "addition to tax" as taxpayer advocates (Br. 9-10). Indeed, all of the other sections of the Code that mention Section 72(t) refer to it as a tax. In contrast, the terms "additional amount" and "addition to tax" discussed in Section 6751(c) are terms of art that refer to the penalties in chapter 68 of the Code. The placement of Section 72(t) in chapter 1, the same chapter as income taxes, rather than in chapter 68, supports the Tax Court's conclusion that it is a tax, not an additional amount or an addition to tax. None of taxpayer's remaining arguments, most of which read words into Section 72(t) that are not there, rebut Congress's clear statutory design and language for Section 72(t).

Taxpayer impermissibly asks the Court to consider the legislative history of Section 72(t), even though there is no ambiguity in the statutory language of that section. But even if the Court considered the legislative history, it should conclude that the exaction in Section 72(t) is a tax. Before Section 6751(c) was enacted, Congress enacted Section 72(t) to recapture taxes, and courts had treated the exaction in Section 72(t) as a tax. If Congress had wanted Section 6751(c) to encompass the exaction in Section 72(t) as a penalty, it could have done so; it did not.

The Supreme Court's decision in *National Federation of Independent Business v. Sebelius* (*NFIB*), 567 U.S. 519 (2012), further supports the Commissioner's position. In that case, the Supreme Court emphasized that for purposes of statutory interpretation, including its analysis of whether the shared responsibility payment under Section 5000A was a tax for purposes of the Anti-Injunction Act of the Internal Revenue Code, the text of the relevant statute controlled. *Id.* at 543-44. For purposes of its constitutional analysis, however, the Court employed a test that looked to the function of the exaction, not just its label. *Id.* at 565. This analysis was the same one courts historically

have applied in the bankruptcy context when deciding whether an exaction is entitled to priority in bankruptcy. *Id.* at 567-68.

Because the relevant inquiry here turns only on the text of Section 72(t) as it relates to another provision of the Internal Revenue Code, Section 6751, the "function" of the exaction it imposes is irrelevant. As the Court in *NFIB* held, Congress's choice of label for purposes of interpreting Code provisions guides the analysis.

Given the differences between the functional analysis that courts apply when examining whether an exaction is a tax entitled to priority in the bankruptcy context and the strictly statutory analysis required here, the bankruptcy cases on which taxpayer relies are inapposite. Moreover, unlike those cases that turned on considerations of bankruptcy policy, no such considerations are implicated here.

ARGUMENT

Section 72(t) imposes a tax for which supervisory approval is not required

Standard of review

This Court reviews whether Section 72(t) imposes a tax, rather than a penalty—a question of pure statutory interpretation—*de novo*. *See Scheidelman v. Commissioner*, 755 F.3d 148, 151 (2d Cir. 2014).

A. The plain language of Section 72(t) and the larger statutory structure establish that the exaction it imposes is a tax

As the Supreme Court held in *NFIB*, the clearest indication of Congress's intent is the statutory text itself. *NFIB*, 567 U.S. at 544 ("the best evidence of Congress's intent is the statutory text"). Section 72(t), which is labeled "10-percent additional tax on early distributions from qualified retirement plans," clearly denominates the exaction that it imposes as a "tax." Section 72(t)(1), entitled "Imposition of Additional Tax," states: "If any taxpayer receives any amount from a qualified retirement plan …, the taxpayer's *tax* under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income." (emphasis added). Congress's intent to treat the Section 72(t) exaction as a tax is also supported by the various other sections of the Internal Revenue Code that expressly refer to it as such. *See, e.g.*, I.R.C. §§ 26(b)(2)(C), 401(k)(8)(D), 401(m)(7)(A), 402(g)(2)(C)(ii), 414(w)(1)(B), and 877A(g)(6).

On the other hand, when Congress has wanted to designate an exaction as a "penalty," "addition to tax," or "additional amount," it has

likewise done so explicitly. *See, e.g.*, § 6651(a) (addition to tax for failure to file return or to pay tax), § 6654(a) (addition to tax for failure to pay estimated income tax), § 6662(a) (accuracy-related penalty), and § 6663(a) (fraud penalty). Yet nowhere does the Code refer to the exaction imposed by Section 72(t) as a "penalty," "addition to tax," or "additional amount."

Given the clear statutory language of Section 72(t) and the related provisions, many Tax Court decisions have held that the exaction in Section 72(t) is a tax for purposes of the Internal Revenue Code. *See, e.g.*, *Williams v. Commissioner*, 151 T.C. 1, 4 (2018) ("section 72(t) imposes a 'tax' rather than a penalty or an addition to tax within the meaning of section 7491(c)" for purposes of placing the burden of production); *El*, 144 T.C. at 148 (similar); *Ross v. Commissioner*, 70 T.C.M. (CCH) 1596, 1995 WL 750120, *6 (T.C. 1995) (Section 72(t) exaction is a "tax" rather than a "penalty" for purposes of the joint and several liability provision of section 6013(d)(3)). These cases arose in different contexts, but, as the Tax Court held (A.17), there is no reason to deviate from them for the purpose of applying Section 6751(b) and (c).

Federal courts have similarly referred to the Section 72(t) exaction as a tax in other contexts. *See, e.g.*, *Kitt v. United States*, 277 F.3d 1330, 1335 (Fed. Cir. 2002) (holding that Section 72(t) exaction is a tax and rejecting taxpayers' characterization of the 10% additional tax as a penalty), *on reh'g in part*, 288 F.3d 1355 (Fed. Cir. 2002); *Eagan v. United States*, 80 F.3d 13, 15 (1st Cir. 1996) ("ten percent additional tax on early distributions under I.R.C. § 72(t)"); *Kute v. United States*, 191 F.3d 371, 372 (3d Cir. 1999) ("ten percent tax imposed by I.R.C. § 72(t)"); *Powell v. Commissioner*, 129 F.3d 321, 326 (4th Cir. 1997) (similar); *Kim v. Commissioner*, 679 F.3d 623, 626 (7th Cir. 2012) (similar). Other courts, including this Court in *In re Dubroff* and the Supreme Court in the two cases that taxpayer cited (Br. 14-15), have, in passing, referred to the exaction as a "tax penalty," thereby avoiding the question presented here. *See, e.g.*, *In re Dubroff*, 119 F.3d 75, 77 (2d Cir. 1997) ("[d]istributions from an IRA before age 59 1/2 are generally subject to a ten percent tax penalty, 26 U.S.C. § 72(t)"); *Clark v. Rameker*, 573 U.S. 122, 125 (2014) ("Unlike with a traditional or Roth IRA, an individual may withdraw funds from an inherited IRA at any time, without paying a tax penalty." (citing Section 72(t)(2)(A)(ii)));

Rousey v. Jacoway, 544 U.S. 320, 323 (2005) (discussing "tax penalty" of Section 72(t)).[4]

Although it is not dispositive, the structure of the Code is also informative. Section 72(t) is part of chapter 1, dubbed "Normal Taxes and Surtaxes," of subtitle A of the Internal Revenue Code. Subtitle A is denominated "Income Taxes."[5] In contrast, most penalties, additional amounts, and additions to tax are in subchapter A ("Additions to the Tax and Additional Amounts") of chapter 68, entitled "Additions to the

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[4] One Supreme Court case, decided before *Clark* and *Rousey*, refers to the exaction as a penalty, but the statement is dictum. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 597 n.9 (2004) (referencing Section 72(t) in discussing variations in statutory definitions of "age").

[5] "To be sure, a subchapter heading cannot substitute for the operative text of the statute," but "statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (internal citations and quotation marks omitted); *see also Matter of Hardee*, 137 F.3d 337, 341 (5th Cir. 1998) ("labels can inform a determination"); *El*, 144 T.C. at 147 n.10 ("Although sec. 7806(b) provides that '[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of' the Code and that 'descriptive matter relating to the contents of * * * [the Code cannot] be given any legal effect', we may consider the similarity of terms and provisions within the Code, as well as any descriptive matter, as an aid to interpretation.").

Tax, Additional Amounts, and Assessable Penalties," of subtitle F. *El*, 144 T.C. at 148. Indeed, Section 6751 itself, which requires supervisory approval for the assessment of a "penalty," "addition to tax," or "additional amount," is also in chapter 68.

Given this structure, the Tax Court repeatedly has held that the terms "additional amounts" and "additions to tax," when used in conjunction, as in Section 6751(c), are "term[s] of art" that refer specifically to the penalties in chapter 68, subchapter A. (A.17 (citing *Whistleblower 22716-13W*, 146 T.C. at 95)); *see also Whistleblower 22716-13W*, 146 T.C. at 93-95 (collecting cases). In *Williams v. Commissioner*, the Tax Court held that FBAR penalties do not constitute "additional amounts" for purposes of the Tax Court's collection due process jurisdiction, and it noted in its analysis that "tax," as used in the relevant statutes, is "broadened by section 6665(a) to include 'additions to the tax, additional amounts, and penalties provided by this chapter [i.e., ch. 68 (secs.6651–6751)],'" but did not include the FBAR penalty of Title 31. 131 T.C. 54, 59 n.6 (2008). This Court recently relied on *Williams* in ruling that "the Tax Court does not have jurisdiction over FBAR penalties because they are not considered

tax deficiencies." *Anand v. Commissioner*, 851 F. App'x 247, 250 (2d Cir. 2021) (summary order) (citing *id.* at 56-59), *cert. denied*, 141 S. Ct. 2760 (2021). This structural analysis, while not meant to substitute for the Court's textual analysis, further supports the conclusion from the latter that the exaction in Section 72(t) is a tax, not a penalty, addition to tax, or additional amount as used in Section 6751(c).

Taxpayer produces a chart purporting to demonstrate that when the phrase "additional amounts" appears in the Code, it is never limited to meaning only the civil penalties enumerated in subchapter A of chapter 68. (Br. 17.) But taxpayer's list is cherrypicked, omitting Code sections containing the phrase "additional amounts" that courts, as noted above, have interpreted as referring only to the civil penalties enumerated in subchapter A of chapter 68. *See, e.g.*, *Whistleblower 22716-13W*, 146 T.C. at 95 (interpreting the phrase "additional amounts" in Section 7623(b)(5)(B)). Taxpayer's list does not contain Section 7623. At the same time, taxpayer fails to mention that the Tax Court has, in fact, held that the term "additional amounts" as used in Sections 6214(a), 6321, and 7491(c)—three of the sections listed in the chart—refers to the penalties in chapter 68. *Bregin v. Commissioner*,

74 T.C. 1097, 1103 (1980) ("as used in chapter 68, the term 'additional amount' means one of the assessable civil penalties referred to in such chapter, and it appears that the same meaning was intended in section 6214(a), especially since it refers to both additional amounts and additions to the tax"); *Williams*, 131 T.C. at 59 n.6 (Section 6321 is broadened to include additions to tax, additional amounts, and penalties of chapter 68); *El*, 144 T.C. at 147 ("The terms 'penalty, addition to tax, or additional amount' [in Section 7491(c)] mirror, in part, the title of chapter 68 of the Code….").

Additionally, taxpayer includes Code sections in the chart in which the phrase "additional amount" does not appear in a series with "additions to tax," *see* Sections 666(b)&(c); 6501(c)(7), and 7447(i)(3)(D), even though numerous courts have concluded that when those phrases appear in a series, "additional amounts" is a term of art. *See Whistleblower 22716-13W*, 146 T.C. at 95. Taxpayer cites instances of the phrase "additional amounts" for which the application of Section 6751(b) would be nonsensical, as such "additional amounts" concern items of deduction or income, which are not assessed. *See* I.R.C. § 63(c)(3) ("additional amount" refers to an additional amount of

deduction granted to certain taxpayers); I.R.C. § 456(d)(1) ("additional amount" refers to an item of gross income). Taxes are assessed, *see* Section 6201(a); deductions and income, which are prefatory to a determination of tax liability, are not. Taxpayer is clearly grasping at straws with this argument.

Nor is there any support for taxpayer's argument (Br. 8) that Section 6751 is a relief provision that should be broadly construed. The case taxpayer cites, *Rice Drug Co. v. Commissioner*, 10 T.C. 642, 642 (1948), has no relation to Section 6751 and was decided before Section 6751 was enacted.

Taxpayer's remaining arguments for why Section 72(t) cannot be a tax also fail. Taxpayer suggests that Section 72(t) must be an "addition to tax" or "additional amount" because the statute says that taxpayer's tax "shall be increased." (Br. 6, 10) But that phrase, as written, modifies "taxpayer's tax," meaning only that the exaction in Section 72(t) is an *increase in the tax* amount, not an addition.

Taxpayer also argues (Br. 10) that the 10% exaction in Section 72(t) is not calculated in the same manner as regular income tax. But there are various types of income taxes, like the alternative

minimum tax and the self-employment tax—both of which also appear in subtitle A of the Code—that are calculated differently from regular income tax. *See Ross*, 1995 WL 750120, at *6. Moreover, the exaction in Section 72(t) is based on a percentage of the amount withdrawn prematurely from a qualified retirement account because it was designed to recapture a measure of the tax benefits provided with respect to those funds when they were contributed on a pre-tax basis and allowed to grow on a tax-deferred basis. *See* H.R. Rep. No. 99-426, at 728-29.

Finally, taxpayer's argument about the caption of Section 72(t)—that the word "additional" in "10-percent additional tax" must mean that the exaction is a penalty (Br. 20-21)—conflates the caption as written with the phrase "additional amounts." Had Congress wanted to use the technical phrase "additional amounts" in the title of Section 72(t), *see supra* 19-20, it could have done so. It instead chose the phrase "10 percent additional tax."

B. Congress's designation of the exaction in Section 72(t) as a "tax" is controlling

There is no need for this Court to resort to the legislative history that taxpayer includes in her brief (Br. 13) because the statutory

language of Section 72(t) is clear. "Well-established principles of construction dictate that statutory analysis necessarily begins with the 'plain meaning' of a law's text and, absent ambiguity, will generally end there." *Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004).

In any event, the legislative history indicates that the exaction in Section 72(t) is a tax; it was enacted to "impose an additional income tax on early withdrawals" and, in part, "to recapture a measure of the tax benefits provided" to taxpayers that make early withdrawals from their tax-favored retirement accounts. *El*, 144 T.C. at 148 n.13 (citations omitted). Furthermore, Section 72(t) was enacted in 1986 and referred to the exaction as a tax well in advance of the enactment of Section 6751 in 1998. *See* Tax Reform Act of 1986, Pub. L. 99-514, Title XI, § 1123, 100 Stat. 2085 (1986); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, Title III, § 3306(a), 112 Stat. 685 (1998). Courts "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

Moreover, the Supreme Court in *NFIB*, 567 U.S. at 543-44, made clear that for strictly statutory analyses of the Internal Revenue Code,

like the one the Court must apply here, courts need not look beyond the language Congress has written in the statute. In *NFIB*, when the Court upheld the constitutionality of the Affordable Care Act, it held that the individual mandate, or "shared responsibility payment," is a tax for *constitutional* purposes, applying a "functional analysis" of the exaction that looked beyond the exaction's label. *NFIB*, 567 U.S. at 561-69. But when the Supreme Court in *NFIB* analyzed whether it had authority to decide the case under the Anti-Injunction Act of the Internal Revenue Code, the function of the exaction was irrelevant. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." I.R.C. § 7421(a). As the Court in *NFIB* held, whether an exaction is a "tax," as that term is used in the Anti-Injunction Act, is highly dependent on the label Congress gives to the exaction. *Id.* at 543-44. The Court explained that it has "applied the Anti-Injunction Act to statutorily described 'taxes' even where that label was inaccurate." *See id.* at 544 (*citing Bailey v. George,* 259 U.S. 16 (1922)). Thus, the Court focused on "[t]he text of the pertinent statutes" as "the best evidence of Congress's intent." *Id.* at 543-44.

Both Section 72(t) and Section 6751(b) are located in the Internal Revenue Code, just as the Anti-Injunction Act. As the Supreme Court in *NFIB* held in regard to the Anti-Injunction Act, “it is up to Congress” whether a provision of the Code should be treated as a tax or a penalty, “so it makes sense to be guided by Congress’s choice of label.” *Id.* at 564. Thus, here, the relevant inquiry turns on the meaning of Congress’s statutory designation, and the function of the exaction is immaterial. Congress clearly intended for the 10% exaction in Section 72(t) to be a tax, labeling it as such and organizing it among other taxes. *See supra* 15-16, 18-19. For purposes of the Internal Revenue Code, these aspects of the exaction in I.R.C. § 72(t) are paramount.

C. The bankruptcy cases on which taxpayer relies are inapposite

The Tax Court correctly set aside the bankruptcy cases on which taxpayer relied as “not controlling.” (A.21-22 (quoting *Ross*, 1995 WL 750120, at *6).)

Primarily, the courts in those cases applied the functional test to determine whether an exaction was entitled to priority in bankruptcy, rather than the statutory analysis applicable here. The functional

analysis that the Court in *NFIB* applied when it held that the shared responsibility payment is a tax for constitutional purposes is the same one courts historically have applied when determining whether an exaction is a tax for purposes of the bankruptcy priority statute (11 U.S.C. § 507). *Id.* at 565. Indeed, the *NFIB* Court took note of precedent from the bankruptcy context when considering the functional analysis for purposes of constitutionality. *Id.* at 565-67 (citing *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996), and *United States v. Sotelo*, 436 U.S. 268, 275 (1978)). But, as discussed above, this test was irrelevant when the Court analyzed the shared responsibility payment for purposes of the Internal Revenue Code. *See supra* 25-26.

Thus, the bankruptcy cases taxpayers cited for support are inapposite. In each of those cases, the courts examined the function of the exaction in deciding whether or not it was entitled to priority in bankruptcy. *See In re Cespedes*, 393 B.R. 403, 404 (Bankr. E.D.N.C. 2008); *In re Bradford*, 534 B.R. 839, 841 (Bankr. M.D. Ga. 2015); *In re Cassidy*, 983 F.2d at 161; *In re Daley*, 315 F. Supp. 3d 679, 681 (D. Mass. 2018). As the court in one of the cases taxpayer cited said, "[t]he

Tax Code and its application are internally consistent on the concept that the I.R.C. § 72(t) Exaction is a 'tax' for the purposes of the Tax Code." *In re Bradford*, 534 B.R. at 844 n.6. That court nevertheless ruled that the Section 72(t) exaction was a penalty for purposes of determining bankruptcy priority, because under that analysis, the court asked "whether the I.R.C. § 72(t) Exaction serves a *function* that entitles it to priority as a tax *under the Bankruptcy Code*." *Id.* (emphasis added).

Those cases also are not relevant because they implicate the Bankruptcy Code and bankruptcy policy, not just the Internal Revenue Code. In cases involving only the statutory interpretation of the Internal Revenue Code, the Court is "guided by Congress's choice of label." *NFIB*, 567 U.S. at 564. But in the bankruptcy context, courts are concerned with "protecting unsecured creditors from the bad conduct of the debtor," which "is best implemented by avoiding burdening the claims of unsecured creditors with penalties that are imposed on the debtor." *In re Cassidy*, 983 F.2d at 164. There is no similar concern in the Tax Code, nor any policy at issue here that would require looking beyond Congress's labels.

CONCLUSION

For the foregoing reasons, the judgment of the Tax Court should be affirmed.

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It is hereby certified that, on December 21, 2021, (1) six paper copies of this brief were mailed to the Court, and (2) I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. Appellant, who is registered with CM/ECF, will be served by the CM/ECF system.

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