UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Number: 12-70259

JEFFREY K. and KRISTINE K. BERGMANN,

Petitioners and Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

Appeal from the United States Tax Court
Case No. 20894-05
Judge Diane L. Kroupa

REPLY BRIEF OF APPELLANTS
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INTRODUCTION

Appellants claimed certain losses in their original 2001 tax return. On March 15, 2004, Appellants amended that return by removing those losses. Subsequently, Respondent issued Appellants a notice of deficiency and assessed Appellants a penalty for having claimed the losses in their original 2001 return.

At issue is whether the amended return for 2001 is a "qualified amended return" ("QAR"), which is a term defined by regulation. If the amended return is a "qualified amended return", then Appellants will not owe any penalties for having originally claimed the losses. On the other hand, if the amended return is not a "qualified amended return", then Appellants will owe a 20% accuracy related penalty with respect to those losses.

The opinion of the Tax Court concluded that the amended filed by Petitioners in March 2004 for tax year 2001 was not a QAR under 26 C.F.R. § 1.6664-2(c). As a result, the Tax Court upheld the accuracy related penalty imposed on Appellants by the IRS under 26 U.S.C. § 6662(a).

Appellants contend that, in making its determination that Appellants amended tax return did not qualify as a QAR, the Tax Court erroneously applied a later enacted and inapplicable version of the regulation concerning QARs. The regulation in effect at the time of the filing of Appellants' amended return, 26 C.F.R. § 1.6664-2(c)(3)(ii), required that, in order to conclude the time period

in which Appellants could permissibly file a QAR, the Tax Court was required to find that: 1) KPMG is a person described in 26 U.S.C. § 6700(a); and 2) the contact with KPMG by the IRS must be concerning an examination of an activity described in 26 U.S.C. § 6700(a) with respect to which Appellants claimed a tax benefit.

To qualify as a person described in 26 U.S.C. § 6700(a), KPMG must have both: (1) organized or participated in the sale of a tax shelter; *and* (2) made or furnished (or caused another to make or furnish) a false or fraudulent statement.

The Tax Court made no finding that KPMG made or furnished (or caused another to make or furnish) any false or fraudulent statements. Furthermore, the Tax Court did not find that the summonses referenced Appellants or the specific transaction that resulted in the losses claimed by Appellants' in their original return. In the absence of such findings, KPMG cannot be a person described in 26 U.S.C. § 6700(a).

Since KPMG cannot be a person described in 26 U.S.C. § 6700(a), and since the summonses did not specifically reference Appellants and the transactions they entered into, under 26 C.F.R. § 1.6664-2(c)(3)(ii), the time in which Appellants could file a QAR had not expired at the time they filed their amended return.

THE REGULATION DEFINING THE TERM "QUALIFIED AMENDED RETURN" WAS SUBSTANTIVELY MODIFIED IN 2005

The regulation defining the term "qualified amended return" was first issued in 1991 (the "1991 Version of the Regulation"). The regulation was amended in 2005 (the "2005 Version of the Regulation"). The 1991 Version of the Regulation is the one that applies to the amended return at issue in this case.

Both versions of the regulation define the term "qualified amended return" temporally, i.e., under both versions of the regulation, an amended return is considered to be a "qualified amended return" only if the taxpayer files it before the IRS has taken certain actions.

Under both versions of the regulation, once a taxpayer is contacted by the IRS concerning a return for a particular year, that taxpayer can no longer file a "qualified amended return" with respect to that year. In summary, both the 1991 and 2005 Versions of the Regulation require that an amended return be filed before "the taxpayer is first contacted by the Internal Revenue Service concerning an examination of the return," in order for an amended return for the applicable year to be considered a "qualified amended return."

The IRS had not contacted Appellants before they filed the amended return at issue in this case. Accordingly, the foregoing temporal requirement does not

preclude Appellant's amended return from being considered a "qualified amended return" and is not at issue in this case.

Both the 1991 and 2005 Versions of the Regulation contain a second temporal requirement. Under this second temporal requirement, the amended return must be filed before certain third parties are contacted by the IRS. This second temporal requirement is the one that is at issue in this case. Appellants contend that their amended return satisfies this second temporal requirement. Respondent contends that it does not.[1]

The Tax Court opinion discusses the provision in 26 C.F.R. § 1.6664-2(c) (which the opinion labels as the "promoter provision"), but the opinion does not quote the regulation. At SER 19, the Tax Court states:

> Under the promoter provision, the period to file a QAR terminates when the IRS first contacts a person concerning liability under § 6700 (a promoter investigation) for an activity with respect to which the taxpayer claimed a tax benefit.

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1. The 1991 Version of the Regulation contains a third temporal requirement, i.e., that the amended return be filed before certain pass-thru entities are first contacted by the IRS. The 2005 Version of the Regulation retains this third temporal requirement and adds further temporal requirements. Respondent does not contend that these other temporal requirements are at issue or have not been met.

This description tracks the language of the current regulation, which is:

> The date any person is first contacted by the IRS concerning an examination of that person under § 6700 (relating to the penalty for promoting abusive tax shelters) for an activity with respect to which the taxpayer claimed any benefit on the return directly or indirectly through the entity, plan or arrangement described in § 6700(a)(1)(A).

(26 C.F.R. § 1.6664-2(c).)

This provision was incorporated into the regulation in March 2005 by Treasury Decision 9186. The regulation was made with limited retroactive effect; the revised regulation was stated in T.D. 9186 to be effective March 2, 2005 and was applicable to amended returns filed on or after April 30, 2004 (based on the issue date of Notice 2004-38). April 30, 2004 is *after* Appellants filed their amended return on March 15, 2004. The 2005 Version of the Regulation therefore has no applicability here.

In contrast, the 1991 Version of the Regulation, which is the regulation applicable to Appellants' amended return, provides:

> The time *any person described in section 6700(a)* (relating to the penalty for promoting abusive tax shelters) is first contacted by the Internal Revenue Service concerning an examination of an activity described in section 6700(a) with respect to which the taxpayer claimed any tax benefit on the return directly or indirectly through the entity, plan or arrangement described in section 6700(a)(1)(A).

(Treas. Reg. § 1.6664-2(c)(3)(ii)(emphasis added).)[2]

While both versions of the regulation contain a promoter provision, the two promoter provisions are substantively different; they require different showings before a particular amended return will be considered to be other than a "qualified amended return." In that regard, the showing under the promoter provision of the 1991 Version of the Regulation is greater, i.e., it is more difficult for the IRS to establish that an amended return is not a "qualified amended return" under the promoter provision of the 1991 Version of the Regulation.

Section 6700(a), the section referenced in the 1991 Version of the Regulation, imposes a penalty on any person who meets two requirements. The

2. Note that the 2005 promoter provision is contained subsection (c)(3)(i)(B) of the regulation, whereas the 1991 version of the promoter provision is contained in subsection (c)(3)(ii) of the regulation.

first requirement is that the person "organizes" or "participates" in the sale of a tax shelter. (26 U.S.C. § 6700(a)(1)(A) and (B).) The second requirement is that the person "makes or furnishes or causes another person to make or furnish . . . a statement . . . which the person knows or has reason to know is false or fraudulent as to any material matter. (26 U.S.C. § 6700(a)(2)(A).)[3]

So, in order for IRS contact with a third party to terminate the ability of a taxpayer to file a "qualified amended return," under the 1991 Version of the Regulation, the third party must have: (1) organized or participated in the sale of a tax shelter; *and* (2) made or furnished (or caused another to make or furnish) a false or fraudulent statement.

It is important to note in this regard that the 2005 Version of the Regulation refers to "any person." It does not refer to "any person described in section 6700(a)," which is the verbiage used in the 1991 Version of the Regulation.

As the 2005 Version of the Regulation does not require that the third party be a person "described in section 6700(a)," the IRS does not have to show, for amended returns subject to the that version of the regulation, that the third party

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3. Alternatively, the second requirement may be satisfied if the person "makes or furnishes or causes another person to make or furnish … a gross valuation overstatement as to any material matter." (26 U.S.C. § 6700(a)(2)(B). However, the Tax Court concluded that "the Appellants' underpayment for 2001 is not attributable to a gross valuation misstatement." Accordingly, this alternative is not relevant.

made or furnished (or caused another to make or furnish) a false or fraudulent statement.

Under the 2005 Version of the Regulation, the IRS must still show that the third party was contacted concerning an "examination" with respect to section 6700 (as it must also do under the 1991 Version of the Regulation). But it no longer has to show that the third party made or furnished (or caused another to make or furnish) a false or fraudulent statement. This is a substantive difference between the regulations.

THE TAX COURT ERRONEOUSLY APPLIED

THE 2005 VERSION OF THE REGULATION

As can be seen from comparing the language of the regulation in force when Appellants filed their amended tax return to the subsequently amended 2005 regulation, the description at SER 19 of the Tax Court's opinion follows the amended (non applicable) language of the 2005 Version of the Regulation rather than the applicable earlier language from the 1991 Version of the Regulation.

The language of the applicable 1991 Version of the Regulation eliminates the time in which a QAR can be filed to when a "person described in § 6700(a) is first contacted by the Internal Revenue Service" and that the contact must be "concerning an examination of an activity described in § 6700(a)."

The new regulation, in contrast, does not include the "described in § 6700(a)" language for the person being contacted or the activity being considered. Relevant to Appellants' case, in order for the QAR to be invalid, KPMG must be "described in § 6700(a)" and the contact with KPMG must be concerning "an examination of an activity described in § 6700(a)" with respect to which Appellants claimed a tax benefit.

Regardless of whether paying the penalty imposed by § 6700 is necessary for a person to be "described in § 6700(a)," certainly the requirements of both §§ 6700(a)(1) and (a)(2) have to be satisfied to be a person "described in § 6700(a)." Section 6700(a) covers "any person who" does the things in (a)(1) "and" the things in (a)(2). Unless both of those factors exist, the time for filing a QAR has not run.

The two requirements of section 6700(a) are cumulative. That is, to be liable for the penalty under section 6700(a), a person must meet *both* requirements. In other words, it is not sufficient for the person to have just organized or participated in the sale of a tax shelter. The person must also have made or furnished (or caused another to make or furnish) a false or fraudulent statement.

The Tax Court's opinion, however, only addresses whether KPMG was contacted concerning the penalty under § 6700 for an activity (whether or not

described in § 6700(a)) to which Appellants claimed a tax benefit. The opinion does not consider whether KPMG satisfied the requirements of § 6700(a)(2). The opinion applies the 2005 regulation–not the applicable earlier 1991 regulation. KPMG is not *described* in § 6700(a) if it merely satisfies the requirement of § 6700(a)(1) but not § 6700(a)(2). 26 C.F.R. § 1.6664-2(c)(3)(ii) did not state only a "person described in § 6700(a)(1)." Section 6700(a)(1) is joined to § 6700(a)(2) with the conjunction "and" so *both* provisions must be satisfied. They were not.

The Internal Revenue Service and the Treasury Department know how to limit a reference, as shown by the reference at the end of the sentence to "§ 6700(a)(1)(A)" in both the current regulation and the prior regulation.

Moreover, the applicable regulation requires that the contact of KPMG must be concerning "an examination of an activity described in § 6700(a)." Thus, it is necessary to determine as well that Appellants' transactions are described in §§ 6700(a)(1) and (a)(2). The regulation does not say that it is concerning any activity, or even an activity only described in § 6700(a)(1).

The Tax Court's opinion does not determine that in fact KPMG is described in § 6700(a) because the opinion does not consider whether KPMG is described in § 6700(a)(2). Similarly, the opinion does not determine that Appellants' transactions are described in § 6700(a) because, again, the opinion did not determine that § 6700(a)(2) is satisfied for either of Appellants' transactions.

Consequently, by erroneously applying the current version of the regulation, which does not have the "described in § 6700(a)" requirements, rather than the requirements of the earlier regulation that was applicable to Appellants' amended return, the Tax Court did not determine that all of the requirements of the applicable regulation had been satisfied.

KPMG is not described in § 6700(a)(2), nor was there a finding that either of Appellants' transactions constituted an activity that is described in § 6700(a)(2). Moreover, in making the determination, Appellee has the burden of production pursuant to 26 U.S.C. § 7491(c). Appellee failed to meet that burden.

In support of his contention, Respondent points out that the Tax Court cited subsection (c)(3)(ii) of Regulation section 1.6664-2 in its opinion, as opposed to subsection (c)(3)(i)(B) of that regulation. (Answering Brief, pages 19-20.) Subsection (c)(3)(ii) is the cite to 1991 version of the promoter provision. Respondent makes this point because in 2005, the promoter provision was moved to subsection (c)(3)(i)(B) of the regulation. Respondent reasons that because the Tax Court referenced the proper cite, it must have applied the proper version of the promoter provision.

Appellants concede that the Tax Court referenced the proper cite; however, Appellants contend that the Tax Court did not apply the promoter provision found at that cite, i.e., that the Tax Court did not apply the 1991 version of the promoter

provision. Appellants' contention that the Tax Court applied the 2005 version of the provision is supported: (1) by the way the Tax Court paraphrased the promoter provision that it did apply; (2) by the failure of the Tax Court to make the factual finding necessary to trigger the 1991 version of the promoter provision; and (3) by the refusal of the Tax Court's to follow the holding of the District Court in *Sala*.

In paraphrasing the promoter provision that it did apply, the Tax Court held that "the period to file a QAR terminates when the IRS first contacts *a person* concerning liability under section 6700 (a promoter investigation) for an activity with respect to which the taxpayer claimed a tax benefit" (emphasis added). (SER 19.)

In other words, in paraphrasing the promoter provision that it applied, the Tax Court left out the requirement of the 1991 Version of the Regulation that the "person" contacted be a person "described in section 6700(a)." If the Tax Court was paraphrasing the 1991 Version of the Regulation, it did so inaccurately. To have accurately paraphrased the 1991 Version of the Regulation, the Tax Court would have had to have said that "the period to file a QAR terminates when the IRS first contacts a person *described in section 6700(a)* concerning liability under section 6700."

The 2005 promoter provision doesn't contain the requirement that the person contacted be a person "described in section 6700(a)." So, notwithstanding

the Tax Court's citation to the 1991 version of the promoter provision, it is apparent that the Tax Court was not paraphrasing that version. It was paraphrasing the 2005 version.[4]

In addition to paraphrasing the wrong version of the promoter provision, the Tax Court also applied the wrong version of the promoter provision. This is clear from the Tax Court's findings. In order for the Tax Court to have concluded that Appellants' amended return was not a "qualified amended return," as defined by the 1991 version of the promoter provision, the Tax Court would have had to have found: (1) that Mr. Greenberg, as agent for KPMG, had organized Appellants' transaction; *and* (2) that Mr. Greenberg had made or furnished or caused another to make or furnish "a statement … which the person knows or has reason to know is false or fraudulent as to any material matter."

The Tax Court made the first finding, i.e., the finding that Mr. Greenberg as agent for KPMG had organized Appellants' transaction. But the Tax Court did not

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4. Further evidence that the Tax Court paraphrased the 2005 version of the promoter provision is the Tax Court's reference to "section 6700." In that regard, in paraphrasing the promoter provision, the Tax Court referenced "section 6700." But the 1991 version of the promoter provision doesn't reference "section 6700," it references section 6700(a). It is the 2005 version of the promoter provision which references "section 6700."

make the second finding, i.e., the finding that Mr. Greenberg made or furnished a statement that he knew or had reason to know was false or fraudulent.[5]

As the Tax Court did not find that Mr. Greenberg had made or furnished a false or fraudulent statement, it could not have applied the 1991 version of the promoter provision in arriving at its holding (or, if it did, it applied the 1991 version of the promoter provision incorrectly).

THE IRS FAILED TO INTRODUCE EVIDENCE THAT THE RETURN DID NOT QUALIFY AS A QAR AND THE TAX COURT DECISION FAILED TO MAKE THE NECESSARY FINDINGS TO SUPPORT THE DECISION THAT THE AMENDED RETURN WAS NOT A QAR

In its decision, the Tax Court made the following findings: (1) that KPMG was served with summonses in 2002 which "explicitly stated that they concerned the liability of KPMG under section 6700" (SER 19); (2) that one of those summonses referred to transactions that were "the same as or substantially similar to the transactions described in Notice 2000-44" (SER 19); (3) that some of the losses claimed in Appellants' original 2001 return (later removed by the amended return) arose from a transaction that was "the same as or substantially similar to"

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5. It might be noted that Mr. Greenberg had previously been criminally charged with making false or fraudulent statements, not to Appellants but to other taxpayers, but that he was fully acquitted of those charges in 2008.

one of the transactions described in Notice 2000-44 (SER 18); and (4) that David Greenberg (a former member of KPMG's Stratecon group), as agent for KPMG, "organized" that transaction on behalf of Appellants (SER 18).

Notably, the Tax Court did not make any finding that KPMG or Mr. Greenberg made or furnished (or caused another to make or furnish) any false or fraudulent statements. Also, the Tax Court did not find that the summonses referenced Appellants' specific transaction.

The Tax Court then made note of *Sala v. United States* (C. Colo. 2008) 552 F. Supp. 2d 1167, *rev'd on other grounds*, 613 F.3d 1249 (10th Cir. 2010). In that decision, the District Court held that a summons to a third party must make reference to a taxpayer's specific transaction before the summons can terminate that taxpayer's ability to file a "qualified amended return" under the 1991 Version of the Regulation. (SER 24-25.)

The Tax Court, however, opted not to follow the District Court's decision in *Sala*. The Tax Court held that District Court decisions are not binding on it and agreed (with Respondent) that a summons will terminate a taxpayer's ability to file a "qualified amended return" if the summons refers to the "type" of transaction

undertaken by the taxpayer, e.g., "a transaction that is the same as or substantially similar to a [listed] transaction."[6] (SER 15).

As the Tax Court found that the KPMG summons in this case referred to the listed transactions described in Notice 2000-44, and that Appellants had undertaken a transaction "the same as or substantially similar to" one of those listed transactions, it held Appellants' transaction was covered by the 2002 summonses and that Appellants' amended return was therefore not a "qualified amended return" as defined by the regulation.

The Tax Court's refusal to follow the District Court's decision in *Sala* is further evidence that the Tax Court applied the wrong version of the promoter provision.

In *Sala*, the taxpayers claimed certain losses in their original 2000 return. The losses arose from a transaction with a partnership named "Deerhurst." The transaction with Deerhurst was similar to one of the transactions described in Notice 2000-44. In November 2003, the taxpayers amended their 2000 return by removing the Deerhurst losses. As the Sala's amended return was filed in

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6. Respondent had argued that because Appellants had entered into a transaction similar to one of the transactions described in Notice 2000-44 (which are "listed transactions"), the summons just needed to refer to "a transaction that is the same or substantially similar to a transaction described in Notice 2000-44."

November 2003, before either of the effective dates of the 2005 regulation, it was the 1991 version of the promoter provision that applied to the amended return.

The IRS made the same argument in this case that it made to the District Court in *Sala*. Respondent argued that the Sala's amended return was not a "qualified amended return" because the alleged promoter of the transaction (KPMG), had already been contacted regarding transactions "similar to" the Deerhurst transaction by the time the taxpayers had filed their amended return. The District Court rejected the IRS' argument.

In its decision, the District Court in *Sala* accurately recited the two requirements of the 1991 version of the promoter provision, i.e., that the IRS must contact a person "*described in section 6700(a)* . . . concerning an examination of an activity described in section § 6700(a) with respect to which the taxpayer claimed any tax benefit on the return directly or indirectly." (*Sala*, 553 F.Supp. 2d at 1204 (emphasis added) (the ellipses are the District Court's).[7] Regarding the second requirement of the provision, the court held that:

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7. Contrary to the decision of the Tax Court in this case, the District Court in *Sala* did *not* omit the first requirement of the 1991 version of the promoter provision that the person contacted be of a person "described in section 6700(a)."

> The relevant inquiry, however, is not whether KPMG was contacted regarding transactions similar to Deerhurst, but whether KPMG was contacted regarding Deerhurst itself.

(*Id.*)

In other words, for purposes of the second requirement of the 1991 version of the promoter provision, it is not sufficient for the third party summons to reference listed transactions generally. If the summons does not reference a client's specific transaction, it will not terminate the ability of that client to file a "qualified amended return," even if the client undertook a transaction similar to a listed transaction generally referenced in the third party summons.

The summons to KPMG in this case did not reference Appellants' specific transaction. Under the holding of the District Court in *Sala*, therefore, the summons was not sufficient to terminate Appellants' ability to file a "qualified amended return." If the Tax Court had followed *Sala*, it would have had to have found that Appellants' amended return was a "qualified amended return," even if it had found that Mr. Greenberg had made a false or fraudulent statement (which it didn't).

However, the Tax Court chose not to follow the holding in *Sala*. It explained that "[d]ecisions of U.S. District Courts are not binding on this Court." (SER 25.)

The Tax Court went on to say that it was not necessary for the summons in this case to reference Appellants' specific transaction for it to cover their transaction. (SER 25.) The court said that the summons only needed to reference "the type of transaction in which [Appellants] participated". (SER 25.) The court then held that, because the summons in this case referenced Notice 2000-44 describing "listed transactions," and that because Appellants' transaction "is the same as or substantially similar to a transaction described in Notice 2000-44," that the summons covered Appellants' transaction and that their amended return could not be considered a "qualified amended return". (SER 25.)

While District Court decisions may not be binding on the Tax Court, the fact that the Tax Court refused to follow the decision in *Sala* in this case is further evidence that it applied the wrong version of the regulation. This is because, in 2005, an additional temporal requirement was added to Regulation 1.6664-2. Under the 2005 addition, if a taxpayer's return includes losses from an "undisclosed listed transaction," an amended return removing those losses from the return will be considered a "qualified amended return" only if it is filed before:

> The date on which the Internal Revenue Service requests, from any person who made a tax statement to or for the benefit of the taxpayer . . . the information required to be included on a list

> under section 6112 relating to a transaction that *is the same as, or substantially similar to*, the undisclosed listed transaction.

(26 C.F.R. § 1.6664-2(c)(3)(ii)(C) (emphasis added)).

For amended returns subject to the 2005 regulation, in the case of undisclosed listed transactions, the IRS no longer needs to reference the specific transaction undertaken by the taxpayer in its third party summons. If the taxpayer has undertaken a transaction which "*is the same as or substantially similar to*" a listed transaction, the taxpayers' transaction will be covered if the summons just references the listed transaction generally.

That is essentially what the Tax Court held in this case. Although it did not cite section 1.6664-2(c)(3)(ii)(C) of the 2005 regulation in its decision, the Tax Court held that the summons to KPMG covered Appellants' transaction because the summons referenced the Notice 2000-44 listed transactions, and because Appellant's transaction "*is the same as or substantially similar to* a transaction described in Notice 2000-44."

The language used by the Tax Court, the "is the same as or substantially similar to" language, is identical to the language used in the 2005 regulation. It is apparent that even though the Tax Court did not cite to Treasury Regulation section 1.6664-2(c)(3)(ii)(C) of the 2005 regulation, it was relying on that section of the 2005 regulation in arriving at its holding.

As evidenced by the way the Tax Court paraphrased the promoter provision that it did apply, by the failure of the Tax Court to make the factual finding necessary to trigger the 1991 version of the promoter provision, and by the refusal of the Tax Court to follow the holding of the District Court in *Sala*, it is clear that the Tax Court applied the wrong version of the regulation, i.e., that the Tax Court erroneously applied 2005 Version of the Regulation.

Alternatively, Respondent contends that the 1991 version of the promoter provision should be interpreted to have the same meaning as the 2005 Version of the Regulation because that is how the IRS interprets the 1991 Version of the Regulation (Answering Brief, p. 26). In support of that contention, Respondent cites cases that purportedly stand for the principle that "an agency's interpretation of its own regulations is controlling, unless plainly erroneous or inconsistent with the regulatory text." (*Id*.)

Respondent is essentially arguing that the clause "any person described in section 6700(a)," in the 1991 Version of the Regulation, should be interpreted to mean just "any person," i.e., that in interpreting that clause the Court should pretend that the last portion of the clause, the "described in section 6700(a)" portion, is not really there. The cases cited by Respondent are inapposite; they do not support his contention that the last portion of the clause can be disregarded.

In making this argument, Respondent is effectively asking this Court to ignore the effective date provisions of the 2005 regulation. The argument is meritless.

CONCLUSION

The Tax Court erroneously applied the 2005 Version of the Regulation. There is no authority that supports the contention that the 2005 Version of the Regulation has the same meaning as the 1991 version. The Court should therefore reverse the Tax Court's decision and find that Appellants are not responsible for the accuracy related penalty at issue.

Respectfully Submitted.

DATED: November 5, 2012

s/ Bradley A. Patterson
Bradley A. Patterson
Attorney for Petitioners and Appellants
Jeffrey K. and Kristine K. Bergmann

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS FOR CASE NUMBER 12-70259

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Corel WordPerfect version 16 in Times New Roman font 14.

DATED: November 5, 2012

s/ Bradley A. Patterson
Bradley A. Patterson
Attorney for Petitioners and Appellants
Jeffrey K. and Kristine K. Bergmann

9th Circuit Case Number(s) 12-70259

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