No. 18-1069

IN THE

Supreme Court of the United States

DIEBOLD FOUNDATION, INC., TRANSFEREE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The first Question Presented is whether the Tax Court has jurisdiction to impose liability for a period other than a legally-mandated "taxable year."[1] 26 U.S.C. § 6214(a)-(b) grants the Tax Court "jurisdiction to redetermine the correct amount of the deficiency" for a "taxable year" but does not grant jurisdiction to impose liability for any other period. At least five circuits have concluded that the Tax Court's jurisdiction is tied to a proper "taxable year," while the Second Circuit concludes that the Tax Court has jurisdiction to impose liability for a period regardless of whether it is a proper "taxable year." Respondent acknowledges this conflict but wrongly characterizes the decisions of the other circuits as dicta.

The second Question Presented is whether it is proper to ignore the non-jurisdictional consequences of a timely-raised issue when the parties and the lower court characterized that issue as "jurisdictional" but appellee changes positions and argues for the first time on appeal that the issue is not "jurisdictional." This question is critical if the Court determines that a proper "taxable year" is not a "jurisdictional" requirement. This question involves a circuit conflict on an important and recurring issue of appellate procedure that Respondent fails to meaningfully address.

Review of both issues is warranted.

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[1] Such a period is referenced in the petition and herein as an improper or incorrect period, tax year, or taxable year.

I. The Second Circuit's Decision Regarding the Tax Court's Jurisdiction Merits Review.

The issue of whether a statutory requirement is "jurisdictional" is "one of considerable practical importance for judges and litigants." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). This Court has regularly granted certiorari to resolve such questions. This Court's recent decision in *Fort Bend Cty. v. Davis* highlighted over a dozen cases in which the Court granted certiorari to address whether a requirement was "jurisdictional." *Id.*, No. 18-525, 2019 U.S. LEXIS 3891 (June 3, 2019). Respondent does not contest that this jurisdictional question is an important and recurring issue. Respondent also does not dispute that this is an ideal vehicle for the Court to address the question. Pet.13-14.

There also is an unmistakable circuit conflict. Respondent concedes that "the Fifth and Tenth Circuits characterized the correctness of the taxable year stated in a notice as a jurisdictional issue" and that the Third, Sixth, and Seventh Circuits looked to the proper "taxable year" to determine the Tax Court's jurisdiction. Pet.14-19; Opp.19-21. The Second Circuit takes the opposite view, holding that the Tax Court has jurisdiction to impose liability for a period even if it is not the "taxable year." Pet.App.9a-10a

Respondent claims that no conflict exists because the Third, Fifth, Sixth, Seventh, and Tenth Circuits' decisions each ultimately concluded that the Tax Court had jurisdiction. Opp.18-21. Respondent argues that the rationale provided for ***why*** the Tax Court had jurisdiction was irrelevant *dicta*. This is wrong. In *Seminole Tribe of Fla. v. Florida*, 517 U.S.

44, 66-67 (1996), this Court concluded that the "rationale upon which [a] [c]ourt based the results of its earlier decisions" is not "mere *obiter dicta*." Thus, "it is not only the result but also those portions of the opinion necessary to that result" that are binding. *Id.* at 66.

a. In *Miles Prod. Co. v. Commissioner*, 987 F.2d 273, 276 (5th Cir. 1993), the Fifth Circuit unequivocally concluded that the Tax Court's jurisdiction hinged upon the correct "taxable year." The Fifth Circuit declared that "[i]t is well established that a deficiency notice is invalid if based upon incorrect taxable periods." *Id.* The Fifth Circuit concluded that the Tax Court had jurisdiction because the taxable year was correct—not because it was irrelevant.

b. In *Estate of Davenport v. Commissioner*, 184 F.3d 1176 (10th Cir. 1999), the Tenth Circuit agreed with the Fifth Circuit and proclaimed that "'[i]t is well established that a deficiency notice is invalid if based upon incorrect taxable periods.'" *Id.* at 1182 n.2 (citing *Miles Prod.*, 987 F.2d at 276). The Tenth Circuit analyzed the relevant period to determine whether it was the correct "taxable year" because "the Tax Court does not have jurisdiction if a deficiency notice sets forth an incorrect taxable period." *Id.* The court concluded that the Tax Court had jurisdiction because the relevant period was the correct "taxable year." The Fifth and Tenth Circuits' analysis refutes Respondent's suggestion that those courts did not "independently analyze" the relevant issues. Opp.20-21.

c. In *Sanderling, Inc. v. Commissioner*, 571 F.2d 174, 176 (3d Cir. 1978), the Third Circuit concluded that the Tax Court had jurisdiction over the correct "taxable year" because the notice "included the taxable event and the correct taxable period." The court recognized that "the Tax Court has held that it has no jurisdiction where the deficiency notice does not cover a proper taxable period." *Id.* The court explained that the Tax Court has jurisdiction over the correct "taxable year" if "the notice actually covered a time longer than that asserted by the taxpayer to be the proper period, and the transaction at issue in fact occurred before the end of that taxable year." *Id.* Thus, the Third Circuit's jurisdictional holding hinged on whether the notice covered the proper "taxable year."

d. In *Estate of Scofield v. Commissioner,* 266 F.2d 154, 167 (6th Cir. 1959), the Sixth Circuit concluded that "the notice was not invalid and did not deprive the Tax Court of jurisdiction" because the notice "covered the correct period of the entire year." The Sixth Circuit focused its analysis on whether the Tax Court had jurisdiction over the taxpayer's correct "taxable year."

e. In *Commissioner v. Forest Glen Creamery Co.*, 98 F.2d 968, 969 (7th Cir. 1938), the Seventh Circuit analyzed whether the predecessor to the Tax Court had jurisdiction over the proper "taxable year." The court considered that question controlling because "[w]hen the Commissioner of Internal Revenue has determined a deficiency against a taxpayer for a taxable year the Board of Tax Appeals has no jurisdiction 'to determine whether or not the tax for any other taxable year has been overpaid or underpaid.'" *Id.* at 970 (citing the predecessor to § 6214(b)). The Seventh Circuit concluded that the

Board of Tax Appeals had jurisdiction because the Commissioner's determination was for the proper "taxable year."

Thus, the circuits squarely addressed the issue of the Tax Court's jurisdiction and predicated jurisdiction on a proper "taxable year." None labeled the proper "taxable year" irrelevant and none sanctioned the Tax Court to impose liability for an improper period. These decisions directly conflict with the Second Circuit's decision, which holds that the Tax Court has jurisdiction to impose liability regardless of whether the relevant period is the correct "taxable year."

Respondent quibbles with the conflict with the Third, Sixth, and Seventh Circuit decisions, arguing they provide less explicit recitations of law than the Fifth and Tenth Circuit decisions. Opp.19. But the Third, Sixth, and Seventh Circuits each tied the Tax Court's jurisdiction to a proper "taxable year" rather than concluding that the Tax Court had jurisdiction to determine liability for an improper period, which unquestionably conflicts with the Second Circuit's decision. Nonetheless, independent of those decisions, a 2-1 circuit conflict on an issue as important as the Tax Court's jurisdiction warrants review. This Court regularly grants certiorari to resolve 2-1, and even 1-1, splits. *See, e.g.*, *Rotkiske v. Klemm*, 139 S. Ct. 1259 (2019) (2-1 split); *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019) (2-1 split); *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019) (2-1 split); *Parker Drilling Mgmt. Servs. v. Newton*, 139 S. Ct. 914 (2019) (1-1 split); *Mission Prod. Holdings v. Tempnology, LLC*, 203 L.Ed.2d 876 (2019) (2-1 split).

Respondent also concedes that the Second Circuit's decision conflicts with multiple Tax Court decisions. Opp.21-23. Respondent's assertions regarding the Tax Court's decisions accentuate the need to grant review. For example, Respondent references several Tax Court decisions that conclude the court was "not authorized to determine a deficiency for a period less than a taxpayer's proper taxable year" *See, e.g., Schick v. Commissioner*, 45 T.C. 368, 373 (1966). Review would clarify whether the appropriate remedy is to enter decision for the taxpayer or to dismiss the case for lack of jurisdiction.

Respondent's remaining objections offer no basis to deny certiorari.

a. Respondent wrongly asserts that an "unpublished, nonprecedential decision cannot create a conflict warranting this Court's review." Opp.18. As this Court explained in *Commissioner. v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam), "the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case."

b. Although the Second Circuit refused to determine the appealed issue—the proper "taxable year"—the Second Circuit concluded that the Tax Court could impose liability even if the period was not a "taxable year." Opp.11. This case therefore is an ideal vehicle to resolve this legal question because there are no factual questions.

II. The Second Circuit's Decision Regarding the Tax Court's Jurisdiction Is Wrong.

A requirement is "jurisdictional" when the relevant statutory text speaks in jurisdictional terms or refers in any way to the court's jurisdiction. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). The Internal Revenue Code "is the mainspring of the [Tax Court's] jurisdiction." *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 422 (1943).

§ 6214[2] grants the Tax Court "jurisdiction to redetermine the correct amount of the deficiency" for a "taxable year."[3] § 6214(b) further specifies that the Tax Court "shall have no jurisdiction to determine" liability "for any other year." "Taxable year" is a defined term that refers to the legally-mandated period for computing taxable income. 26 U.S.C. § 441. Nothing in § 6214—or elsewhere—grants the Tax Court jurisdiction to determine or impose liability for a period that is not a "taxable year." Thus, § 6214 delineates the "class of cases" that the Tax Court is "competent to adjudicate," *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)—*i.e.,* cases in which the determination is for a "taxable year"—and grants no adjudicatory authority to "redetermine the correct amount" for any period that is not a "taxable year."

Rather than addressing this text, Respondent and the Second Circuit address a separate jurisdictional prerequisite—sufficient "notice"—that has no bearing on the Tax Court's jurisdiction to impose liability for an improper period. 26 U.S.C. §§ 6213(a), 7522;

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[2] § 6214(a) refers to jurisdiction "to redetermine the correct amount of the deficiency," while § 6214(b) clarifies that this jurisdiction covers "redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter."

[3] Respondent agrees that these provisions "apply equally to a transferee's liability." Opp.3.

Opp.13-15; Pet.App.6a-9a. While notice may be relevant to determine whether the Tax Court has jurisdiction to impose liability for a correct “taxable year,” sufficient notice can never give the Tax Court jurisdiction to impose liability for a period that is not a proper “taxable year.” Pet.14-15.

Respondent and the Second Circuit also conflate a challenge to the existence of a “deficiency” (what they characterize as the “merits” or the “correctness of the Commissioner’s determination”) with the Tax Court’s jurisdiction/authority to determine liability for a period that is not a “taxable year.” Opp.12-13, 16-17; Pet.App.7a-13a. The text of § 6214 does not premise jurisdiction on the existence of an actual “deficiency” because the Tax Court’s job is to “redetermine the correct amount” of the deficiency for a “taxable year.” However, that does not address whether the Tax Court may impose liability for an improper period.

If a court concludes that a period is not the taxpayer’s legally-defined “taxable year,” the Tax Court has no jurisdiction to “redetermine” liability for that period regardless of “the parties’ litigation conduct.” *Kontrick*, 540 U.S. at 456. Indeed, the Tax Court cannot “redetermine the correct amount” of a deficiency for a period that is not the “taxable year” because there is no “correct amount” to “redetermine” outside of a legally-mandated “taxable year.” Pet.21-23; Opp. 12-13. If the Tax Court lacks jurisdiction to impose liability due to an improper period, Respondent may, subject to the statute of limitations, issue a new notice for the correct taxable year and the Tax Court then may redetermine the correct amount of any deficiency. This further step is essential because the ability to determine the “correct amount of the deficiency" hinges on a legally-valid "taxable year."

Under the Second Circuit's decision, the Tax Court has jurisdiction to impose liability even if it is absolutely certain that the period is not the legally-defined "taxable year." This gives the Tax Court adjudicative authority that Congress did not grant.

III. The Second Circuit's Decision Regarding Waiver Merits Review and Is Wrong.

As the petition explained, the Second Circuit's decision conflicts with prior decisions of this Court and ten circuits on an important and recurring issue of appellate procedure. Pet.24-34. Respondent fails to rebut or even address the authorities and analysis in the petition. Accordingly, there is an uncontroverted circuit conflict on this question that warrants review.

The few rebuttal points Respondent raises do not provide a basis to deny review.

a. Respondent wrongly asserts that the Second Circuit's decision provided a case-specific exception to a general rule that otherwise permits appellants the opportunity to fully respond to arguments raised for the first time in an appellee's brief. Opp.24. The Second Circuit declared that "arguments not raised in an appellant's opening brief, but only in his reply brief" are waived and then rejected the "premise" that appellant "was entitled to raise the merits issue for the first time in its reply brief because the [appellee] raised the issue in its response." Pet.App.13a. The Second Circuit mentioned no general rule for which it was providing a case-specific exception and gave no indication that a different rule would apply to future appellants.

b. The Foundation appealed the Tax Court's decision on the grounds that the asserted period was not the correct taxable year, which was intended to subsume all associated ramifications (whether jurisdictional or not). Pet.33. The Foundation intentionally forfeited any questions of liability if the correct taxable year was a period ending July 2, 1999—*i.e.*, if the challenge to the correct taxable year was unsuccessful. However, Respondent conflates the issue that was forfeited (whether there was a deficiency and transferee liability if the taxable year did properly end on July 2, 1999) with the issue of the proper "taxable year," which was the subject of the appeal.[4] Opp.24-25. Appellant's opening brief framed the correct-taxable-year issue as a "jurisdictional" issue because the Tax Court held, and Respondent agreed, that the correct taxable year was a jurisdictional requirement. It was not until Respondent changed positions in his appellate reply brief that the characterization of the correct taxable year as a "jurisdictional" requirement became at issue. At that time, the Foundation had the right to respond to that newly-raised argument and explain why the requirement would have the same impact if framed as a "non-jurisdictional" requirement. Pet.30-34.

Refusing to consider that argument deprived the Foundation of the right to "fully respond" to the newly-raised argument. Opp.24-25. In contrast to

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[4] Respondent and the Second Circuit inaccurately use the term "merits" to refer to both issues.

the Second Circuit's decision, the majority of circuits permit appellant to reply to an appellee's newly-raised argument without being limited to the specific points raised in appellant's opening brief. Pet.25-27.

c. Respondent falsely asserts that the Tax Court considered and rejected the Foundation's challenge to the correct taxable year before the Tax Court issued its Order denying the motion to dismiss for lack of jurisdiction. Opp.25. In its Order, the Tax Court acknowledged that it had ***not*** previously considered or decided in its prior rulings "the question of whether Double-D Ranch's short year is its proper taxable year." Pet.App.23a; Pet.12, n.7. Since the Tax Court addressed the correct taxable year only as a "jurisdictional" requirement (and that characterization was not disputed), the Foundation properly focused its analysis on that ruling when it appealed the Tax Court's decision. If the Tax Court erred in treating the correct taxable year as a jurisdictional requirement, it still was necessary for either the Second Circuit, or the Tax Court on remand, to address the non-jurisdictional ramifications of the correct taxable year because the Tax Court never separately decided that issue. Pet.33-34. By refusing to address this statutory requirement, the Second Circuit's decision failed to address a central issue in the case.

Finally, Respondent fails to square the Second Circuit's restrictive application of waiver with the decisions of this Court, which repeatedly emphasize that the characterization of an issue as "jurisdictional" is ripe for confusion. *See*, *e.g.*, *Fort Bend Cty.,* No. 18-525, 2019 U.S. LEXIS 3891, at *10 n.4 ("Courts, including this Court, . . . have more than occasionally [mis]used the term 'jurisdictional' to refer to nonjurisdictional prescriptions.").

Respondent correctly points out that the "distinction between jurisdictional conditions and merits determination" are "easily overlooked" and that the Fifth Circuit, the Tenth Circuit, and the Tax Court each have framed an improper period as a jurisdictional defect. Opp.21-23. Respondent also does not dispute that:

1. the Foundation timely raised the correct-taxable-year requirement in the Tax Court;
2. Respondent conceded in the Tax Court that the correct-taxable-year requirement was jurisdictional;
3. the Tax Court concluded that the correct-taxable-year requirement was jurisdictional; and
4. Respondent flipped positions in the Second Circuit and argued for the first time that the correct-taxable-year requirement was not jurisdictional. Pet.8-11; Pet.App.23a.

"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). The refusal to consider a timely-raised statutory requirement altogether when a court concludes it was mistakenly framed as "jurisdictional" subverts justice. The Second Circuit's decision to allow Respondent to skirt a statutory mandate by manufacturing a forfeiture through newly-raised arguments warrants review.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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June 11, 2019