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No. 21-610

In the
Supreme Court of the United States

LOUIS S. SHUMAN; SANDRA SHUMAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is: Whether an Order of the United States Tax Court is deemed final, and legally enforceable, including enforcement on jurisdictional grounds, when the U.S. Tax Court Order was not served on Petitioners, or filed, in compliance with applicable governing Federal Statutes and Court Rules, thereby violating governing Federal Statutes, Federal Court Rules, and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

STATEMENT OF RELATED PROCEEDINGS

This proceeding, relating to the Commissioner of Internal Revenue Service's Notice of Determination regarding Petitioners' tax years of 2008, 2009, and 2010 is related to the following cases:

Louis S. Shuman and Sandra Shuman v. Commissioner of Internal Revenue No. 18-2426(L) (4th Cir.), and Louis S. Shuman and Sandra Shuman v. Commissioner of Internal Revenue No. 19-1242 (4th Cir.). These two cases were consolidated by the United States Court of Appeals for the Fourth Circuit, which issued and filed the Court's Opinion on August 15, 2019, with Notice of Judgment and Judgment filed and entered on August 15, 2019, and the Court's Mandate issued filed and entered on October 30, 2019.

These consolidated cases, relating to the Commissioner of Internal Revenue Service's Notice of Determination regarding Petitioners' tax year of 2011, were appealed to the United States Supreme Court, which entered an Order, on March 2, 2020, denying Petition for Writ of Certiorari; and an Order denying Rehearing on April 27, 2020.

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PETITION FOR WRIT OF CERTIORARI
INTRODUCTION

At issue in this case is whether the Petitioners (1) can be denied their right to timely appeal a federal court order of the United States Tax Court, when the order being appealed was not served on Petitioners, or filed, under applicable federal law; and (2) when an order of the United States Tax Court becomes final and enforceable.

OPINIONS BELOW

The Fourth Circuit Unpublished Opinion (March 23, 2021) is reproduced at Appendix A, p.1. The Fourth Circuit Notice of Judgment And Judgment (March 23, 2021) are reproduced at Appendix B, p.3. The Fourth Circuit Order suspending briefing is reproduced at Appendix C, p.11. The Fourth Circuit Orders temporarily staying issuance of Mandate (April 7, 2021), Order Denying Rehearing (May 25, 2021), and Mandate (June 2, 2021) are reproduced at Appendix D, pp.12-14.

The United State Tax Court's Order and Decision (September 24, 2020) is reproduced at Appendix G, p.52. The United State Tax Court's Order To Show Cause (August 12, 2020) is reproduced at Appendix H, p.54. Petitioners Response to the Order To Show Cause is reproduced at Appendix I, p.56. The Order of the United States Tax Court directing the Commissioner of Internal Revenue To Respond To Petitioners Response (September 3, 2020)) is reproduced at Appendix J, p.62. The Commissioner of Internal Revenue's directed Response (September 15, 2020) is

reproduced at Appendix K, p.64. Petitioners Reply to the Commissioner of Internal Revenue directed Response (September 2, 2020) is reproduced at Appendix L, p.75.

JURISDICTION

The Order and Decision of the United States Tax Court dated September 24, 2020, was not served and filed on Petitioners, in violation of applicable federal law, and the Due Process Clause of the Fifth Amendment. Since the Order and Decision was not served and filed in accordance with applicable federal law, and the Due Process Clause of the Fifth Amendment, Petitioners Notice of Appeal was timely filed on December 28, 2020; said Notice of Appeal is reproduced at Appendix M, p.83. Petitioners Motion For Reconsideration (December 28, 2020), was also timely filed for these same above stated reasons, which Motion is reproduced at Appendix N, p.86.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part that: "No person shall be ...deprived of life, liberty, or property without due process of law..." U.S. Const. Amend. 5. App. p. 237.

The following relevant provisions of the applicable federal laws and rules are reproduced at Appendix X-1-X-22, at pp. 181-237:

United States Supreme Court Rules ("SCR"): SCR 16.3; SCR 45; SCR 45.2; SCR 45.3; SCR 48.

26 U.S.C 2072; 26 U.S.C. 6330; 26 U.S.C. 7481; 26 U.S.C. 7483

Federal Rules of Appellate Procedure ("FRAP") FRAP 13; FRAP 13(a); FRAP 14; FRAP 36; FRAP 41; FRAP 45; FRAP 45(b); FRAP 47;

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Tax Court Administrative Orders 2020-04 and 2020-05; U.S. Tax Court Press Releases of November 20, 2020 and December 18, 2020

Internal Revenue Manual 35.9.3.6 (04-27-2012)

STATEMENT OF THE CASE

Fact History: Events Giving Rise to This Appeal

The consolidated cases Louis S. Shuman and Sandra Shuman v. Commissioner of Internal Revenue No. 18-2426(L) (4th Cir.), and Louis S. Shuman and Sandra Shuman v. Commissioner of Internal Revenue No. 19-1242 (4th Cir.) were appealed to the U.S. Supreme Court by Petition for Writ of Certiorari, which Petition was denied by Order dated March 2, 2020, and by Order denying Rehearing dated April 27, 2020. App. p.92. At issue in these consolidated cases was the Commissioner of Internal Revenue ("IRS") denial of Petitioners refund claim for tax year 2011.

At issue in this case on appeal is the application of federal court orders in the consolidated cases, to this pending case, affecting denial of refund claims for tax years 2008-2010, and years related thereto; and, the timeliness of Petitioners appeal of the Tax Court order directing application and enforcement of the federal court orders in the consolidated cases, to this case.

ARGUMENT

A. Applicable Law Relating To the Facts Of This Case: Service Entry and Filing of United States Tax Court Order

Petitioners position in this case is that applicable federal law requires that a Tax Court Order, in order to be properly served and filed, must be: (1) served on Petitioners (2) filed with the Tax Court (3) be accompanied by service on Petitioners of a Notice of Docket Activity regarding said Tax Court Order and (4) said Notice of Docket Activity must be filed with the Tax Court. See App. E p.15; App. I p.56. Absent compliance with these four, above stated, requirements, the Tax Court Order has not been served, or entered, and the time deadline for Petitioners to file their Notice of Appeal of said Tax Court Order has not begun to run, much less expired.

The Commissioner of Internal Revenue's ("IRS") position is that the Tax Court Order at issue herein was entered on September 24, 2020, and since Petitioners Notice of Appeal was not filed until December 28, 2020, the 90 day time limit for filing their appeal had expired, pursuant to 26 U.S.C. 7483. SCR 16.3. IRS does not address whether the Tax Court Order had been entered in compliance with applicable federal law. And, by implication, since IRS does not address whether the Tax Court Order was in fact served on Petitioners, the IRS appears to take the position that so long as the Tax Court Order was entered, service on Petitioners is irrelevant.

It is clear that the Tax Court Order was required to be served on Petitioners. United States Tax Court Rules ("TCR") 21(a) requires that an Order of the United States Tax Court ("Tax Court") must be served on Petitioners. TCR 21(a) specifically states, in relevant part, that:

"except as otherwise required by these Rules or directed by the Court, all... orders, decisions, notices ... or other similar documents or papers relating to a case... shall be served on each of the parties or other persons involved in the matter to which the paper relates..."

It is also clear that the Tax Court Order can only be properly entered if entered in compliance with applicable federal law. United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") Local Rule ("LR") 25(a)(5) requires that a Court Order can only be entered in the Court's docket when filed in accordance with the Court's Rules. LR 25(a)(5) specifically states, in relevant part, that:

"Except as otherwise provided by local rule or Court order, all orders, decrees, opinions, judgments, and proceedings of the Court relating to cases filed and maintained in the CM/ECF system will be filed electronically in accordance with these rules, which will constitute entry on the docket kept by the clerk under FRAP 36 and 45(b)."

The Tax Court Order at issue herein was not filed in accordance with the Fourth Circuit's Rules, and therefore was not entered, as a matter of law. The

Fourth Circuit's LR 25(a)(3) requires that service of an Order by electronic transmission must be made by serving Petitioners with the Order and by serving Petitioners with Notice of Docket Activity showing the Order was filed with the Clerk of the Tax Court by entry of the Order on the Court's docket. Local Rule 25(a)(3) specifically states, in relevant part, that:

"Electronic transmission of a document... consistent with this rule, together with a transmission of a notice of docket activity from the Court, constitutes filing of the document under the Federal Rules of Appellate Procedure and the Court's local rules and constitutes entry of the document on the docket kept by the clerk under FRAP 36 and 45(b)."

Federal Rules of Appellate Procedure (FRAP") 14 specifically states in relevant part that the Federal Rules of Appellate Procedure apply to appeals from the Tax Court.; and that the 4th Circuit's Local Rule 25 apply to the Tax Court; and, to Petitioners appeal in this case. FRAP 25; FRAP 47; FRAP 13.

The Tax Court Docket shows no record of electronic, or mail, service of the Tax Court Order of September 24, 2020 on Petitioners. App. p.172. The Tax Court Docket also shows no record of electronic, or mail, service of Notice of Docket Activity on Petitioners regarding the Tax Court Order of September 24, 2020. Since Petitioners were not served with a copy of the Tax Court Order, and Petitioners were not served with a Notice of Activity regarding the Tax Court Order of September 24, 2020, said Tax Court Order was not in compliance with applicable federal law, and accordingly

was not properly entered in the docket of the Tax Court.

Since the Tax Court Order was not properly entered in the docket of the Tax Court, the time to appeal said Order has not yet begun to run, and has not expired. Petitioners Notice of Appeal dated December 28, 2020 was therefore timely, and, as a matter of law, is not properly dismissed on jurisdictional grounds. FRAP 14; FRAP 25; FRAP 36; FRAP 47; TCR 21; TCR 161; TCR 162

The Tax Court: (1) failed to serve Petitioners with the Tax Court Order of September 24, 2020; (2) failed to serve Petitioners with the Notice of Activity regarding the Tax Court Order of September 24, 2020; and (3) failed to file and enter the aforesaid Tax Court Order and Notice of Docket Entry.

In addition, the Tax Court shut down access to its electronic filing system from November 20, 2020 to December 27, 2020 (December 27, 2020 being a Sunday). See U.S. Tax Court Administrative Order ("TCO") 2020-04, App. p.229 and TCO 2020-05, App. p.231. These Orders prohibited access to Court files, except as read only, only permitted filing by paper, and precluded e-filing of papers. These Orders also stated in relevant part that paper filings do not require a motion for leave to file, while Dawson is inactive: that is, from November 20 through to December 27, 2020; and that the Tax Court does not plan to issue any orders or opinions until Dawson becomes active. By U.S. Tax Court Press Release of November 20, 2020 ("TCPR"), App. p.233; and TCPR of December 18, 2020, App. p.235, the Tax Court gave further notice of

its shutdown of its e-filing system until December 27, 2020, and its rules regarding waiver of need to file a motion for leave to file papers during the shutdown.

The Tax Court's shutdown of its electronic ("e-file") filing system was due to its establishment of a new e-filing system entitled Dawson. Dawson became active on December 28, 2020, and it was on the first day that Dawson became active, thereby allowing Petitioner access to their file in this case, that Petitioners became aware, for the first time, of the Tax Court Order of September 24, 2020. As noted in TCPR of December 18, 2020, e-files, such as Petitioners, would be issued temporary passwords on or about December, 28 2020, so as to have full access to their file. App. E, p.40.

On December 27, 2020, the Tax Court sent Petitioners their temporary password stated to entitle them to full access to their files under Dawson. App. E, p.41. Petitioners activated their registration with Dawson on December 28, 2020, and on that date, for the first time, Petitioners saw the Tax Court order of September 24, 2020. Despite representations to the contrary, Petitioners were not given full access to their files in Dawson: Petitioners were only given full access to one file; and were, and have been, denied full access to this case now on appeal before this Court.

Immediately upon seeing the Tax Court Order of September 24, 2020, Petitioners filed, based upon timely compliance with applicable federal law, their Notice of Appeal on December 28, 2020; and, filed their Motion For Reconsideration on December 28, 2020. TCR 21(b)(1)(D) states in relevant part that service of the Tax Court Order, and the Notice of Docket Activity

related thereto, may be made by “Electronic means if the person consented in writing in which event service is complete upon transmission, but it is not effective if the serving party learns that it did not reach the person to be served.” Here in this case, Petitioners were registered for e-filing and had therefore accepted and agreed in writing to receive papers by email, but any alleged service of the Tax Court Order, or Notice of Activity related thereto, was not effective as proper service, since the Court was on notice that Petitioners were not served with said papers by email, or by regular mail.

Issuances of the Tax Court’s orders relating to the Dawson e-filing system, as noted, are unclear, vague, and subject to differing reasonable interpretations. Vague, unclear, or confusing laws violate the Due Process Clause, and are not properly enforced so as to deny a party their protected constitutional rights. In U.S. v Davis 588 U.S. (2019), 139 S.Ct 2319, the Court stated that in “... our constitutional order, a vague law is no law at all.” 139 d. Ct., at p. 2333. See Kisor v Wilkie 588 U.S. ____; 139 S. Ct. 2400 (2019).

Mullane v Central Hanover Bank Trust Co. 339 U.S. 306 (1950), holds that a central and basic principle of due process, is the “... opportunity to be heard.” Grannis v. Ordean, 234 U.S. 385,394, 34 S.Ct. 779, 8 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” 339 U.S., at p. 314. It is settled that the Due Process Clause of the Fifth Amendment imposes restrictions on the federal

government, in like manner to restrictions imposed by the 14th amendment on the States. Bolling v Sharpe 247 U.S. 497 (1954). This restriction on the federal level covers the three branches of the federal government: legislative, executive and judicial. Murray's Lessee et al v Hoboken Land and Improvement Co. 59 U.S. 272 (1855). See Leasing Corp. v. United States 429 U.S. 338 (1977). Earle v. McVeigh 91 U.S. 503; Hanson v. Denckla 357 U.S. 235 (1958).

It is settled law that Petitioners were entitled to notice, and a fair hearing, before property deprivation. Here, a court order which they did not get, because it was not properly entered, or served, ought not be used to deprive them of property, before the fair hearing procedures in federal court, including their right of appeal, have been concluded.

B. Applicable Law Relating To the Facts Of This Case: Finality of United States Tax Court Order, including finality for purposes of enforcement

U.S. Supreme Court Rule ("SCR") 45 states in relevant part that:

In a case on review from any court of the United States, as defined by 28 U.S.C. §451, a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment. The certified copy of the judgment, prepared and signed by this Court's Clerk, will provide for costs if

any are awarded. In all other respects, the provisions of paragraph 2 [SCR45.2] apply.

SCR45.2 states, in relevant part, in plain language, that:

... the mandate issues 25 days after entry of the judgment.... The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the court orders otherwise. If the petition is denied, the mandate issues forthwith.

The effective date of SCR 45 was July 1, 2019. SCR 48. The U.S. Congress authorized the U.S. Supreme Court to "prescribe general rules of practice and procedure... in the ..[U.S.] Courts of Appeal. 28 U.S.C. 2072.

28 U.S.C. 2072 states in relevant part that:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Based on the above SCR 45 became the law of the land on July 1, 2019.

The plain language of SCR 45, is in conflict with 26 U.S.C. 7481(a)(2)(B) which states, on its face, that a Tax Court Order becomes final once the U.S. Supreme Court has denied a petition for certiorari "... if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeal..." The latter federal tax statute conflicts with, and is superseded by, SCR 45.3 which in this case herein requires that the 4th Circuit issue its mandate after the U.S. Supreme Court Clerk forwards to the 4th Circuit (1) an opinion or order of the U.S. Supreme Court denying certiorari, and (2) a certified copy of the judgment, prepared and signed by the U.S. Supreme Court Clerk.

Settled principles of statutory construction give guidance when there is a conflict between two or more federal statutes. Interpretation, application and enforcement of legislation begins "with reference to the plain language of the statute itself." Board of Governors of Federal Reserve System v. Dimension Financial Corp. 474 U.S. 361 (1986); at p.373; Tennessee Valley Authority v Hill 437 U.S. 153 (1978); U.S. v. Borden 308 U.S. 188 (1939). As stated in Board of Governors 47 U.S. 361, at pp.373-374, the plain language of the statutes at issue, is the place to begin, in the search for finding the purpose and meaning of the legislation at issue since: "'Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute

itself takes no account of the purposes of compromise and, in the end, prevents the effectuation of congressional intent.”

In Epic Sys. Corp. v. Lewis 138 S.Ct. 1612 (2018); at p. 1624, the Court stated that:

“When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at ‘liberty to pick and choose among congressional enactments’ and must instead strive ‘to give effect to both.’ ” *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing “‘a clearly expressed congressional intention’ ” that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). The intention must be “ ‘clear and manifest.’ ” *Morton, supra*, at 551, 94 S.Ct. 2474. And in approaching a claimed conflict, we come armed with the “stron[g] presum[ption]” that repeals by implication are “disfavored” and that “Congress will specifically address” preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452, 453, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988). These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding

irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them."

The above settled rules of statutory construction, as applied to the case herein, shows clear Congressional intent, Supreme Court intent, and statutory intent, from the plain language of 28 U.S.C. 2072, which states that all laws in conflict with the Supreme Court's Rules "shall be of no further force or effect after such rules have taken effect." It follows that SCR 45, as a procedural non-substantive rule, supersedes the procedural rules in 26 U.S.C. 7481(a)(2)(B), to the extent they are in conflict.

Settled principles of statutory construction also provide for reconciliation of the two apparently conflicting statutes as follows: 26 U.S.C. 7481(a)(2)(B) is not in conflict with SCR 45, and remains in full force and effect when the Tax Court Order is appealed only to the federal appellate Courts, including the federal Courts of Appeal-but not the U.S. Supreme Court. When, however, there is an appeal to the U.S. Supreme Court, from a federal appellate Court, then SCR 45 applies and is controlling. Epic Sys. Corp. v. Lewis 138

S.Ct. 1612 (2018); Morton v. Mancari 417 U.S. 535 (1974); SCR 45; 28 U.S.C. 2072; SCR 16.3; SCR 48.

26 U.S.C. 6330 provides states that there shall be no collection action against taxpayer property when, as in this case, taxpayers have exercised their right to a hearing on IRS's collection actions, and have timely appealed to the Tax Court. 26 U.S.C. 6330(a)(1); 26 U.S.C. 6330(d)(1). 26 U.S.C. further provides that collection actions shall be suspended while the matter is being heard, and while appeals therefrom are pending; and, the statutory stay on collection actions shall not expire until 90 days after there is a "final determination" on the matters being heard. 26 U.S.C. 6330(d)(1); 26 U.S.C. 6330(e). IRS in writing has concurred with the above interpretation of the plain language of this statute. Specifically, in Internal Revenue Manual ("IRM") 35.9.3.6 (04-27-2012), IRS states, regarding collection due process cases, that "... the date the Tax Court decision is final is the date the section 6330(e)(1) suspension of the collection statute of limitations and the levy prohibition ends."

Since the 4th Circuit has not yet issued a mandate, based on an order and judgment from the Supreme Court, there is not yet a final Tax Court order in the related case Docket No.: 15847-14L, to be applied to this case Tax Court Docket No: 15850-14L.

C. The Issues An Question Presented is of National Significance and Exceptionally Important

Clear understanding and application of federal rules governing the finality of Tax Court Orders, which

directly and materially impact taxpayer compliance nationwide, and IRS enforcement nationwide, is exceptionally important to compliance by each taxpayer of the United States, and to compliance with, and enforcement of, the laws of the United States, by the Commissioner of Internal Revenue, and the Tax Court.

CONCLUSION

It is settled law that Petitioners were entitled to notice, and a fair hearing, before property deprivation. Here, a court order which they did not get, because it was not properly entered, or served, ought not be used to deprive them of property, before the fair hearing procedures in federal court have been concluded, and before the court order itself has obtained lawfully enforceable status. This violates settled constitutional principles. Lipke v. Lederer 259 U.S. 557(1922); Coe v Armour Fertilizer Works 237 U.S. 413 (1915). For all the foregoing reasons, this Court should grant the petition for certiorari.

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