No. 21-1420

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 United States Tax Court
(Tax Court Docket No. 21119-17)
Honorable Michael Thornton, United States Tax Court Judge

BRIEF FOR PETITIONER-APPELLANT

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JURISDICTIONAL STATEMENT

On July 10, 2017, the Commissioner of Internal Revenue ("Commissioner") sent Ms. Grajales a notice of deficiency (the "Notice of Deficiency"). The Notice of Deficiency determined that Ms. Grajales had an income tax deficiency of $3,030.00 for 2015. As part of the income tax deficiency, the Commissioner determined that Ms. Grajales (sometimes "Taxpayer") was liable for the 10% exaction, prescribed by § 72(t).[1]

On October 10, 2017, Ms. Grajales timely petitioned the United States Tax Court, requesting the Tax Court redetermine her income tax deficiency.

On November 6, 2018, the parties submitted this case under Tax Court Rule 122, which allows for the submission of cases based on a stipulated record (i.e., without trial). The sole issue for decision was whether § 72(t)-based exactions are considered a penalty, additional amount, or addition to tax (sometimes "Penalties") under § 6751(b)(1). (A007.)

On January 25, 2021, the Tax Court issued an opinion (156 T.C. No. 3) (the "Opinion") determining that § 72(t)-based exactions are not Penalties and that the condition precedent to the assessment of penalties in § 6751(b) did not apply. The Tax Court's decision was entered on March 22, 2021.

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[1] All Section ("§") references are to the relevant version of the Internal Revenue Code.

Ms. Grajales timely filed her notice of appeal on or about May 27, 2021. Venue is proper because Ms. Grajales is a resident of the State of New York. I.R.C. § 7482(b).

STATEMENT OF THE ISSUE

Whether the 10% exaction under § 72(t) is a Penalty as defined by § 6751(c) triggering the supervisory approval requirement of § 6751(b).

STATEMENT OF THE CASE

Ms. Grajales appeals from the January 25, 2021 order of the United States Tax Court (Honorable Michael Thornton) determining that she is liable for the § 72(t)-based exaction. The § 72(t) exaction is a penalty, additional amount, or addition to tax under § 6751(c), requiring supervisory approval under § 6751(b). Here, the Commissioner's employees did not obtain supervisorial approval before issuance of the Notice of Deficiency. (A032.) Section 6751(b)(1) provides "[n]o penalty under this title shall be assessed 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." Consequently, the Commissioner's assessment of a penalty against Ms. Grajales is void.

<u>Background</u>

Ms. Grajales is an employee of the State of New York. As part of her employment, she participates in a pension plan. In 2015, Ms. Grajales borrowed from her pension plan. The State of New York sent Ms. Grajales and the Commissioner a Form 1099-R, *Distribution Form Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.*, stating that she had taxable income of $9,026.00. The Commissioner determined that Ms. Grajales's loan from her pension plan did not meet the exceptions under § 72(p)'s general rule that loans from pension plans are treated as distributions and included in income.

On July 10, 2017, the Commissioner issued the Notice of Deficiency, reflecting the Form 1099-R distribution, and determined that Ms. Grajales had an income tax deficiency of $3,030.00 for 2015. In addition to the income tax liability, the Commissioner determined that Ms. Grajales was liable for the 10% exaction under § 72(t), amounting to $<u>*902.60*</u>.

On October 10, 2017, Ms. Grajales timely petitioned the United States Tax Court, requesting the Tax Court redetermine her income tax deficiency. The parties thereafter agreed that the additional includible income from Ms. Grajales's pension loans was <u>*$908.62*</u>, rather than $9,026.00. The parties also agreed that if she were

liable for an exaction under § 72(t), the amount assessed would be $*90.86*, rather than $902.60.

On November 6, 2018, the parties moved to submit this case under Tax Court Rule 122 with the sole issue being whether § 72(t) exactions are considered a penalty, additional amount, or addition to tax under § 6751(b)(1) and (c).

On January 25, 2021, the Tax Court issued the Opinion determining that § 72(t) exactions are taxes and not penalties, additional amounts, or additions to tax. The Tax Court's decision was entered on March 22, 2021.

Procedural History Before the Tax Court

Ms. Grajales filed a petition with the Tax Court on October 10, 2017, contesting the Commissioner's deficiency determination.

On November 16, 2018, the parties agreed to submit the matter to the Tax Court for decision, on a stipulated record, without trial.

On January 25, 2021, the Tax Court issued the Opinion determining that § 72(t)-based exactions are not subject to the supervisory approval requirement of § 6751(b).

On March 22, 2021, the Tax Court entered its decision.

On May 27, 2021, Ms. Grajales filed her notice of appeal.

Rulings Presented for Review

In its January 25, 2021 Opinion, the Tax Court held that the § 72(t) exaction was a tax and not a penalty, additional amount, or addition to tax for purposes of § 6751(b), which requires supervisorial approval before determination of a penalty, additional amount, or addition to tax.

Ms. Grajales appeals the Opinion in its entirety and asks this Court to determine that § 72(t) is a penalty, additional amount, or addition to tax for purposes of § 6751(b) and that supervisorial approval of the § 72(t) exaction is required before its assertion.

SUMMARY OF ARGUMENT

The Commissioner determined that Ms. Grajales's loan from her pension plan did not meet any of the exceptions prescribed by § 72(p), so the amounts received were treated as a distribution and included in her income. The parties agreed that the additional includible income from Ms. Grajales's pension loan was $908.62. The parties also agreed that if she were liable for an exaction under § 72(t), the amount assessed would be $90.86.

The plain language of § 72(t) instructs that the exaction imposed is an amount payable on top of the regular tax. Since the § 72(t) exaction is an amount that is payable in addition to the regular tax, it is either a penalty, addition to tax, or additional amount under § 6751(c). If § 72(t) is a penalty, addition to tax, or additional amount, then the Commissioner must comply with the supervisorial approval requirements in § 6751(b) before sending a Notice of Deficiency asserting the § 72(t) exaction.

Ms. Grajales asks this Court to determine that § 72(t) is not a tax for purposes of § 6751(b), and that supervisorial approval is required before the Commissioner can determine a §72(t) exaction against a taxpayer.

ARGUMENT

Standard of Review

The Tax Court determined that the supervisorial approval requirements of § 6751(b) do not apply to the Commissioner's assessment of amounts under § 72(t). Ms. Grajales appealed. This Court reviews "decisions of the tax court 'in the same manner and to the same extent as decisions of the district courts in civil actions.'" *Williams v. Comm'r*, 718 F.3d 89, 91 (2d Cir. 2013) (quoting I.R.C. § 7482(a)(1)). Here, Ms. Grajales asks the Court to determine whether the exaction prescribed by § 72(t) is a Penalty as defined by § 6751(c). This is a question of the proper interpretation of two federal statutes. Questions of statutory interpretation are reviewed de novo. *United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002).

Point I

The Plain Language of § 72(t) Creates An Exaction That Is More Than The Regular Tax; Its Assessment Is Subject To § 6751(b).

The Tax Court incorrectly determined that the supervisorial approval requirements of § 6751(b) do not apply to the Commissioner's assessment of amounts under § 72(t). The holding ignores the plain language of §§ 6751(c) and 72(t).

"It is a basic rule of statutory construction that a court begin with 'the plain and ordinary meaning of statutory terms.'" *Garcia v. Teitler*, 443 F.3d 202, 207 (2d Cir. 2006) (quoting *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 56 (2d Cir. 2002)).

Section 6751(b)(1) provides: "No penalty under this title shall be assessed 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." (Emphasis added.)

Section 6751(c) explains "[f]or purposes of this section, the term 'penalty' includes any addition to tax or any additional amount." (Emphasis added.)

Relief provisions, such as those in § 6751, are to be broadly construed. *See Rice Drug Co. v. Comm'r*, 10 T.C. 642, 646 (1948).

Section 72 defines what pension distributions are subject to income tax. Section 72 provides: "Except as otherwise provided in this chapter, gross income includes any amount received as an annuity (whether for a period certain or during one or more lives) under an annuity, endowment, or life insurance contract." I.R.C. § 72(a)(1).

Section 72(t) penalizes early distributions. Specifically, § 72(t)(1) provides:

> 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.

I.R.C. § 72(t)(1) (emphasis added). Section 72(t)(2) explains what distributions are not subject to the Penalty.

The "taxpayer's tax" is determined under section 1 by applying the tables in that section to the taxpayer's "taxable income," which is the taxpayer's "gross income minus the deductions allowed by this chapter." I.R.C. § 63(a). Thus, a "taxpayer's tax" is based on the amount "includible in gross income." As noted, the parties have agreed that Ms. Grajales received a non-qualifying loan that resulted in $*908.62* being included in her gross income, causing a tax of $135.00. The open question is what is the additional $90.86 exaction under § 72(t) – a tax or an additional amount?

Meriam Webster defines "additional" as "more than is usual or expected"

and amount as "a principal sum and the interest on it." Merriam-Webster's Unabridged Dictionary, available at https://www.merriam-webster.com/dictionary/additional and https://www.merriam-webster.com/dictionary/amount. Thus, the plain language shows that an additional amount is a principal sum that is more than expected or usual.

Because § 72(t) uses the amount includible in gross income again to add 10% to the "taxpayer's tax," that 10% is something different from the "taxpayer's tax." In other words, that 10% is a quantity added to the usual tax. Section 72(t) requires an additional $*90.86* be added to that tax. The added amount is not a tax; it is a separate exaction based on income that has already been taxed (i.e., an addition to tax or an additional amount).

To that end, the § 72(t) exaction is not calculated in the same way as the "taxpayer's tax." The § 72(t) exaction does not account for any losses or deductions available to the taxpayer. It is simply 10% of the amount includible in gross income with no consideration of the taxpayer's other income or losses. Thus, a taxpayer might have no income tax obligation, yet still be subject to the § 72(t) exaction.

The plain language of § 72(t) compels the conclusion that it does not authorize a tax. Instead, it imposes an amount in addition to the regular income tax. Thus, for purposes of § 6751(c), the § 72(t)-based exaction is a "Penalty."

Point II

The Exaction Under § 72(t) Is Intended To Discourage Certain Behavior. Like Penalties, Its Purpose Is Penal.

The Tax Court overlooked that § 72(t)'s purpose is penal. Generally, penalties support voluntary compliance by assuring compliant taxpayers that tax offenders are identified and penalized. IRM, pt. 20.1.1.2.1(7) (Nov. 25, 2011). In other words, penalties deter conduct disfavored by Congress. The exaction under § 72(t) deters the use of retirement funds that receive beneficial tax treatment for nonretirement purposes. Thus, Congress intended it to be a Penalty.

When analyzing statutes, the "inquiry begins with the plain language of the statute and 'where the statutory language provides a clear answer, it ends there as well.'" *Peralta-Taveras v. Attorney General*, 488 F.3d 580, 584 (2d Cir. 2007) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). However, "[i]f the text of a statute is ambiguous, we must look to the statute as a whole and construct an interpretation that comports with its primary purpose and does not lead to anomalous or unreasonable results." *Connecticut ex rel. Blumenthal v. U.S. Dept. of Interior*, 228 F.3d 82, 89 (2d Cir. 2000) (emphasis added).

Congress enacted § 72(t) to deter taxpayers from making early withdrawals from retirement plans:

> ***Present law imposes withdrawal sanctions*** with respect to certain tax-favored retirement arrangements and requires withdrawal restrictions to be provided under others. The absence of withdrawal restrictions in the case of some tax-

favored arrangements allows participants in those arrangements to treat them as general savings accounts with favorable tax features rather than as retirement savings arrangements. Moreover, taxpayers who do not have access to such arrangements, in effect, subsidize the general purpose savings of those whose employers maintain plans with liberal withdrawal provisions.

Although the committee recognizes the importance of encouraging taxpayers to save for retirement, the committee also believes that tax incentives for retirement savings are inappropriate unless the savings generally are not diverted to nonretirement uses. ***One way to prevent such diversion is to impose an additional income tax on early withdrawals from tax-favored retirement savings arrangements in order to discourage withdrawals and to recapture a measure of the tax benefits that have been provided.*** Accordingly, the committee believes it appropriate to apply an early withdrawal tax to all tax-favored retirement arrangements. For the same reasons, the committee believes it is appropriate to limit the extent to which participants may make hardship withdrawals from a qualified cash or deferred arrangement.

Moreover, the committee is concerned that the present-law level of the additional income tax ***appears in many instances to be an insufficient deterrent to the use of retirement funds for nonretirement purposes***, because for taxpayers whose income is taxed at a higher marginal rate, the sanction may be neutralized by the tax-free compounding of interest after a relatively short period of time, particularly with respect to amounts contributed to a retirement arrangement on a before-tax basis. Accordingly, the committee believes it to be appropriate to increase the tax from 10 to 15 percent.... The committee recognizes that actual retirement may commonly commence before age 59–1/2 in some industries and, therefore, provides an exception to the tax for the early commencement of a participant's benefits. The committee also believes it appropriate to provide, under limited

> circumstances, an exemption from the tax for certain withdrawals on account of specified hardships.

S.Rep. No. 99–313, at 612–13 (1985) (emphasis added). This legislative history is summarized in *In re Cassidy*, 983 F.2d 161, 164 (10th Cir. 1992):

> The legislative history indicates that the ***basic purpose 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. (Emphasis added).

In *Cassidy*, the Tenth Circuit concluded that the purpose of § 72(t) as was to prevent certain actions and to deter others. The bankruptcy court reached a similar conclusion in *In re Bradford*, 534 B.R. 839, 861 (Bankr. M.D. Ga. 2015):

> Although there is one phrase in this legislative history indicating a recognition that the exaction might allow the "recapture" of some lost tax revenue, that single reference pales in comparison to the lengthy and detailed discussion concerning the ***anticipated deterrent impact of the law***. This slight indication that Congress contemplated some revenue benefit from the exaction on these "inappropriate" tax benefits ***is not a sufficient basis to hold that the provision has the root purpose of supporting the government***. (Emphasis added).

The Supreme Court has explained that "[i]n distinguishing penalties from taxes . . . 'if the concept of penalty means anything, it means punishment for an unlawful act or omissions.'" *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 567 (2012) (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

This is significant here for two reasons. First, the § 72(t) exaction functions as a punishment for actions (i.e., early withdrawal of a pension). Second, *Sebelius* is relied on by several of the bankruptcy courts to determine that § 72(t) is a penalty and not a tax. *See In re Daley*, 315 F. Supp. 3d 679, 682 (Bankr. D. Mass.); *see also In re Bradford*, 534 B.R. at 853.

Several bankruptcy courts have concluded that the exaction under § 72(t) is a tax or penalty for bankruptcy purposes. In *In re Daley*, 315 F. Supp. 3d at 683, the District Court for Massachusetts not only held that § 72(t) is a penalty and not a tax, but it also concluded "that the primary purposes of § 72(t) in the context of the Bankruptcy Code is to deter taxpayers from making early withdrawals from qualified retirement plans and not to compensate the government for lost revenue."

Similarly, in *In re Cespedes*, 393 B.R. 403, 409 (Bankr. E.D.N.C. 2008), the bankruptcy court held "that the 10% early IRA withdrawal assessment is a penalty that is not compensation for actual pecuniary loss[.]" Also, in *In re Bradford*, "the Court conclude[d] that the primary purpose and function of the I.R.C. § 72(t) Exaction is not to support the government, but rather to deter an 'inappropriate' use of tax-preferred retirement accounts." *Bradford*, 534 B.R. at 865.

The Supreme Court, although not specifically dealing with this issue, has also referred to the § 72 exaction as a penalty. In *Clark v. Rameker*, 573 U.S. 122, 125 (2014), the Court, discussing IRAs, stated "[t]o ensure that both types of IRAs

were used for retirement purposes and not as general tax-advantaged vehicle, Congress made certain withdrawals from both types of accounts subject to a 10 percent penalty if taken before an accountholder reaches the age of 59 ½. See §§ 72(t)(1)-(2)[.]" In *Rousey v. Jacoway*, 544 U.S. 320, 323 (2005), the Court stated that "[w]ithdrawals made before the accountholder turns 59 ½ are, with limited exceptions, subject to a 10-percent tax penalty. § 72(t)." The Court in *Rousey* continuously referred to the § 72(t) exaction as a penalty and discussed the "permit[ted] penalty-free early withdrawals" allowed under § 72. *Id.* at 332–33. Thus, although it did not specifically hold that § 72(t) was a penalty, the Supreme Court has acknowledged that it is a penalty.

Several courts, including the Supreme Court, have determined the § 72(t) exaction is penal and have concluded it to be a penalty.

The purpose and function of § 72(t) instructs that it is a Penalty rather than a tax. It is not meant as a revenue generating mechanism for the government but a deterrent against certain conduct.

Point III

Section 72(t) Imposes An Additional Amount Or Addition To Tax As Defined By § 6751(c).

Against this background, the Tax Court incorrectly rejected Ms. Grajales's argument that the plain language of § 72(t) imposes an additional amount or addition to tax for purposes of § 6751(c). Specifically, the Tax Court incorrectly determined:

> In particular, we reject petitioner's argument that the section 72(t) exaction is properly considered to be an "additional amount" within the meaning of section 6751(c). "[W]e have ***consistently held that 'additional amounts,' particularly when it appears in a series that also includes 'tax' and 'additions to tax,' is a term of art that refers exclusively to the civil penalties enumerated in chapter 68, subchapter A***." Whistleblower 22716-13W v. Commissioner, 146 T.C. 84, 95 (2016); see also Williams v. Commissioner, 131 T.C. 54, 59 n.6 (2008); Pen Coal Corp. v. Commissioner, 107 T.C. 249, 258 (1996); Bregin v. Commissioner, 74 T.C. 1097, 1102-1103 (1980). "[A]dditional amount" appears in section 6751(c) in conjunction with the terms "penalty" and "addition to tax". Because the section 72(t) exaction is not a civil penalty enumerated in chapter 68, it is not an "additional amount" within the meaning of section 6751(c).

Grajales, 156 T.C. No. 3, slip. op. at 7 (emphasis added).

First, the term "additional amount" appears in twenty-two sections of the Internal Revenue Code:

CODE SECTIONS REFERENCING ADDITIONAL AMOUNT	DEFINITION OF ADDITIONAL AMOUNT
63(c)(3)	None
456(d)(1) & (2)	None
666(b) & (c)	Cross-references into section 661(a)(2), which provides: any other amounts properly paid or credited or required to be distributed for such taxable year;
965(i)(5)	None
6214(a)	None
6221(a)	None
6226(c)(1)	None
6233(a)(1)(B), (a)(3), (b)(1)(B) & (b)(3)	None
6234(b)(1) & (c)	None
6321	None
6324A(a)	None
6404(g)(1)(A) & (g)(2)(A)-(E)	None
6423(d)(2)	The term "tax" includes a tax and an exaction denominated a "tax", and any penalty, addition to tax, additional amount, or interest applicable to any such tax.
6501(c)(7)	None
6601(e)(2)(A)	None
6602	None
6751(c)	None
7122(b)(2) & (3)	None
7447(i)(3)(D)	None
7491(c)	None
7508(a) & (e)(1)	None
7508A(a)(2)	None

Contrary to the Tax Court's holding, none of the Code sections incorporating the term "additional amount" limits its meaning to only the civil penalties enumerated in chapter 68, subchapter A.

More important, the Tax Court erred because, by definition, the notice and supervisory approval requirements of § 6751 apply to additional amounts and additions to tax imposed by the entire title (i.e., title 26, the Internal Revenue Code) and not just chapter 68 of the Code.

Thus, without repeating the analysis of the rules of construction referred to in Points I & II, the Tax Court's limitation of the applicability of "additional amount" and "addition to tax" in § 6751 to only those "additional amounts" referred to in chapter 68 is not supported by the plain language of § 6751.

Point IV

The Tax Court's Reliance on *El* is Misplaced and Ignores § 7806.

The Tax Court relied upon *El v. Comm'r,* 144 T.C. 140, 148 (2015) to determine that § 72(t) is not a Penalty for § 6751(b) purposes. *El* is wrongly decided.

El examined whether the § 72(t) exaction was "a 'penalty, addition to tax, or additional amount' within the meaning of section 7491(c)." *El v. Comm'r*, 144 T.C. at 148 (quoting I.R.C. § 7491(c)). *El* held that the § 72(t) exaction was not a penalty because: (1) the title of the section refers to § 72(t) as an "additional tax"; (2) other sections of the Code refer to it as a tax under § 72(t); and (3) § 72(t) is found in subtitle A, chapter 1 of the Code, "Income Taxes." The *El* Court overlooked § 7806 and the applicable rules of statutory construction.

Section 7806 provides:

> *(a) Cross references*. The cross references in this title to other portions of the title, or other provisions of law, where the word "see" is used, are made only for convenience, and shall be given no legal effect.
>
> *(b) Arrangement and classification*. No 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 this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the

> sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law.

The plain language of § 7806 establishes that *El*'s analysis of the relevance of titles and the arrangement of the Code sections is incorrect. *Compare Rowen v. Comm'r*, 156 T.C. No. 8, Slip Op. at 7, n. 9 (2021) ("Although the caption of section 7345 reads '*Revocation or Denial of Passport in Case of Certain Tax Delinquencies*,' the caption does not have the force of law[.]"); and *CF & I*, 518 U.S. at 223 ("the Government has disclaimed reliance on the subtitle heading as authority for its position in this case, recognizing the provision of 26 U.S.C. § 7806(b) that no inference of legislative construction should be drawn from the placement of a provision in the Internal Revenue Code."). Stated another way, labels can be informative, but "a subchapter heading cannot substitute for the operative text of the statute." *Florida Dept. of Revenue v. Picadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008).

El is also wrong because, even it was appropriate to consider the captions, it ignores the Code's use of the word "<u>additional</u>" in § 72(t)'s captions ("10-Percent Additional Tax" and "Imposition of Additional Tax"). It is "'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The Tax Court in *El* disregarded the term

"additional" when analyzing whether the statute was an additional amount and its refusal to consider the term "additional" makes that term superfluous and void. The analysis in *El* was incomplete and incorrect.

Turning to the plain language of § 72(t), it imposes an exaction that is added to the regular tax (i.e., an additional amount). Section 6751(c) provides: "the term 'penalty' includes any *addition to tax or any additional amount*." Thus, § 6751(b) broadly requires supervisorial approval for all penalties, additions to tax, and additional amounts. Stated another way, § 6751(b) requires supervisorial approval for any additional amount imposed by § 72(t).

[CONCLUSION ON NEXT PAGE]

CONCLUSION

The Tax Court's January 25, 2021 Opinion should be reversed.

Date: September 24, 2021

Respectfully submitted,[2]

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[2] Timothy Middleton and Conor Kennedy from the Rutgers Federal Tax Law Clinic also significantly contributed to the preparation of this brief.

STATUTORY ADDENDUM

26 U.S.C. § 72(t) – 10-PERCENT ADDITIONAL TAX ON EARLY DISTRIBUTIONS FROM QUALIFIED RETIREMENT PLANS

(1) IMPOSITION OF ADDITIONAL TAX
If any taxpayer receives any 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.

(2) SUBSECTION NOT TO APPLY TO CERTAIN DISTRIBUTIONS Except as provided in paragraphs (3) and (4), paragraph (1) shall not apply to any of the following distributions:
(A) In general Distributions which are—
(i) made on or after the date on which the employee attains age 59½,
(ii) made to a beneficiary (or to the estate of the employee) on or after the death of the employee,
(iii) attributable to the employee's being disabled within the meaning of subsection (m)(7),
(iv) part of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of such employee and his designated beneficiary,
(v) made to an employee after separation from service after attainment of age 55,
(vi) dividends paid with respect to stock of a corporation which are described in section 404(k),
(vii) made on account of a levy under section 6331 on the qualified retirement plan, or
(viii) payments under a phased retirement annuity under section 8366a(a)(5) [3] or 8412a(a)(5) of title 5, United States Code, or a composite retirement annuity under section 8366a(a)(1) [3] or 8412a(a)(1) of such title.

* *

26 U.S.C. § 6751 – Procedural Requirements

(a) COMPUTATION OF PENALTY INCLUDED IN NOTICE
The Secretary shall include with each notice of penalty under this title information with respect to the name of the penalty, the section of this title under which the penalty is imposed, and a computation of the penalty.

(b) APPROVAL OF ASSESSMENT

(1) IN GENERAL

No penalty under this title shall be assessed 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.

(2) EXCEPTIONS Paragraph (1) shall not apply to—

(A) any addition to tax under section 6651, 6654, 6655, or 6662 (but only with respect to an addition to tax by reason of subsection (b)(9) thereof); or

(B) any other penalty automatically calculated through electronic means.

(c) PENALTIES

For purposes of this section, the term "penalty" includes any addition to tax or any additional amount.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(g)

It is hereby certified that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,288 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word word processing program in 14-point font size and Times New Roman style.

Date: September 24, 2021

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CERTIFICATE OF SERVICE

It is hereby certified that on September 24, 2021, I electronically filed the foregoing Brief for Petitioner-Appellant with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. Counsel for the Respondent-Appellee is a registered CM/ECF user and will be served by the CM/ECF system. It is further hereby certified that, I will mail to the Clerk of the Court of the United States Court of Appeals for the Second Circuit six paper copies of the foregoing Brief for Petitioner-Appellant.

Date: September 24, 2021

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