No. _____

In The

Supreme Court of the United States

JOE ALFRED IZEN, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether equitable tolling may extend substantiation evidence gathering deadlines under I.R.C. § 170(f)(12).

2. Whether Congress lacks the power to delegate unbridled discretion to the Commissioner to refuse to promulgate regulations which provide equitable relief from filing deadlines in appropriate cases.

3. Whether in a statutory scheme conflicting provisions must be construed and applied, if possible, so that both competing purposes can be realized.

4. Whether Petitioner was entitled to a hardship exemption under I.R.C. § 170(f)(11).

5. Whether the Petitioner Izen was entitled to summary judgment because the Commissioner failed to present controverting evidence supporting his claim that a charitable deduction was never made and that the charitable deduction had no value.

PARTIES TO THE PROCEEDINGS

The following list provides the names of all parties to the proceedings below:

Petitioner, Joe Alfred Izen, Jr., was a Petitioner in the United States Tax Court and an Appellant in the Court of Appeals.

Respondent, Commissioner of the Internal Revenue Service, was the Respondent in the United States Tax Court and was the Appellee in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Joe Alfred Izen, Jr., respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Tax Court's Memorandum Opinion, was reported at 148 T.C. No. 5, (App. D). The Court of Appeals Opinion was unpublished (App. A).

JURISDICTION

The Judgment of the Court of Appeals was entered on June 29, 2022. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

The notification required by Rule 29.4(b) has been made to the Solicitor General of the United States by providing a copy of this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Bill of Rights, Ninth Amendment, U.S. Constitution.

I.R.C. 170(B)(12). I.R.C. 170(f)(11). I.R.C. 170(f)(12).

STATEMENT OF THE CASE

Petitioner purchased a 50% ownership interest in a Hawker-Siddley DH125-400A jet aircraft at a bankruptcy sale, donated his interest in the aircraft to the 1940 Air Terminal Museum at Hobby Airport in Houston, Texas in December, 2010, but did not claim the charitable gift deduction allowed by IRC 170(B)(12) until he filed an Amended Petition in the Tax Court raising the deduction in a subsequent 1040X amended tax return for tax year 2010 while the Tax Court case was pending. The Commissioner denied the deduction claiming that Petitioner's substantiation evidence was not "contemporaneous" and did not meet the various time deadlines set out in IRC § 170(f)(12).

FACTUAL SUMMARY:

Petitioner's summary judgment Declaration and Exhibits satisfied the following substantiation requirements of IRC 170(f)(12):

> (B) Content of acknowledgement: An acknowledgement meets the requirements of this subparagraph if it includes the following information:
>
> (i) The name and taxpayer identification number of the donor. PETITIONER'S SUPPORTING EVIDENCE: Izen's Declaration In Support of Petitioner's Second Motion for Summary Judgment; Exhibit D and E, Letter of Acknowledgment (Name of Donor) ROA 571-581, 623-626; Exhibit G, Form 8283

attached to Amended Return (Donor's SSN/Tax ID No.) ROA 663-664.

(ii) The vehicle identification number or similar number. PETITIONER'S SUPPORTING EVIDENCE: Izen's Declaration; Exhibit C; McKenzie Appraisal; Pg. 5; ROA 594; Izen Declaration; Exhibit D; Pg. 1, ROA 623; and Declaration of Philippe Tanguy; Exhibits A and B, ROA 557-568.

(iii) In the case of a qualified vehicle to which subparagraph (A)(ii) applies:

(I) a certification that the vehicle was sold in an arm's-length transaction between unrelated parties,

(II) the gross proceeds from the sale, and

(III) a statement that the deductible amount may not exceed the amount of such gross proceeds.

(iv) In the case of a qualified vehicle to which subparagraph (A)(ii) does not apply:

(X) a certification of the intended use or material improvement of the vehicle and the intended duration of such use; PETITIONER'S SUPPORTING EVIDENCE: Izen Declaration; Exhibit D. Pg. 1, ROA 623. " . . . This donation allows us to enhance our collection significantly. This will make an excellent addition to the museum's collection. The Hawker is an excellent fit for the museum's diverse collection. The museum looks forward to adding the Hawker to our collection not

only for its educational benefits but for its significance as a part of flight and aircraft history." (Use as a museum piece displayed to public).

(II) a certification that the vehicle would not be transferred in exchange for money, other property, or services before completion of such use or improvement. PETITIONER'S SUPPORTING EVIDENCE: Izen Declaration; Exhibit E; Pg. 2, ROA 625. "The Museum represents that it accepts full and complete ownership of the Aircraft and full legal and financial responsibility for it and will not sell the aircraft for at least two years after accepting its donation."

(v) Whether the donee organization provided any goods or service in consideration, in whole or in part, for the qualified vehicle. PETITIONER'S SUPPORTING EVIDENCE: Izen Declaration; Exhibit E; Pg. 3, ROA 626. "The Museum represents and warrants that no goods, services, or other tangible benefits have been conferred upon or transferred to donor in return for the aircraft and that the donation described herein was given solely for the purpose of benefiting the operations of the Museum, which is a tax exempt, non-profit corporation under Section 501(c)(3) of the Internal Revenue Code and the laws of the State of Texas. Donors delivered a signed original of the Donation Agreement to the Museum on or before December 31, 2010. Donors, On Point and Izen, never exercised any further control

> over the donated Aircraft or made any use thereof.
>
> (vi) A description and good faith estimate of the value of any goods or services referred to in clause (v) or, if such goods or services consist solely of intangible religious benefits (as defined in paragraph (8)(B), a statement to that effect. PETITIONER'S SUPPORTING EVIDENCE: – There is no compensation referred to in " . . . clause (v) above. . . ." Izen Declaration; Exhibit E; Pg. 3, ROA 626.

The Tax Court rejected Petitioner's supporting evidence and granted summary judgment for the Commissioner. The Tax Court refused to read all of Petitioner's Exhibits and supporting documents together in order to satisfy the proof required by the above enumerated provisions of IRC 170(B)(12).

The Tax Court refused to consider Petitioner's supporting evidence attached to Petitioner's 2010 1040X. ROA 927. (App. D)

The Tax Court "assumed without deciding" that Petitioner's 2010 1040X was a valid return, but rejected any of its attachments such as the Houston Air Museum's Form proving Petitioner's entitlement to a charitable deduction because it found that the documents were "not contemporaneous." Tax Court Opinion, ROA 932-933 fn 3. (App. D)

Petitioner's 2010 1040X and its attachments satisfied any contemporaneous written acknowledgement requirements.

Both Sec. 170 and the Regulations promulgated thereunder recognize that disclosure of required information which supports a charitable deduction must be included only on the " . . . first return which claims the deduction . . . " which in this case is Petitioner's 2010 1040X.

Winston McKenzie's Appraisal is qualified as well as contemporaneous. See Izen Declaration, ROA 571-581; Exhibit C. ROA 587-622. The Appraisal identified the Aircraft; Provided the aircraft serial number(s); stated the qualifications of the appraiser; set out the method of appraisal; stated the purpose of the appraisal, including a statement it is made for tax purposes; and included all the other required information and disclosures, including comparable sales used to reach a value, and was completed within thirty days prior to the donation.

The Bankruptcy Court's December 18, 2007 Order of Sale removed all doubt that On Point and Izen acquired title to the aircraft and supported the donation. The Bill of Sale further supported the title of On Point and Izen. Izen Declaration, ROA 571-581; Exhibits A and B, ROA 582-586.

The Donation Agreement conveyed On Point's and Izen's title in the aircraft to the museum. Izen Declaration, ROA 571-581; Exhibit E; Pg. 1, ROA 624.

> "Donors and the Museum hereby agree that effective on the Delivery Date (on or before December 31, 2010), all right, title, and interest, in the Aircraft is hereby transferred from

> the Donor invested exclusively in the Museum. SUPPORTING EVIDENCE: Izen Declaration; P. 10, Para. 26, ROA 580-581; and Tanguy Declaration, P. 7-8, Para. 13-16. ROA 563-564.

The Tax Court found the following facts which Petitioner accepts as true unless otherwise indicated below:

Petitioner timely filed his 2010 Federal income tax return, pursuant to an extension, on October 17, 2011. On this return he claimed the standard deduction and did not claim any deduction for charitable contributions.

The IRS commenced an examination of Petitioner's 2009 and 2010 returns and determined that he failed to substantiate certain deductions claimed on his Schedules C, Profit or Loss From Business, and Schedules E, Supplemental Income or Loss. On August 17, 2012, the IRS mailed him a notice of deficiency determining deficiencies of $93,123 and $18,643, and section 6662(a) accuracy-related penalties of $27,612 and $5,522, for 2009 and 2010, respectively.

Petitioner timely petitioned the Tax Court. His petition challenged respondent's disallowance of his Schedule C and Schedule E deductions, but did not allege any charitable contribution deductions.

On March 28, 2014, Izen filed, ROA 98-144, and on April 1, 2014, ROA 156, the Tax Court granted, a motion for leave to file an amended petition. Petitioner alleged in his amended petition that, on December 31,

2010, he had donated a 50% interest in a 1969 model Hawker-Siddley DH125-400A private jet aircraft to the Houston Aeronautical Heritage Society (Society), an organization tax exempt under section 501(c)(3), which operates a museum at the William P. Hobby Airport. Izen alleged that his 50% interest in the aircraft had been appraised at $338,080, and that he was entitled for 2010 to a charitable contribution deduction in that amount. ROA 157-158.

Izen and On Point Investments, LLP (On Point), a partnership, purchased the aircraft in December, 2007 for $42,000. Izen and On Point each paid $21,000 for a 50% undivided interest. After its purchase, the aircraft remained in storage for three years at an airfield in Montgomery County, Texas. ROA 557-568, 582-584, ROA 767-777.

On December 31, 2010, Izen and On Point contended that they made completed gifts to the Society of their respective 50% interests. Contrary to the Tax Court's reference to Tanguy's alleged representation of On Point and Izen during the donation of the aircraft to the Houston Air Museum, the documents and summary judgment evidence submitted by Petitioner conclusively confirmed Tanguy's representation and participation in the donation of the mutually-owned aircraft. ROA 557-568; 582-584.

On January 23, 2016, Izen filed a motion for partial summary judgment seeking a ruling that he was entitled to a charitable contribution deduction for the gift he claimed he made. ROA 260-324. The Tax Court

denied that motion on March 9, 2016, (App. E) finding that there existed several disputes of material fact. ROA 348-349. These included: (1) whether Izen had secured from the Society and attached to his return a "contemporaneous written acknowledgment" as required by section 170(f)(12) ROA 623, 626; (2) whether the required Form 8283, Noncash Charitable Contributions, had been properly signed and dated by an officer of the Society, ROA 664; and (3) whether the fair market value of Izen's 50% interest, as of December 31, 2010, was $338,080. ROA 594, 605.

Contrary to the Tax Court's finding, Petitioner claimed a charitable deduction for his gift of his interest in the Hawker jet aircraft to the Houston Air Museum in his Amended Tax Court Petition which Izen filed after the Tax Court entered an order granting Izen leave to file. ROA 658-668. Izen claimed a charitable deduction for the gift of the jet Hawker aircraft to the Houston Air Museum for the first time on a tax return on April 14, 2016, when Petitioner filed his 2010 Form 1040X, ROA 658-704. Izen included with this amended return: (1) an acknowledgment letter addressed to Philippe Tanguy, dated December 30, 2010, and signed by Drew Coats as president of the Society, ROA 681; (2) a Form 8283 executed by Amy Rogers, managing director of the Society, and dated April 13, 2016, ROA 664, and signed December 15, 2010 by Appraiser McKenzie; (3) a copy of an "Aircraft Donation Agreement" executed on December 31, 2010, by Joe Alfred Izen, Jr. and Drew Coats as president of the Society, ROA 626; and (4) an appraisal by Winston

McKenzie dated April 7, 2011, opining that the fair market value of Izen's 50% interest in the aircraft, as of December 30, 2010, was $338,080. ROA 669-704. The Commissioner represented that the IRS "will not process petitioner's amended 2010 tax return." ROA 927.

On May 27, 2016, the Commissioner filed a motion for partial summary judgment, contending that Petitioner's charitable contribution deduction should be denied on the ground that he failed to satisfy the substantiation requirements of Section 170(f)(12). ROA 415-426. On July 18, 2016 Petitioner filed a renewed motion for partial summary judgment, urging that the defects previously discerned by the Court had been cured by his subsequent filing of the 2010 amended X return. ROA 555-722. Petitioner contended that his claimed charitable contribution deduction of $338,080 should be allowed in full after denying Petitioner's Motion to Compel "Branerton" discovery from the Commissioner, ROA 553-554, and after refusing to grant Petitioner's Motion to Allow the filing of the declaration of witness, Kevin Williams, ROA 758, the Tax Court entered a decision and Memorandum Opinion on October 19, 2016, ROA 932-933, denying Petitioner's Second Motion for Summary Judgment and granting the Commissioner's Motion for Summary Judgment.

After Petitioner and the Commissioner entered into several stipulations, the Tax Court entered a final

decision on those stipulations disposing of all remaining claims on May 18, 2021. ROA 1230-1231. (App. B).

REASONS FOR GRANTING THE PETITION

1. EQUITABLE TOLLING MAY EXTEND SUBSTANTIATION EVIDENCE GATHERING DEADLINES UNDER I.R.C. § 170(F)(12).

EQUITY JURISDICTION COMES TO THE U.S. TAX COURT:

In *Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493 (2022) this Court extended the remedy of equitable tolling to the jurisdiction of the U.S. Tax Court. This unanimous decision recognized the power of Tax Court Judges to grant equitable tolling relief from filing deadlines imposed by Congressional tax statutes which did not contain absolute language prohibiting any extension. The Court reasoned that without such absolute language mandating that a filing deadline was jurisdictional and could not be extended, a Tax Court Judge has the power and duty to entertain claims of equitable relief seeking such tolling and to grant extensions of deadlines when they are factually supported and in conformity with equitable principles.

Hidden within this opinion, however, is a footnote which supports this Court's reasoning for application of equitable principles in Tax Court practice. See *Boechler* at fn. 1. Never has a footnote in an Opinion of this Court so transcended and swallowed the

significance of the ground breaking opinion which it underlies.

In rejecting the Commissioner's "suggestion" that traditional equitable principles cannot be extended to non-Article III Judges, this unanimous Court noted that it had already done so in various prior cases. See *Boechler* at fn. 1 (equitable principles extended to enforcement of bankruptcy filing deadlines and deadlines to file claims with federal agencies.)

In reaching its conclusion that equitable principles apply to Tax Court practice, this Court reached and decided one of the issues underlying a Tax Court decision reversed and remanded by the Ninth Circuit previously presented to this Court by a Petition for Writ of Certiorari. See *Dixon v. C.I.R.*, 316 F.3d 1041, 1048 (9th Cir. 2003) (IRS counsel bribed party witnesses in Tax Court Test Case proceedings committing fraud on Court.)

In *Dixon* the Commissioner asserted that the Tax Court had no equitable powers which would enable it to entertain bills of review or equitable proceedings analogous to those permitted by Federal Rules of Civil Procedure Rule 60(b) allowing collateral attacks on Tax Court judgments based on fraud on Court. A unanimous Panel of the Ninth Circuit ruled otherwise in *Dixon* and remanded that case to the Tax Court to hold evidentiary hearings on the aggrieved taxpayers' pleadings seeking relief and to fashion a remedy which would accord those taxpayers the same settlement benefits which the Commissioner fraudulently

extended to the bribed party witnesses. See *Dixon* at P. 1048. Notably, this Court later declined to consider the matter when it refused the aggrieved taxpayers' Petition for Writ of Certiorari in *Hongsermeier v. Comm'r*, 621 F.3d 890 (9th Cir. 2010) (cert. denied Dkt. No. 10-749 March 7, 2011). Thus, in *Boechler* this Court merely determined the extent of non-Article III Judges' equitable powers.

HISTORICAL NOTE:

The federal common law which still exists and has application where not replaced by state law derives from ancient origins and a divided legal system under which legal causes of action were decided by common law courts and cases in equity were filed separately with the King's Chancellor and decided in a separate, but parallel system.

Relief under equitable principles became part of the bundle of rights of a U.S. citizen under the adoptive reach of the Ninth Amendment (App. H) to the United States Constitution when that so-called "forgotten" amendment was enacted with the Bill of Rights.

Later the right to equitable relief in separate courts of equity was abolished by many of the states and by federal statute, but the Ninth Amendment rights to equitable relief were preserved by vesting equitable jurisdiction in the federal Article III courts and judges by "merger" of law and equity powers in the same court.

The extension of the power to grant equitable relief to non-Article III courts, judges, and agencies, was necessary to accord complete relief to parties forced to venture before those Courts and agencies in order to obtain complete justice: "There shall be no wrong without a remedy." The extension of equitable powers to non-Article III judges and agencies was presaged by Congressional laws allowing Tax Court judges to enjoin collection of deficiencies in collection due process hearings – an issue which greatly troubled the Commissioner in *Boechler* – and was inevitable.

The reach of *Boechler* is just this and no more. A Court of the United States or an agency acting as a Court under delegated powers must have the power to grant complete justice among the parties; therefore, that power must include the right to equitable relief when warranted by the facts and circumstances of the case.

The Commissioner's counter argument that Congressional intent set out in statutory wording cannot be overridden or harsh or absurd results be softened by the conscience of equity is no more than the argument that the common law may be overridden by statute.[1]

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[1] The rule requiring strict construction of statutes in derogation of common law has, itself, been softened by the countervailing view that it is inapplicable to statutory schemes which require a liberal construction. A liberal construction of a statutory scheme which prohibits application of equitable principles should be applied, however, only where demonstrable prejudice would result

EQUITY ABHORS A FORFEITURE:

In making its holding in *Boechler* this unanimous Court did nothing more than extend this equitable principle to avoid the forfeiture of a taxpayer's legal rights to obtain relief. This equitable maxim is the underpinning and the very essence of the doctrine of equitable tolling. What harm or prejudice resulted or could result from a decision by the Tax Court, on remand, equitably tolling and excusing the taxpayer's one day filing default of his petition? The Commissioner could not show any. When the taxpayer "drops the ball," equity may pick it up.

Further, *Boechler* does not extend equitable powers lightly. *Boechler's* mandate that harsh results required by Congressional statutes which undermine the general purpose of the statutory scheme – such as the charitable deduction here – may be ameliorated and softened by application of equitable principles absent absolute statutory language requiring the penalty if consistent with the complimentary legal and equitable maxims: "Equity follows the law" and "What the law does not prohibit, it allows." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (Mem), 206 L. Ed. 2d 266(Mem) (2020).

> Instead, we have emphasized, courts bear an "obligation" to determine independently what the law allows and forbids. *Abramski v. United States*, 573 U.S. 169, 191, 134 S.Ct.

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underlying the main purpose of the statutory scheme – prejudice which was not present in *Boechler*.

2259, 189 L.Ed.2d 262 (2014) ; see also 920 F.3d at 39-40 (opinion of Henderson, J.); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027-1032 (C.A.6 2016).

NO HARM OR PREJUDICE HERE PREVENTS GRANT OR LITIGATION OF PETITIONER'S CHARITABLE DEDUCTION:

The labyrinth of hoops Congress set up which must be traversed in order to substantiate an IRC 170(f)(12) charitable deduction for the Hawker Jet in this case set out in IRC 170(f)(12) were completely satisfied and met by the Petitioner's substantiation evidence which the Tax Court refused to read and consider as a whole. See *15 W. 17th St. LLC v. Comm'r*, 147 T.C. No. 19 (2016, en banc). The only missing element – Petitioner's social security number – would have been inevitably discovered and known to the Commissioner's auditors or counsel upon the filing of Petitioner's "first-filed income tax return" claiming the deduction.

Finally, the Petitioner's claim of the charitable deduction itself could not have evaded the scrutiny of the Commissioner in this case or his legal power to challenge it. Petitioner claimed the charitable deduction for the first time in a Tax Court Amended Petition properly filed with the Tax Court Clerk and served on the Commissioner before Petitioner filed his first return claiming the charitable deduction.

The harm or prejudice here – avoidance of audit scrutiny – was impossible under the facts of this case. The Tax Court's "new matters" jurisdiction addressed by Tax Court Rules of Practice and Procedure Rule 142 has never been challenged and allows a taxpayer to present and have determined new claims to tax deductions, credits, and exemptions, which were not claimed on a taxpayer's challenged return. *Leathers v. Leathers*, No. 08-CV-1213, (D. Kan. 2015, 9-25-15) affirmed at 856 F.3d 729 (10th Cir. 2017) (taxpayer sued in Federal District Court for collection of assessments entitled to raise offsets, credits and deductions which were not claimed before IRS, but failed to provide such proof). See *Leonhart v. Commissioner*, 27 T.C.M. (CCH) 443, 1968 T.C. Memo 98 (U.S.T.C., 1968) and *Griffith v. Commissioner*, 56 T.C.M. (CCH) 220, 1988 T.C. Memo 445, 1988, WL 95665 (U.S.T.C., 1988) (newly-raised charitable deductions reviewed and decided by Tax Court under Rule 142).

Clearly, Congress did not pass IRC 170(f)(12) with the Tax Court's New Matters jurisdiction in mind. A taxpayer who waits until filing a Petition in Tax Court to raise the challenged charitable deduction has zero chance of evading detection by the IRS and has the same zero chance in avoiding IRS challenges to overstated values by able and proficient and sometimes even vicious IRS counsel and agents. Thus the concerns of Congress concerning IRS failure to detect grossly overstated charitable deductions has no application under these facts, a reality which apparently escaped both the Commissioner, the Tax Court, and even

the Fifth Circuit, when they refused to allow the charitable deduction.

The evidence gathering deadlines for substantiation set out in IRC 170(f)(12) are subject to equitable tolling and should be extended under *Boechler's* authority.

2. CONGRESS LACKS THE POWER TO DELEGATE UNBRIDLED DISCRETION TO THE COMMISSIONER TO REFUSE TO PROMULGATE REGULATIONS WHICH PROVIDE EQUITABLE RELIEF FROM FILING DEADLINES IN APPROPRIATE CASES.

COMMISSIONER'S REFUSAL TO PROMULGATE REGULATIONS:

Congress left the door open for the Commissioner to promulgate regulations placing the burden of ameliorating the harsh results of IRC 170(f)(12)'s evidence-gathering mandates on the donee charity receiving charitable gifts rather than the harried taxpayer. The Commissioner wreaked havoc by refusing to exercise his delegated powers and, instead, by enforcing the harsh results, without any amelioration or application of equitable principles, on the taxpayers including Petitioner. Literally billions of dollars in disallowed charitable deductions have resulted from the Commissioner's unconscionable non-action.

Faced with this quandary the Tax Court, en banc, could not devine the seemingly clear path of adoption and application of equitable principles found by this

unanimous Court in *Boechler*. Instead, in a divided en banc opinion the Tax Court ruled that the Commissioner had unbridled discretion to refuse Congress' invitation to promulgate needed regulations protecting taxpayers from harsh results which would deprive them of the chance to be heard on their cases or on the validity of their deductions. See *15 W. 17th St. LLC v. Comm'r.*, 147 T.C. No. 19, P. 1 (2016, en banc).

> The substantiation requirements of subparagraph (A) do not apply to a contribution "if the donee organization files a return, on such form and in accordance with such regulations as the Secretary may prescribe," that includes the information specified in subparagraph (B). I.R.C. sec. 170(f)(8)(D). To date, the Secretary has not issued regulations to implement the donee-reporting regime referred to in subparagraph (D).

The proper course to remediate the Commissioner's unconscionable inaction was not the one suggested by the Tax Court Majority – to grant the Commissioner unbridled discretion to refuse to act nor the course suggested by the Tax Court dissent – to imply that the Commissioner had acted and to provide ameliorating relief remedying the harsh results.

The proper path devined by this unanimous Court in *Boechler* was to enforce the mandate of equity jurisprudence upon the Commissioner and the Tax Court in conformity with the dictates of the Ninth Amendment.

Since the day the non-delegability of legislative function was decided by this Court, questions have

lingered over the non-delegability of judicial function – a constitutional prohibition most recently addressed in this Court's opinions in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), deciding that the power to conduct jury trials was limited by the Constitution to Article III Judges.

If the judicial function is delegable by Congress to federal agencies including the IRS and non-Article III Judges who oversee their administrative determinations, such delegation must perforce include the ambit of equitable powers possessed by the Article III Courts to render complete justice to the parties before it with the full panoply of the equitable rights preserved by the Ninth Amendment. To the extent that Congress attempted to delegate otherwise, it exceeded the limits of its legislative clout. Congress, the legislative branch, has no power to decree the abolition of equitable powers without the strict and absolute language this Court did not find in *Boechler*.

MATTERS OF GRACE, TAX DEDUCTIONS, AND THE COMMISSIONER'S JUDICIAL CAPACITY:

Subject to appeal to the Tax Court, Court of Appeals, and thence to this Court, the Commissioner is endowed with administrative powers containing judicial capacity. The first determination of the validity of a taxpayer's charitable deduction will be made by IRS auditors in the quasi-administrative proceeding known as IRS audit unless, like here, the taxpayer has

raised the challenged charitable deduction, for the first time, before the Tax Court as a "new matter."

The oft repeated tax maxim: "Deductions are a matter of grace and not of right" still holds true and requires the taxpayer to assume the burden of proof required to substantiate his deductions. *School District of Abington Township, Pennsylvania v. Schempp Murray III v. Curlett*, 374 U.S. 203, 289, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

> I think *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, suggests a further answer. We held there that a State may not condition the grant of a tax exemption upon the willingness of those entitled to the exemption to affirm their loyalty to the Government, even though the exemption was itself a matter of grace rather than of constitutional right.

However, those granted the power to extend grace may fall from grace. To the extent that the Commissioner failed to act with the equitable conscience he inherited from the Chancellor and his judicial progeny in our federal system under the Ninth Amendment, the Commissioner fell from grace and his inaction was properly remedied by this Court's unanimous action in *Boechler* and should likewise be remedied by grant of Petitioner's writ with appropriate relief. Henceforth, the equitable decisions of the Commissioner and the Tax Court such as those recited by IRS in its collection due process findings in *Boechler* should conform to and be guided by those traditional equitable standards of

fair play and substantial justice that guide the equitable conscience and rulings of Article III judges and their Courts.

3. IN A STATUTORY SCHEME CONFLICTING PROVISIONS MUST BE CONSTRUED AND APPLIED, IF POSSIBLE, SO THAT BOTH COMPETING PURPOSES CAN BE REALIZED.

"What the Lord giveth, the Lord taketh away. Blessed be the name of the Lord." In the imperfect tax context of the federal legal tax system, what is given by Congress paradoxically is taken away by the same statutory scheme.

So it is with the charitable deductions under the I.R.C. 170(B)(12) which allows charitable deductions for gifts of aircraft, vehicles, and boats, with a value in excess of $5,000.00 which is conflicted by I.R.C. 170(f)12 setting deadlines for gathering "contemporaneous" substantiation evidence supporting the charitable deductions and taking the deductions away if the deadlines are not complied with.

Statutory construction of federal law requires that the entire statutory scheme into which a particular statute falls must be considered and each competing purpose, if possible, must be achieved through enforcement. The general purpose of the statutory scheme must be determined and upheld. *Norfolk Southern Corp. v. Comm'r of Internal Revenue*, 104 T.C. 13, 104 T.C. No. 2 (T.C. 1995).

CHARITABLE DEDUCTIONS – LIBERAL CONSTRUCTION:

Since the enactment of the original Internal Revenue Code of 1913 and the later enactment of the Internal Revenue Code of 1926, the US Congress has from time to time passed general statutory schemes which have the purpose of encouraging charitable donations to worthy causes which benefit the general public through deductions in the various Internal Revenue Codes which offset a contributing taxpayer's net taxable income by various percentages based on the fair market value of the gift.

The general purpose of all these Congressional schemes has been to liberally support charitable giving and the Courts have interpreted the IRC statutes liberally in support of charitable gifts in line with Congressional intent. The favored status of charitable gifts as well as the deductibility of same has been a fixture of the IRC for almost a century. See *Markle v. Comm'r*, 28 BTA 201 (B.T.A. 1933) and discussion. Emanouil v. Comm'r., T.C. Memo. 2020-120 (2020).

IRC Sec. 170 represents the general statutory scheme governing deductions for charitable giving set out by the US Congress in legislation dating from at least the adoption of the Internal Revenue Code of 1954.

As will be established hereafter by the authorities set out below this Court begins its construction of charitable deduction statutes by determining the general

statutory scheme Congress intended and giving it effect wherever possible.

ENHANCED AUDIT SCRUTINY – CONFLICTING PURPOSE:

For a while the requirements for charitable deductions were given a liberal construction without any legislative or regulatory limitations. However, the Commissioner's audit statistics began to present dark clouds of questionable tax reporting and outright gross misrepresentations of the value of gifts by taxpayers convincing Congress to enact certain heightened substantiation requirements applicable to gifts over a certain monetary value so that what the Commissioner referred to as "gross overstatement in value abuse" could be rectified.

STATUTORY PURPOSE OF IRC 170(f)(12)

Then came Sec. 170(f)(12) which imposed on taxpayers claiming charitable deductions of vehicles with a fair market value of $500 or more to obtain various forms of written documentation called a contemporaneous written acknowledgement prior to various deadlines provided by that statute.[2] The time deadlines

[2] IRC § 170 also contemplated that charitable organizations who were donees might be required to independently report these charitable gifts in a manner identifying the donors and thereby exempting the identified donors from having to comply with IRC 170(f)(12). As further discussed above the Commissioner ignored Congress' invitation to pass regulations requiring the charitable donees to make such reporting. The responsibility for any errors

imposed by Congress to gather such contemporaneous documentation were fixed at " . . . before . . . " January 31 of the year after the tax year in which the charitable deduction was claimed. Various portions of the contemporaneous written acknowledgement had to be attached to the taxpayer's " . . . first filed return . . . " on which the charitable deduction was first claimed.[3] A careful examination of the legislative history of IRC 170(f)(12) and its companion "remedial" sections was to enhance, if not insure, "audit scrutiny." Gross over valuations of the stated value of charitable gifts were being taken, purportedly, on tens of thousands of taxpayers' returns resulting in gross understatements of those taxpayers' income tax liability. The Commissioner's cries entered sympathetic Congressional ears and these legislators resolved to take action to remedy the situation.

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in reporting the required information supporting an IRC 170 charitable deduction therefore remained the donor taxpayer's onerous burden. Thereafter the Commissioner to his discredit uniformly took the position that any errors in the donee charity's contemporaneous written acknowledgement papers would disallow the charitable deduction.

[3] The taxpayer did not claim the charitable deduction for the gift of his interest in the Jet Hawker aircraft to the Houston Air Museum at Hobby Airport until he was already in U.S. Tax Court on a Petition challenging the Commissioner's Notice of Deficiency for the tax year 2010 in which the charitable gift was made. The first filed income tax return which claimed the taxpayer's charitable gift deduction for the first time was filed while the taxpayer was in Tax Court for determination of his correct tax liability for tax year 2010.

The action taken involved creating a set of legal hoops to jump through in the form of substantiation gathering. Protecting a claimed charitable gift deduction from disallowance at audit and qualifying under the enhanced reporting requirements imposed by Congress under which some of the substantiation had to be gathered before certain dates and supplied to the IRS became increasingly onerous. The taxpayer had to comply with the following:

> Obtain an expensive written appraisal before the end of the tax year setting out the fair market value of the gift by a qualified appraiser, get an accurate acknowledgement of the gift from the donee charity before the end of the tax year in which the deduction is taken or before January 31 of the following year, and make sure the donee charity inserts your (the taxpayer's) SSN.

Couple the above with proof of an actual transfer of the gift during the tax year in which the deduction was claimed with a statement from the donee denying that the gift is going to be sold by the charity within a certain period of time and denying that the donor has received any benefit or interest in the gift are also required. Recognizing that all of the above might be extremely difficult, if not impossible, for a particular taxpayer who has benefited the public by his gift, Congress enacted the "reasonable cause" curative provisions of IRC 170(f)(11) which Petitioner argued and the Tax Court refused to consider. Congress also empowered the Commissioner to make regulations

softening the effect of the above evidence gathering and reporting gyrations which might work hardship on taxpayers who made reasonable efforts to comply with the law.[4] See IRC 170(f)(10)(D), (f)(11)(H) and (f)(12)(F). Suffice it to say that the statutory purpose of heightened audit scrutiny or disclosure of IRC 170(f)(12) and the intent of Congress are satisfied where, as here, "audit scrutiny" is enhanced or the statute is enforced in such a way that gross over valuations of charitable gifts cannot escape reporting or detection by the Treasury and its Commissioner. See *Scheidelman v. Comm'r*, 682 F.3d 189, 109 A.F.T.R.2d 2012 (2nd Cir. 2012) (IRC Sec. 170 charitable deduction allowed despite defects in appraisal where sufficient disclosure of taxpayer information satisfied Congressional intent.)

ENHANCED AUDIT SCRUTINY SATISFIED UNDER FACTS OF THIS CASE:

Evidence And Content Of Taxpayer's Contemporaneous Written Acknowledgement And First-Filed/Amended 1040 2010 Personal Income Tax Return:

Petitioner procured a timely appraisal of the fair market value of the gift of his interest in the Hawker

[4] The Commissioner's declination to take up this regulatory invitation apparently due to the enormous volume of protests received from charitable donees who did not wish to be responsible for reporting was fully discussed and lamented by the dissent in an opinion of the full U.S. Tax Court which was considering the denial of a large charitable endowment deduction. See *15 W. 17th St, LLC*, supra

Jet aircraft. The rationale for the requirement to obtain a contemporaneous appraisal and to attach that appraisal to the first-filed return on which the charitable deduction is claimed not only discloses the possibility to the IRS that a grossly overvalued deduction has been claimed for the gift, but also allows the IRS to obtain its own expert appraisal if it desires to do so in order to resolve the issue of over valuation. The requirement that a qualified appraiser make the appraisal was inserted as an obvious safeguard to prevent overstatement since any qualified appraiser making a grossly over valued appraisal could become subject to other penalty of law provided in the statutory scheme.

Appraisal And Contents of Contemporaneous Written Acknowledgement Satisfied All But One IRC 170(f)(12) Requirement:

Petitioner not only acquired a timely contemporaneous appraisal and timely provided it to the IRS on his first filed/amended 2010 tax return, he also presented various documents including an acknowledgement of gift which, when read together, satisfied all of the reporting and disclosure requirements of IRC 170(f)(12) save and except for the taxpayer's SSN. When read together the appraisal and all of the documents Petitioner received from the donee Air Museum proved that Petitioner had made a charitable gift to the air museum of his interest in the Hawker Jet prior to December 31, 2010, that the Air Museum acknowledged that it would not resell the aircraft without

waiting to do so for the statutory-required time period preventing resale, that the aircraft was going to be utilized by the Air Museum to display to the general public and that Petitioner retained no interest in the aircraft and would receive no other form of private inurement back from the Museum as a result of the gift. ROA 557-568, 571-581, 594, 582-586, 587-622, 623-626, 663-664.

IRC 170(f)(12)'s reporting requirements other than a contemporaneous appraisal were inserted by Congress to further enhance the ease of the Commissioner's audit with one important exception. The requirement to provide a taxpayer identification number, here the taxpayer's SSN, could only be for the purpose of identifying the taxpayer claiming the deduction. Under IRC Sec. 170's statutory scheme, the donor taxpayer's SSN will be supplied by the "first-filed return" claiming the deduction if it is not provided on the contemporaneous written acknowledgement.

DISHARMONY IN THE LOWER COURTS CONCERNING PROPER RULES OF CONSTRUCTION FOR CHARITABLE GIFT STATUTE:

Here, unless absolutely required to do so in order to meet the intent of Congress, a rule of statutory construction should be followed by this Court which rejects a literal "crabbed" construction of both 170(f)(11) and 170(f)(12). See *Rickey v. US*, 592 F.2d 1251 (5th Cir. 1979) at P. 1258:

> Nevertheless, the Crawford court was another of the courts which rejected "slavish" interpretations of the Code in order to obtain results more in line with the Congressional intent in enacting the attribution and waiver sections of the Code. In this case the Rickey estate terminated all of its actual interest in the corporation. We join the list of courts and reject a crabbed reading of the Code when the rationale for applying a rule is absent, and where application of the rule leads to inappropriately harsh results.

The above quoted rule announced in *Rickey* should be applied here and here is why:

> Despite the Commissioner's and the Tax Court's insistence that Congressional intent required the disallowance of the Petitioner's charitable deduction, the opposite is true because Congressional intent was satisfied. Although the Air Museum's contemporaneous written acknowledgement did not contain Petitioner's social security number, Petitioner could not claim the deduction without placing the claim for deduction on his first-filed amended return claiming the deduction.
>
> This is so because a taxpayer's return must be signed AND CONTAIN THE TAXPAYER'S IDENTIFICATION NUMBER. Otherwise, the form 1040 submitted will not be considered a return and will be returned by the IRS with instructions that it cannot be filed. Any taxpayer who intended to claim and receive the benefit of an overstated charitable

> deduction would not submit the return claiming the overstated deduction without his signature or social security number. Therefore, there was never any chance that Petitioner's charitable deduction for the gift of his interest in the Hawker Jet in 2010 would have ever evaded the audit scrutiny of the IRS simply because the donee Houston Air Museum gave Petitioner an incompetently drafted acknowledgement of the gift which did not contain Petitioner's social security number.

STRICTISSIMI JURIS AND HARSH RESULTS VERSUS ABSURD RESULTS AND COMMON SENSE READING REQUIREMENT. WHICH SHOULD APPLY HERE?

The modern day insistence of the Secretary and his Commissioner that tax statutes must be read strictly and the harsh results of a strict reading must be imposed has its roots in the ancient common law interpretive doctrine of strictissimi juris. Under a strictissimi juris reading, all the words of a statute must be given effect regardless of the results even if the results are harsh, unfair, or seem immoral to the jurist applying the doctrine.

First, we must note that this Court recognizes and applies the doctrine to statutory construction as well as the interpretation of documents. It has done so since its inception as a Federal Constitutional Court beginning at least as early as 1800. In a watershed decision linking these ancient US Supreme Court cases applying that rule to modern tax practice, this Court opined

in *Mobile Co. v. State of Tennessee*, 153 U.S. 486, 490, 14 S. Ct. 968, 38 L. Ed. 793 (1894) as follows:

> And the court is of opinion, and doth accordingly so adjudge and decree, that said eight per cent clause is arbitrary, insensate, and absurd, and is void and unenforceable, and furnishes no obstacle whatever to the taxation of said properties.

This Court in *Mobile* announced an exception to the rule of strictissimi juris interpretation requiring federal statutes be enforced as worded regardless of harsh results. The results of such a reading according to *Mobile* must not be absurd.

The *Mobile* case was cited at least forty-eight times after *Mobile* was handed down in 1894 leading up to this Court's *United States v. Davis*, 25 L. Ed. 2d 323, 90 S. Ct. 1041, 397 U.S. 301 (1970) decision supposedly requiring harsh application of Congress' words under a strict reading of statutes regardless of the absurdity which might result. None of this Court's cases citing *Mobile* which followed that decision reversed, modified, or even mentioned *Mobile's* absurd result exception to the strictissimi juris rule of statutory construction.

Most of these cases followed the example of *Combes v. Getz*, 285 U.S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1932) which applied other grounds in *Mobile* to the cases and facts before the High Court in each decision. (Impairment clause challenge can be mounted in Federal Court to state law impairment of contracts.)

The Fifth Circuit has applied the rule of strictissimi juris interpretation as a legal rule of construction. An example of such an application is *Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty*, 608 F.2d 197 (5th Cir. 1979).

> We are of the further opinion that 971 et seq. is not to be viewed through the constricting glass of Stricti juris, or as some would suggest, Strictissimi juris. We view the legislative history of these sections to mandate a more liberal application than that which existed prior to the 1971 amendments to the Maritime Lien Act. Our review leads us inexorably to the conclusion that it was the intent of the Congress to make it easier and more certain for stevedores and others to protect their interests by making maritime liens available where traditional services are routinely rendered. See *Nacirema Operating Co., Inc. v. S. S. Al Kulsum*, 407 F.Supp. 1222 (S.D.N.Y. 1975). 1973) which interpreted a zoning ordinance.

See also *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares, More or Less*, 508 F.2d 1116 (5th Cir. 1975) (U.S. tariffs subject to strictissimi juris construction.)

In modern legal practice including tax practice this Court has engrafted an additional consideration ameliorating the harsh effects of a strictissimi juris construction which may lead to absurd results. Federal Courts reviewing a tax statute must give it a common sense reading in an effort to avoid absurd results in

enforcing the statute considered. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 3252, 73 L. Ed. 2d 973 (1982). An example of proper application of this Court's rule of construction which is an exception to the harsh reading of IRC 170(f)(12) advocated by the Secretary and his Commissioner and swallowed far too frequently by the Tax Court's current jurists can be found in *Transbrasil S.A. Linhas Aereas v. Department of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986).

> In addition, it seems semantic nonsense for the FAA to calculate the "frequency of operations" during months in which Transbrasil could not or did not operate. Statutory language must be accorded a common sense reading, yet the FAA's interpretation of Sec. 124(f) requires an airline which has been operating six flights a month during its three month period of actual operation to reduce its frequency of operations to just over one flight a month as the result of a provision whose purpose is merely a provision to maintain the status quo with respect to frequency of operations. The Supreme Court has instructed that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973.

To the ameliorating effects of a requirement that Federal Courts give a common sense reading when giving construction to a tax statute must be added the

requirement that the statute in question must be read logically to uphold rather than frustrate the intent of any statutory scheme enacted by Congress to which the statute is applicable. See *Word v. US Commodity Futures Trading Comm'n*, 924 F.3d 1363, 1369 (11th Cir. 2019).

> Third, Word's interpretation would lead to absurd results thwarting Congress' intent. *Lewis v. Barnhart*, 285 F.3d 1329, 1332 (11th Cir. 2002) (courts will interpret statutes to avoid "absurdity of results" (internal quotation marks omitted)). All a petitioner would have to do is simply not appeal the original order requiring him to pay, refuse to pay, move to set aside the original order later, and, if he loses that motion, appeal the denial, never having to post a bond while continuing to delay payment. That would encourage the very dilatory tactics and mounting of expenses in collection of the reparation awarded that Congress intended to discourage by imposing the statutory bond requirement. The more logical reading is that the bond required must be twice the size of at least the reparation order originally entered "against the [petitioner]" before the CFTC. 7 U.S.C. 18(e).

Here, logic dictates that a taxpayer like Petitioner who has supplied the Commissioner with his social security number while reporting and claiming the deduction on an amended first-filed return within the contemplation of IRC 170(f)(12) has complied with all of the substantiation proof and reporting requirements to sustain his charitable gift deduction even if his

social security number was incompetently omitted from his acknowledgement of gift. Congressional intent that an overstated deduction by Petitioner would not escape detection by the Commissioner due to a failure to identify Petitioner so that he could be located was obviated by Petitioner's voluntary identification of himself when he placed his social security number on his properly filed amended 2010 1040 which first claimed the charitable deduction.

DE MINIMUS NON CURAT LEX:

Recently this Court opined that an absurd result which must be avoided in a statutory construction is one which reaches a consequence:

> "So monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges, 4 Wheat., at 203.

King v. Burwell, 135 S. Ct. 2480, 2505, 192 L. Ed. 2d 483, 576 U.S. 473, 514 (2015). This Court derived its definition of an absurd result from *Sturges v. Crowninshield*, 4 Wheat. 122, 17 U.S. 122, 4 L. Ed. 529 (1819), an 1819 decision which rejected an interpretation of the law and the U.S. Constitution which would allow the institution of debtor's prison to prevail over state bankruptcy laws. Yet, in *Mobile*, supra, this Court rejected any statutory construction which would exempt property from taxation as absurd. These two definitions of absurd results utilized by this Court cannot be reconciled, but they prove that both the monster and

the monstrous result lie within the eye of the jurist making the statutory construction.

In any event Petitioner suggests that denial of his charitable deduction based on a donee's error in failing to include the donor's social security number is an absurd result which any reasonable member of the public would deem monstrous, if not immoral.

Application of the statutory rule of construction "de minimus non curat lex" should be applied here. See *Houston v. U.S. Gypsum Co.*, 580 F.2d 815 (5th Cir. 1978). In light of all of Petitioner's substantiation which he submitted to the Commissioner, the Tax Court, and the Fifth Circuit, omission of his social security number in the donee Museum's acknowledgement of gift letter was a "trifle" which cannot serve as a basis for a denial for the Petitioner's charitable deduction.

4. PETITIONER WAS ENTITLED TO A HARDSHIP EXEMPTION UNDER I.R.C. § 170(F)(11).

IRC Sec. 170(f)(11) provides that a taxpayer proving "reasonable cause" for delay and lack of wilful neglect is excused from the IRC Sec. 170 deadlines for obtaining an appraisal and other documents substantiating his deduction. A taxpayer's proof of reasonable cause and lack of wilful neglect saves all charitable deductions under IRC § 170 from disallowance due to defects and timeliness even if the taxpayer cannot prove substantial compliance. Tax Court Judge

Laro made this clear in *Alli v. Comm'r*, T.C. Memo. 2014-15 at PP 60-61:

> Even if a taxpayer does not strictly or substantially comply with the qualified appraisal and other documentation requirements, a charitable contribution deduction will not be denied if the failure to meet those requirements is due to "reasonable cause and not to willful neglect". Sec. 170(f)(11)(A)(ii)(II). The burden of proving reasonable cause is on the taxpayer. Rule 142(a).
>
> In *Crimi v. Commissioner*, T.C. Memo. 2013-51, we interpreted the section 170(f)(11)(A)(ii)(II) reasonable cause standard by looking to the reasonable cause standard of other Code provisions. "Reasonable cause" requires that the taxpayer have exercised ordinary business care and prudence as to the challenged item.
>
> Thus, the inquiry is inherently a fact-intensive one, and facts and circumstances must be judged on a case-by-case basis." Id. at *99-*102 (citing *United States v. Boyle*, 469 U.S. 241 (1985)).

Alli destroys the Commissioner's argument that IRC Sec. 170(f)(11)'s reasonable cause provision does not apply to charitable deductions subject to the provisions of IRC Sec. 170(f)(12). Petitioner was entitled to a trial in the Tax Court on his claims of "reasonable cause" excusing any alleged defects in the timeliness or content of his substantiation. Petitioner's appraisal met all 15 requirements of a qualified appraisal under IRC Sec. 170.

Government counsel maligns Petitioner's Declaration testimony describing the serious illness which Izen acquired prior to December, 2010, Lyme neuroboroleosis, a spirochete infection of the brain and nervous system which severely reduced Petitioner's eyesight, caused high blood pressure which could not be controlled by traditional blood pressure medication and which inhibited Izen from conducting his legal business and his financial affairs including tax reporting obligations. Contrary to the Government's unsupported surmise that Petitioner could have timely corrected the lack of an acknowledgement of gift from the donee containing Petitioner's SSN if Petitioner filed his personal income tax return 1040 for tax year 2010 on the extended date in October, 2011 and managed to file a Tax Court Petition and amend his petition, Petitioner's actions in filing a return, a Tax Court Petition and later an amendment many years later, are just as consistent with a taxpayer who first contracted a serious illness and acted in good faith and as diligently as he could to meet his tax filing and substantiation requirements. (ROA 574-577). The Tax Court's summary judgment order (App. E) which deprived Izen of trial on his issue of reasonable cause should be reversed and alternatively remanded for a new trial if this Court does not reverse and render in Petitioner's favor and allow Petitioner's charitable deductions.

5. PETITIONER IZEN WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE COMMISSIONER FAILED TO PRESENT CONTROVERTING EVIDENCE SUPPORTING HIS CLAIM THAT A CHARITABLE DEDUCTION WAS NEVER MADE AND THAT THE CHARITABLE DEDUCTION HAD NO VALUE.

The Commissioner's summary judgment evidence did not provide any opinion of the amount of the aircraft's fair market value. (ROA 571-581). The Commissioner's attack on the veracity of Petitioner's qualified appraisal and its appraiser was a smoke screen put forth in an effort to avoid the consequences of the Government's failure to present competent summary judgment evidence controverting qualified appraiser McKenzie's opinions.

Tax Court Judge Lauber had no unbridled discretion to totally disregard qualified expert opinion as to value. He is no qualified appraiser and his failure to even mention the comparable sales utilized by appraiser McKenzie in reaching his opinion are more reflective of the bias Tax Court Judge Lauber has continually demonstrated in his Tax Court opinions disfavoring allowance of charitable contributions rather than any specialized knowledge he or any other Tax Court Judge could profess to hold as a result of serving in that position.

The Government's failure to properly prepare its case and present competent summary judgment proof in support of its valuation opinions which properly

controverted the expert opinion of Petitioner's qualified appraiser mandates reversal and rendition in this Court in Petitioner's favor sustaining Petitioner's charitable deduction. The Commissioner, like any other litigant under the Tax Court Rules of Practice and Procedure, must meet summary judgment standards requiring presentation of controverting summary judgment proof or face the consequences.

The Tax Court's summary judgment standard of proof governing summary judgment evidence under Tax Court Rules of Practice and Procedure Rule 121(a) is no different than Federal Rules of Civil Procedure Rule 56. *R & J Partners v. Comm'r of Internal Revenue* (5th Cir. 2011).

CONCLUSION

The opinion and judgment of the Court of Appeals should be reversed and this Court should render judgment granting Petitioner his charitable deduction disallowed by the Commissioner and the Tax Court. Alternatively, the opinion and decision of the Court of Appeals should be reversed and this case should be remanded with instructions for a new trial before the United States Tax Court on the validity of Petitioner's charitable deduction.

Respectfully submitted,

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