No. 21-490

IN THE

Supreme Court of the United States

JUDITH S. COFFEY, *et al.*,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Judith S. Coffey, Estate of James Coffey, Judith Coffey, Executrix, and the Government of the United States Virgin Islands (collectively, "Petitioners") request writ of certiorari to review the decision of the Eighth Circuit Court of Appeals in No. 18-3256, *Coffey v. Commissioner of Internal Revenue*, 987 F.3d 808 (8th Cir. 2021). Pursuant to Supreme Court Rule 15.6, Petitioners respectfully submit this Reply to the government's Brief in Opposition dated December 8, 2021 ("Op. Br.").

The government's Brief in Opposition is premised upon a misleading recitation of factual assumptions. The government represents that "it must be assumed that Judith Coffey is not a bona fide USVI resident. Section 932(c) accordingly does not apply to her; Section 932(a) applies instead." Op. Br. at 18. That assumption is false.

The undisputed facts are: Judith Coffey filed her Forms 1040 with VIBIR pursuant to Section 932(c)(2) taking the position that she is a *bona fide* USVI resident. She did *not* file her Forms 1040 pursuant to Section 932(a)(2) taking the position that she is a U.S. citizen residing outside of the USVI. IRS examined Ms. Coffey's Forms 1040 and determined on audit that the residency position she took on the returns was incorrect. The assumption for summary judgment purposes is that the IRS' subsequent determination is correct and that the residency position Ms. Coffey took on the Forms 1040 is incorrect. This assumption does not change the circumstances of filing or the information reported on the face of the Forms 1040, and it certainly does not transform the returns into nullities. In fact, the government now admits that

IRS is charged with auditing positions taken on those returns and to correct them if it finds they are wrong -- *including the claims of USVI residency asserted thereon*. *Coffey v. Commissioner,* No. 11-1362, Doc. 18 at 40. To facilitate such audit authority, IRS Agents have access to the Section 932(c)(2) returns filed with VIBIR. IRS exercised its authority and audited Judith Coffey's returns, identifying and adjusting the USVI residency claim on the face of the returns. Even if we assume for purposes of summary judgment that IRS's adjustment of her residency is correct, this adjustment does not change the fact that Judith Coffey filed her federal Forms 1040 taking the position that she is a *bona fide* USVI resident. Respondent timely accessed and audited the returns because she filed them in the right place based on the information contained thereon.

Judith Coffey did not intend to file a non-resident return under Section 932(a)(2) and file it in the wrong place based on the position taken thereon. Rather, she intended to file a USVI-resident return under Section 932(c)(2) and filed it in the right place based on the position taken thereon. The actual question presented herein is whether the statute of limitations under Section 6501(a) begins when a taxpayer files her Form 1040 with VIBIR pursuant to Section 932(c)(2) taking the position of *bona fide* USVI residency – even if IRS later audits that return and deems that position incorrect. In the context of this question, Petitioners address five specific arguments raised in the government's opposition.

POINTS IN REPLY

I. Petitioners filed their returns in the appropriate place for the positions taken thereon.

The government contends that its admission that Judith Coffey's Forms 1040 are returns required under the Internal Revenue Code is irrelevant to whether she properly filed Forms 1040 under the nonresident protocol of Section 932(a)(2). But that is not the issue Petitioners present in this case. Ms. Coffey filed her Forms 1040 pursuant to the USVI resident protocol of Section 932(c)(2). And the government's admissions are relevant to *this* issue. The government admits that Forms 1040 filed with VIBIR under Section 932(c)(2) are federal returns and that it is authorized to audit those returns for correctness and compliance with Section 932(c)(4). It can adjust positions taken on the face of those returns, including claims of USVI residency. IRS Agents know that federal guidance directs taxpayers to file Forms 1040 under Section 932(c)(2) with VIBIR. That is where IRS found Ms. Coffey's returns. That IRS audited and adjusted positions taken on the face of those returns does nothing to change these facts. Ms. Coffey's filing of her Forms 1040 was in "meticulous compliance with all filing requirements in the Internal Revenue Code or IRS regulations" based on the information set forth on their face. These are the returns required to be filed under Title 26 that trigger the statute of limitations under Section 6501(a).

The government argues that Congress' mandate and IRS' guidance do not apply to Judith Coffey, as "Section 932 'does not create an exception for a taxpayer's mistaken position about residency.'" Op. Br. at 14 (quoting *Estate of*

Sanders, 834 F.3d at 1277). But Congress did contemplate that sometimes a USVI residency position or a tax position taken on a Form 1040 filed under Section 932(c)(2) could be incorrect. And to account for that, Congress specifically enacted subsections 932(c)(4)(A)-(C), which document its authorization of IRS to audit those returns, correct errors on them, and assert U.S. income tax liabilities with respect to them. And to do that, those returns must be recognized as federal returns. The government now admits all of this, and it admits that it exercised that authority. Yet it asks this Court to disregard these facts and pretend the returns it is authorized to audit don't exist.

The government treats returns filed pursuant to Section 932(c)(2) as federal returns when it suits its purpose. Notably, the government ignores the fact referenced in the Petition that it has prosecuted taxpayers filing Forms 1040 with the Virgin Islands under Section 932(c)(2) for willfully making and subscribing to a false *federal* return in violation of Section 7206(1). If the government recognizes a return as federal for purposes of federally prosecuting the filer, it must recognize that return as a federal return for the protections it affords that filer.

II. The government concedes that the Forms 1040 at issue satisfy *Germantown*.

The government argues that Petitioners' reliance on *Germantown Trust Co. v. Commissioner,* 309 U.S. 304 (1940), is misplaced because that case is a "what" case (whether what was reported on the return was enough to allow the IRS to determine a tax liability) but our case is a "where" case (whether Judith Coffey filed Forms 1040 in

the right place). The government admits that the Forms 1040 Judith filed with VIBIR are valid federal returns filed on the right form and providing enough information upon which IRS can determine a tax liability. Op. Br. at 22. The government argues only that she filed the returns in the wrong place (VIBIR office rather than an IRS office). The government, therefore, concedes that the Forms 1040 satisfy the *Germantown Trust* analysis.

Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934) provides that the adequacy of the filing is determined by the information provided and positions taken on the face of the return – right or wrong. "Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such…, and evinces an honest and genuine endeavor to satisfy the law. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary." *Zellerbach*, 293 U.S. at 180.

The government admits that Judith Coffey filed her Forms 1040 with VIBIR taking the position that she is a *bona fide* USVI resident. The statute mandates how a taxpayer must file a Form 1040 taking such position – the taxpayer *shall* file her Form 1040 with the Virgin Islands. Section 932(c)(2). Judith Coffey did just that. She filed those Forms 1040 with VIBIR – the only place she could have filed them based on the information set forth on their face. The government admits that it accesses those Forms 1040 at VIBIR to audit them for errors, including errors on *bona fide* residency positions taken under Section 932(c)(4)(A).

The government argues that if it corrects an error on residency on a Form 1040 filed under Section 932(c)(2), then we should pretend the return is a nullity because the error existed at the time the return was filed and therefore it never should have been filed with VIBIR. The position fails under the clear *Zellerbach* precedent that errors on the return do not render the return a nullity *even if they could have been corrected at the time the return was filed*. Moreover, the government's position belies its own admission that *it is authorized to audit returns filed with VIBIR under Section 932(c)(2) to correct residency errors on those returns*. If all returns that erroneously claim USVI residency are nullities, then the government's position renders its authority to audit such returns superfluous. And, more significantly from a statutory construction standpoint, it improperly renders Section 932(c)(4)(A) superfluous. *See, Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). The government's position is wrong and it cannot stand.

III. The government's representations regarding *Estate of Sanders v. Commissioner* are false.

The government cites to *Sanders v. Commissioner*, 834 F.3d 1269 (11th Cir. 2016) as the "only other court of appeals" to address the issue presented. It asks this Court to disregard Petitioners' contention that *Sanders* is distinguishable and inapplicable here by stating: There was no dispute in *Estate of Sanders*, just as there is no dispute here, that a return required to be filed with the VIBIR is a 'return required to be filed under the Internal Revenue Code.'" Op. Br. At 23. The government's assertion is false.

In *Sanders*, the government told the Court of Appeals that the Form 1040 Mr. Sanders filed with VIBIR under Section 932(c)(2) was *not* a federal return: "Sanders did not file federal tax returns with the IRS in 2002-2004." *Sanders* Doc. 47 ¶¶3-8. The government repeated this false claim at oral argument in that case when it affirmed the Eleventh Circuit panel's belief that a return filed with VIBIR never enters IRS "audit machinery." *Coffey v. Commissioner*, 987 F.3d 808 (8th Cir. 2021) Supplemental Joint Appendix (hereafter "SJA") at 194-254, 207-209.

Government Counsel in this case is aware of its representations to the panel in *Sanders* because the counsel team here includes the same attorney who made those representations to the Eleventh Circuit.

And the government made the same false representation to the Tax Court in proceedings below: "A territorial income tax return filed with the VIBIR by a bona fide USVI resident ***does not constitute a federal income tax return for any purpose***." (Respondent's Response to Petitioners' Motion for Summary Judgment at 33 (Jul. 25, 2012) (emphasis added)). The government told the Tax Court that the return Judith Coffey filed with VIBIR under Section 932(c)(2) is "***not a federal return***." (Oral Arg. Tr. 151:19 (Oct. 30, 2013)(emphasis added)).

The government properly concedes the truth here -- that a Form 1040 filed with VIBIR pursuant to Section 932(c)(2) is indeed a federal income tax return for purposes of Section 6501(a). The government admits the truth now only because Petitioners confronted it in the proceedings before the Eighth Circuit with evidence Petitioners'

counsel discovered in depositions of government agents and related discovery in a similarly-situated Tax Court case. The government considered the information and properly made the admissions. But it *never* made such admissions in *Sanders*, and any suggestion that it did -- or that the *Sanders* Court determined as much -- is patently false. The government's false assertions in *Sanders* adversely affected that Court's determination and it had the same effect on the dissenting judges in the Tax Court, as they believed: "Petitioners simply did not file a Federal income tax return, on the facts of this case." *Hulett v. Commissioner*, 150 T.C. 60, 105 (Jan. 29, 2018).

IV. The government's reliance on *Condor*, *Helvering* and *Robinette* is inapplicable.

The government cites to *Condor Int'l, Inc. v. Commissioner*, 78 F.3d 1355, 1358-1359 (9th Cir. 1996); *Helvering v. Campbell*, 139 F.2d 865, 866-868 (4th Cir. 1944); and *Robinette v. Commissioner*, 139 F.2d 285, 287-288 (6th Cir. 1943) in support of the notion that courts "have recognized that a taxpayer subject to a dual-filing requirement (like the one in 26 U.S.C. 932(a)(2)) does not trigger the federal limitations period by filing a tax return with only the territorial taxing authority." Op. Br. at 24.

But the cases all involve *two separate and distinct statutes* that require taxpayers to file *two separate and distinct tax returns* establishing *two separate and distinct tax liabilities*. Section 932(a)(2) is *one* statute that sets forth the filing requirements with respect to *one* income tax return – a Form 1040. This return calculates *one* tax liability which is allocated between the U.S. and the USVI based upon the income allocated to the two using

IRS Form 8689 (Allocation of Individual Income Tax to the U.S. Virgin Islands). The *original* of this Form 1040 is filed with IRS and a *copy* of the same Form 1040 is filed with VIBIR along with IRS Form 8689.

Taxpayers residing in or with income from the USVI file their Form 1040 – only *one* Form 1040 – under the provisions of either Section 932(a)(2) or Section 932(c)(2) depending on the residency position they take on the face of the Form 1040. Under no circumstances does a taxpayer file her Form 1040 for a tax year *twice* using *both* filing protocols. The government, in the Tax Court proceedings, admitted that any such requirement would be absurd because each return calculates a separate income tax liability on the same income in separate duplicative calculations, and each requires the taxpayer to take separate and distinct residency positions under the penalties of perjury. SJA at 540-541. Yet, now, the government claims that the Forms 1040 Judith Coffey filed pursuant to Section 932(c)(2) is just one-half of her "dual-filing requirement" under Section 932(a) and that she still owed Forms 1040 to the U.S. Op. Br. at 5. The proposition is false. The filing of a Form 1040 with VIBIR under Section 932(c)(2) satisfies the requirements of Section 6501(a).

V. The government's conclusion of *trust us, we won't go back more than six years* provides no assurance.

The government claims that "longstanding USVI residents" have "no cause for concern" about the lack of repose caused by the Eighth Circuit's opinion. Op. Br. at 27. In other words, "taxpayers who file correct returns have no cause for concern that IRS ignores their

limitations repose." Such an argument is absurd in any case, but more so here as the government knows full well that determining "*bona fide* residency" requires a detailed judicially-constructed facts-and-circumstances analysis that has evolved over years *after* the years at issue here.

The government claims that the only taxpayers who should have concern are those who participated in an "abusive tax scheme" and insinuates that those taxpayers are not entitled to repose. The "scheme" to which the government refers is the USVI Economic Development Program as authorized by Congress under Section 934(b). IRS initiated a campaign in the early 2000's targeting taxpayers who availed themselves of that program. The assertion is an unabashed ploy to persuade this Court by disparaging Petitioners as people trying to get away with some fraudulent tax avoidance scheme. But if the government truly believed that Judith Coffey was involved in a fraudulent tax avoidance transaction, it could have asserted the civil fraud penalty, which, under Section 6501(c), strips an offending taxpayer of the statute of limitations protection. The government did not do so here because it knows it could not establish such a case.

The government further claims that its 2008 Treasury Regulation – which provides statute of limitations repose for all Section 932(c)(2) filers on a prospective basis – is alive and well after the Eighth Circuit decision. Op. Br. at 28. The Regulation states: "For purposes of the U.S. statute of limitations under section 6501(a), an income tax return filed with the Virgin Islands by an individual who takes the position that he or she is a bona fide resident of the Virgin Islands described in paragraph (a)(2)(i)

of this section…will be deemed to be a U.S. income tax return….” Treas. Reg. 1.932-1(c)(2)(ii). The assurances the government expresses in its Opposition disregard the Regulations proviso that the repose exists at the Commissioner’s whim and he may end such repose whenever he wishes.

The government claims that this regulatory repose is contrary to the statute but that it grants the repose gratuitously because it finally fixed the information exchange between the IRS and the VIBIR with a “new working arrangement.” *Id*. at 5. However, the record below illustrates that there was no formal change in the information sharing procedures already in place between IRS and VIBIR, and that Treasury implemented the Regulation *because Congress reprimanded IRS for the very position it takes in this case.*

It is axiomatic that a Treasury Regulation cannot establish a rule that is inconsistent with or contrary to the underlying statute. A Regulation may interpret the underlying statute, but it can’t run afoul. The Regulation is entirely consistent with Petitioners’ position.

CONCLUSION

Judith Coffey filed her Forms 1040 with VIBIR pursuant to Section 932(c)(2) in satisfaction of her federal filing obligations. She filed those returns in meticulous compliance with the federal statute and IRS guidance. IRS audited those returns and determined that the USVI residency position asserted thereon was incorrect. The system worked as intended by Congress – but IRS failed to preserve the statute of limitations on assessment, and its determination is time-barred.

This Court should grant the petition and reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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