No. 18-1270

In The

Supreme Court of the United States

Henry M. Jagos,
Kathy A. Jagos,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals, Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Did the Tax Court lack jurisdiction when it had no facially legitimate notice of deficiency?
2. Did the Sixth Circuit Court Of Appeals properly consider all of Petitioners arguments and the law?
3. Why did the Sixth Circuit Court Of Appeals come to a different ruling than the Eighth Circuit Court Of Appeals on the same issue?

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PETITION FOR A WRIT OF CERTIORARI

Henry M. Jagos and Kathy A. Jagos (Jagoses) respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this instant case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App.1a-3a) is unpublished. The Memorandum Findings of Fact And Opinion of the United States Tax Court (App.8a-15a) is available at T.C. Memo. 2017-202.

JURISDICTION

The Court of Appeals entered judgment on June 21, 2018 (App.1a). Jagoses timely filed a petition for rehearing, which the Sixth Circuit denied on October 9, 2018 (App.4a). This Court has Jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

The Commissioner of Internal Revenue ("C.I.R.") issued a Notice Of Deficiency (NOD) in connection with Jagoses 2012 Form 1040 tax return. In United States Tax Court Jagoses challenged the legitimacy of the NOD because the NOD was unauthorized. The Tax Court rejected Jagoses argument without comment.

Jagoses appealed the Tax Courts determination to the Sixth Circuit Court of Appeals on the grounds the NOD was not legitimate (affecting the Tax Court's jurisdiction) and the Tax Court made no comment on either the legitimacy of the NOD or how that issue would affect its jurisdiction. *See* Tax

Court transcript, p. 12-13. The Sixth Circuit Court Of Appeals upheld the Tax Courts determination.

Hearing this NOD case is of exceptional importance, as a great number of NOD tax cases are brought to the Tax Court yearly.

PETITIONERS ARGUMENTS

1. **Did the Tax Court lack jurisdiction when it had no facially legitimate notice of deficiency?**

26 C.F.R. §301.6212-1 specifically identifies 'district directors', 'service center directors', or 'regional director of appeals' as those having exclusive authority to issue deficiency notices. The Sixth Circuit Court itself has also cited this regulation as authority for who has authorization to issue deficiency notices. *Powers v. C.I.R.*, 949 F.2d 397 (6th Cir, 1991) (citing 26 U.S.C. § 6212 and 26 C.F.R. §301.6212-1 for determining authority to issue deficiency notices).

Even in cases such as *Kellog v Commissioner*, 88 TC 167(1987) the Tax Court itself plainly recognized that notices of deficiency can be issued *only* by people in certain positions. The Court stated:

> "Further, the authority to determine and issue statutory notices of deficiency is vested by statute in the Secretary of the Treasury or his delegate. See secs. 6212 (a), 7701 (a)(11)(B), and 7701 (a)(12)(A)(i). *Pursuant to sections 301.6212-1 (a) and 301.7701-9 (b), Proced. & Admin. Regs., the Secretary has delegated to District Directors the authority to send deficiency notices.* See *Perlmutter v.*

Commissioner, 44 T.C. 382, 385 (1965), affd. 373 F.2d 45 (10th Cir. 1967). A District Director possesses the requisite authority to sign and to mail statutory notices of deficiency and may redelegate this authority to various subordinates except as restricted by proper order or directive." *Id*, at 172. (Emphasis added)

It then went on to state:

"At the time the letter dated January 24, 1986, was issued, the District Director of the District of Buffalo had not issued any delegation orders redelegating authority to issue notices of deficiency pursuant to section 301.7701-9 (c), Proced. Admin. Regs., to Cartin or Ziolkowski. .... Revenue officers are not among the officials named in the delegation order as having authority to sign and send notices of deficiency. *As such, the revenue officer who prepared and issued the letter of January 24, 1986, was not authorized to issue statutory notices of deficiency. **Because he did not possess the delegated authority to issue a notice pursuant to section 6212, it follows that the revenue officer's letter dated January 24, 1986, cannot be considered a statutory notice of deficiency within the meaning of section 6212.***"

"In light of the foregoing principles, we find that the letter dated January 24, 1986, is not a statutory notice of deficiency. On this record, we agree with respondent that no notice of deficiency was issued that would

support deficiency jurisdiction in our Court. *Id*, at 173-174. (Emphasis added)

Given the above, it should be clear who has (and does not have) delegated authority to issue deficiency notices. Under the relevant regulation (26 C.F.R §301.6212-1) the person in the instant case (a 'Program Manager, Return Integrity And Compliance Services') *simply did not have it.* Therefore, the deficiency notice in this case would be unauthorized and void.[1]

There should be no question that agency regulations have controlling legal authority and are binding on agencies. Courts have consistently given deference to agency regulations. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, (1984) ("Regulations are given controlling weight..."). Agency regulations are just

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[1] It is instructive and relevant to this controversy to illustrate the preposterousness of the alleged Notice of Deficiency disputed here. Delegation Order 4-8 at App. 6a lists 15 different positions/titles within the IRS who could have issued an NOD to Jagoses with the delegated authority necessary to issue an NOD yet an NOD was issued to Jagoses from someone whose position/title is NOT on that list? More suspicious still, the position/title of the person who did issue the alleged NOD was "Program Manager, Return Integrity and **Compliance** Services" whereas there is a position/title on Delegation Order 4-8 of "Program Manager, Return Integrity and **Correspondence** Services" (bolded for emphasis and comparison). In short, not only does the IRS issue an alleged NOD to Jagoses from an official NOT on the delegated authority list but the IRS issues an alleged NOD to Jagoses from an official with a variant of the authorized position/title but not the actual position/title listed. What kind of game is the IRS playing here with something as foundational as delegation of authority for assessment of a devastatingly significant volume of additional taxes?

one step under congressional acts, and are binding authority.

Here, the agency itself determined that delegations of authority for this particular function have such importance that they should be promulgated as regulations. The regulation specifies precisely who has the authority to take the specific action.

When a power is expressly granted, it also generally means the negation of powers not expressly granted. *Interstate Commerce Com'n v. Blue Diamond Prod. Co.*, 192 F.2d 43, 46 (8th Cir., 1951). Similarly, when a delegation of authority to do a particular act is expressly granted to specific positions/titles by regulation, it would also necessarily mean the exclusion of others having that authority. If there is no such exclusion, there would be no point of delegating the authority to the specific position/title. Anyone could do it.

Since the agency made the authority delegation *by regulation*, and given the legal weight of authority regulations carry, the delegation of authority done via regulation (as well as its exclusion), is binding on the agency.[2] Since the notice in this case does not

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[2] Many courts have cited the regulation as authority that district directors (and service center directors) alone have authority to issue deficiency notices. *Mitchem v. U.S.*, 923 F.2d 862 (9th Cir 1990) ("because 26 C.F.R. Sec. 301.6212-1 specifically delegates the authority to issue notices of deficiency for unpaid taxes to the district directors, the notice provided to Mitchem was not unauthorized or irregular"); *Ruff v. Commissioner*, 60 T.C.M. 932, 935-936 (U.S.T.C., 1990) ("The Secretary has delegated to District and Service Center Directors the authority to determine and notify the taxpayer of a deficiency. 301.6212-1(a) and 301.7701- 9(b)"); *Perlmutter v. CIR*, 373 F.2d 45, 46 (10th Cir., 1967) ("The Secretary has

indicate it was issued by anyone identified in the regulation, it would be void.

The next issue for consideration is the effect of the unauthorized deficiency notice. As already discussed in *Kellog*, supra, when a deficiency notice is issued by someone who lacks authority, it "cannot be considered a statutory notice of deficiency within the meaning of section 6212". Further, as stated in *Kellog*, the logical consequence is that such a notice cannot support jurisdiction in the Tax Court. *Kellog*, supra at 173-174. Therefore, the record in this case simply does not show the Tax Court had jurisdiction to determine the merits of the case.

2. Did the Sixth circuit court of appeals properly consider all of Petitioners arguments and the law?

On petition for rehearing the panel decision did not address the Supreme Court's decision in *Federal Crop Ins Corporation v. Merrill*, 332 U.S. 380 (1947) concerning how agency delegations of authority must be made by regulation; nor did it determine whether or not the regulation that does exist is binding and exclusive. Jagoses believe a very different decision would result if these issues were decided. Since these critical issues were never addressed a review by this court is necessary.

This case was initiated by Jagoses petition to the Tax Court. They moved to dismiss the petition for lack of jurisdiction due to lack of legitimacy of the

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delegated to the Commissioner of Internal Revenue the function of issuing deficiency notices, and the Commissioner, in turn, has redelegated that function to the District Directors" [footnote 2, citing 26 C.F.R. §§ 301.6212-1(a), 301.7701-9(b)]).

deficiency notice that had been sent to them. The lack of legitimacy of the Notice was based on the fact it had not been issued by anyone identified in the regulations as being authorized to issue it.

In briefing this appeal, Jagoses pointed to the agency's own regulation on the matter at 26 C.F.R. §301.6212-1 (authority delegated only to 'district directors' and 'service center directors') as controlling and being exclusive. They also cited *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380 (1947) as authority for their contention that delegations of authority must be made via regulation. The panel decision neither discussed *Merrill*, nor the controlling legal weight and exclusivity of the regulation that exists.

Taking the decision in *Merrill*, as well as the regulation into account would result in a radically different decision. Therefore a review by this court is necessary.

In this case, the Appeals Court never addressed Jagoses argument that: (1) the IRS own regulation concerning who has authority ('district directors' and 'service center directors') to issue tax deficiency notices is exclusive, and no one in any such position issued the notice in question; and (2) the Supreme Court's decision in *Federal Crop Ins Corporation v. Merrill*, 332 U.S. 380, 384 (1947) which held that delegations of authority must come from either statute or "through the rule-making power" (i.e. regulations).

The panel's decision cites an unpublished, unofficial Internal Revenue Manual provision which supposedly delegated authority for deficiency notices to the position of 'Program Manager'. But this is in

contradiction of the controlling regulation Jagoses presented. 26 C.F.R §301.6212-1 states:

> "Notice of deficiency.
> General rule. If a *district director or director of a service center* (or regional director of appeals), determines that there is a deficiency in respect of income, estate, or gift tax imposed by subtitle A or B, or excise tax imposed by chapter 41, 42, 43, or 44, of the Code, *such official* is authorized to notify the taxpayer of the deficiency by either registered or certified mail." (Emphasis added)

The panel decision goes on to conclude that, although a 'program manager' is not included within the regulation, delegations of authority can be done via unofficial agency manuals because Jagoses "have not pointed to any statutory provision requiring that delegations be made in the regulatory process."

But Jagoses reply brief cited *Federal Crop Ins Corporation v. Merrill*, 332 U.S. 380 (1947), a case which discussed the obligation of the public to know the bounds of anyone's authority who acts for the government. To this end, it stated the "scope of this authority may be explicitly *defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power." Id* (Emphasis added). Merrill at 384. The panel decision failed to even mention this case.

The Supreme Court has recognized that delegations of authority can only be done: (1) in legislation by congress, or (2) by agencies "through the rule-making power". The only relevant 'rule-making power' that exists is in 5 U.S.C. §553. This

statute requires 'rule-making' by federal agencies to include 'rules of agency organization' (which would necessarily include what position in the organization has authority to perform a particular function). The only exception for this is that unless some other statute requires prior public notice before a rule is effective, a rule relating to 'agency organization' can be effective without public notice of the rule-making procedure. See §553(b) [following sub-paragraph (3)].[3] Although an agency may not need to publish advance notice concerning the rule-making procedure for a delegation of authority, it must nonetheless publish the authority delegation as a 'rule' after the rule-making procedure is completed.

Given the plain language of the ruling in *Merrill* and the above law, it is clear that delegations of authority must be done via regulation. The Appeals Court overlooked the delegation of authority requirements outlined in *Merrill.*

In addition, as discussed above, a regulation was in fact made which delegated authority to issue deficiency notices exclusively to 'a district director or director of a service center'. There should be no question that agency regulations have *controlling* authority over anything to the contrary. Courts have consistently given deference to agency regulations. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844, (1984) ("Regulations are given controlling weight..."). Agency regulations are just one step under congressional acts, and are binding authority.

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[3] 5 U.S.C. §551(4) defines a "rule" to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization,..."

Given the above, the delegation of authority regulation made by the agency itself (and unchanged even to this day) gave *exclusive* authority to those mentioned in the regulation to issue deficiency notices. The regulation is binding on the agency. See, e.g., *United States ex rel. Accardi v. Shaughnessy* (The Accardi Doctrine), 347 U.S. 260, 265-267 (1954) (delegation of authority by regulation binding on attorney general). Therefore, exclusive authority to issue deficiency notices is governed/controlled by the regulation the agency itself made, and has not changed.

In *Federal Crop Ins Corporation v. Merrill,* 332 U.S. 380 (1947) the Supreme Court recognized the only two ways delegations of authority must be made: (1) by legislation, or (2) by agency 'rule-making'. 5 U.S.C. §553 also recognizes that 'rules of agency organization' (which would necessarily include what position in the organization has authority to perform a particular function) are subject to the 'rule-making' requirements (except public notice of the rulemaking process is not generally required before the rule is made).

Since the panel decision never discussed the decision in *Merrill,* and that decision would control, Jagoses petition for writ of certiorari should be granted.

3. Why did the Sixth Circuit Court Of Appeals come to a different ruling than the Eighth Circuit Court Of Appeals on the same issue?

In *Muncy v. Commissioner* 0:2015ag01626 8th Circuit, Muncy argued to the Tax Court that the NOD issued to him had not been issued by a duly authorized delegate of the Secretary, that it was null

and void, and that the Tax Court thus lacked jurisdiction. Upon review, the Eighth Circuit Court concluded that the Tax Court erred by declining to address the legitimacy of the NOD and vacated the Tax Court's memorandum and order, and remanded the case back to the Tax Court with instructions to determine if the person issuing the NOD had authority to do so.

In this present case, Jagoses were denied by the Sixth Circuit Court Of Appeals a proper review and determination by the Tax Court of the NOD that was issued in their case.

Since one United States Court Of Appeals has entered a decision in conflict with the decision of another United States Court Of Appeals on the same important matter, Jagoses petition for writ of certiorari should be granted (Rule 10).

CONCLUSION

For the reasons stated above, this petition for a writ should be granted.

Respectfully submitted,

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