Appendix

In the United States Court of Appeals
For the Eleventh Circuit

No. 24-11846
Non-Argument Calendar

BRIAN D. SWANSON,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Petition for Review of a Decision of the
U.S. Tax Court
Agency No. 2526-23

Opinion of the Court

Before NEWSOM, BRASHER, and BLACK, Circuit Judges.

PER CURIAM:

Brian Swanson, proceeding pro se, appeals from the Tax Court's order and opinion determining he owed a deficiency of $15,648 for tax year 2019 and ordering a sanction of $15,000 for bringing frivolous claims. Swanson contends the Tax Court erred in calculating a deficiency and in ordering sanctions because his earnings do not constitute income within the meaning of Subtitle A. He also asserts the federal income tax is unconstitutional under the Uniformity Clause since it does not apply equally to residents of Puerto Rico. The Commissioner of the Internal Revenue Service (Commissioner), in turn, moves for summary affirmance of the Tax Court's order and to suspend briefing while the motion for summary affirmance is pending. After review,[1] we affirm the Tax Court.

We conclude summary affirmance is warranted because Swanson's appeal is frivolous. See *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir.

[1] We review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Meruelo v. Comm'r of Internal Revenue, 923 F.3d 938, 943 (11th Cir. 2019) (quotation marks omitted). We review the Tax Court's interpretation of a provision in the Internal Revenue Code de novo. Id. We review questions of constitutional law de novo. Kentner v. City of Sanibel, 750 F.3d 1274, 1278 (11th Cir. 2014). Finally, we review the Tax Court's imposition of sanctions pursuant to 26 U.S.C. § 6673 for abuse of discretion. Pollard v. Comm'r, I.R.S., 816 F.2d 603, 604 (11th Cir. 1987).

1969[2] (explaining summary disposition is appropriate where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous"). Swanson has been informed in prior appeals by this Court that the same arguments he advances in this appeal lack merit. See *Swanson v. United States* (*Swanson I*), 799 F. App'x 668, 670 (11th Cir. 2020); *Swanson v. United States* (*Swanson III*), No. 23 11739, 2023 WL 5605738 at *2 (11th Cir. Aug. 30, 2023). We have previously rejected Swanson's argument that his salary as a public school teacher is not taxable income as "patently frivolous" and meritless on multiple occasions,[3] including in Swanson's own prior appeals. *Swanson I*, 799 F. App'x at 671; *Swanson III*, 2023 WL 5605738 at *2. Therefore, Swanson's argument the Tax Court incorrectly calculated his tax deficiency with reference to the wrong amount of taxable income rather than an unknowable amount permitted under Subtitle A[4] is frivolous. See *Groendyke Transp., Inc.*,

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

[3] See Stubbs v. Commissioner, 797 F.2d 936, 938 (11th Cir. 1986) (stating arguments "that wages are not taxable income . . . have been rejected by courts at all levels of the judiciary and are patently frivolous"); Biermann v. Commissioner, 769 F.2d 707, 708 (11th Cir. 1985) (rejecting as frivolous the argument that wages are not "income").

[4] Subtitle A of the Internal Revenue Code describes the income tax and provides that "gross income means all income from whatever source derived," followed by a non-exhaustive list that includes compensation for services, including fees, commissions, fringe benefits, and similar items, and gross income

406 F.2d at 1161-62.

We also previously rejected as frivolous Swanson's argument the federal income tax is unconstitutional under the Uniformity Clause because it does not apply equally to residents of Puerto Rico. *See Swanson III*, 2023 WL 5605738 at *2 ("First, it is not clear that the Uniformity Clause applies to income taxes, as the Supreme Court has noted that the uniformity requirement is not imposed on all taxes authorized by the Constitution, but only to 'duties, imposts and excises.' Further, Swanson's reliance on the differential treatment of Puerto Rico is misplaced. . . .the majority opinion in *Vaello Madero* [5] still permits Puerto Rico to be treated differently based on current precedent." (citations omitted)).

Finally, Swanson's claim the Tax Court abused its discretion in sanctioning him for his frivolous claims is itself frivolous. See 26 U.S.C. § 6673(a)(1)(B) (providing the Tax Court may require a taxpayer to pay a penalty not exceeding $25,000 if the taxpayer maintains a position in Tax Court proceedings that is frivolous or groundless). He presented claims that were previously rejected by this Court and others, including in his own prior cases, as patently frivolous and has a history of meritless appeals in the Tax Court and this Court. See *Pollard v. Comm'r, I.R.S.*, 816 F.2d 603, 604-05 (11th Cir. 1987) (holding the Tax Court did not abuse its discretion in imposing sanctions where a taxpayer raised frivolous arguments previously rejected by the Court and had a history of frivolous tax claims).

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derived from business. 26 U.S.C. § 61(a)(1), (2).

[5] United States v. Vaello Madero, 596 U.S. 159, 161-66 (2022).

Accordingly, because Swanson's appeal is frivolous, we GRANT the Commissioner's motion for summary affirmance and DENY as moot the Commissioner's motion to suspend the briefing schedule.

AFFIRMED.[6]

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[6] Swanson's motion to correct his opening brief is GRANTED.

In the United States Court of Appeals
For the Eleventh Circuit

No. 24-11846
Non-Argument Calendar

BRIAN D. SWANSON,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Petition for Review of a Decision of the
U.S. Tax Court
Agency No. 2526-23

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before NEWSOM, BRASHER, and BLACK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

United States Tax Court
Washington, DC 20217

BRIAN DEAN SWANSON, Petitioner	Docket No. 2526-23
v.	
COMMISSIONER OF INTERNAL REVENUE, Respondent	

ORDER OF SERVICE OF TRANSCRIPT

Pursuant to Rule 152(b) of the Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to the Commissioner a copy of the pages of the transcript of the proceedings in this case before the undersigned judge at Columbia, South Carolina, containing his oral findings of fact and opinion rendered at the trial session at which the case was heard. In accordance with the oral findings of fact and opinion, decision will be entered for the Commissioner.

(Signed) David Gustafson
Judge

Bench Opinion by Judge David Gustafson
April 8, 2024
Brian Dean Swanson v. Commissioner of Internal Revenue
Docket No. 2526-23

THE COURT: The Court has decided to render the following as its oral findings of fact and opinion in this case. This bench opinion is made pursuant to the authority granted by section 7459(b) of the Internal Revenue Code and Tax Court Rule 152; and it shall not be relied upon as precedent in any other case. References in this opinion to rules are to the Tax Court Rules of Practice and Procedure, and references to sections are to the Internal Revenue Code (26 U.S.C.), as amended and in effect at the relevant times.

This is a deficiency case brought pursuant to section 6213(a), in which petitioner, Brian Dean Swanson, asks us to redetermine a deficiency in his Federal income tax for the year 2019, as determined by respondent, the Commissioner of the Internal Revenue Service ("IRS"), and as set forth in the statutory notice of deficiency ("NOD") sent to Mr. Swanson on December 7, 2022. (Ex. 3-J.) Mr. Swanson timely filed a petition with the Tax Court on March 2, 2023. We accordingly have jurisdiction over this case.

Before trial, the parties filed a stipulation of facts (Doc. 13, paras. 1-6 and Exhibits 1-J to 4-J) and a supplemental stipulation (Doc. 30, paras. 7-8, Exhibits 5- J to 6-J); and the Court gave notice to the parties (Doc. 31) that we would take notice of court records (marked as Court Exhibits 201-C through 254-C in Doc. 32) from Mr. Swanson's previous cases. Trial of this case was conducted in Columbia, South

Carolina, on April 8, 2024. Mr. Swanson represented himself, and Clifford Howie represented the Commissioner.

The issues for decision are: (1) whether there is a deficiency in Mr. Swanson's Federal income tax for the year 2019; (2) whether he is liable for the addition to tax under section 6651(a)(1) (in lieu of the section 6662(a) accuracy-related penalty, which the Commissioner concedes, see Doc. 28 at 1, n.1); and (3) whether he should be required to pay to the United States a penalty pursuant to section 6673(a)(1) for maintaining frivolous or groundless positions in this Court. We will hold Mr. Swanson liable for a deficiency but not for the addition to tax. We will also require Mr. Swanson to pay a penalty of $15,000 to the United States for maintaining frivolous positions in this Court.

On the evidence before us, and using the burden-of-proof principles explained below, the Court finds the following facts:

Mr. Swanson resided in Georgia at the time he filed his petition in this case. (Doc. 13, para. 1.)

Previous tax years.

Mr. Swanson's theory of the taxation of wages has evolved over the years. In February 2017 he was assessed frivolous return penalties for 2013, 2014, and 2015. He testified (and we assume) that 2015 was the first year in which he had excluded his teaching salary from the wages he reported on his Form 1040 (Exhibit 6-J at 5). For reasons we cannot tell, the frivolous return penalty for 2015 was abated, and he cites this as IRS vindication of his position (or at least as evidence that he supposedly believed the IRS had vindicated his position). He thereafter filed returns

for a series of years, not reporting his teaching salary as income and claiming resulting overpayments. When the IRS allowed those overpayments, he took it as an indication that the IRS accepted his position. When the IRS later perceived what he was failing to report, disputed his position, adjusted his liabilities, and took action (assessing frivolous return penalties, or determining deficiencies), he took this as IRS self-contradiction.

Before commencing this case, Mr. Swanson had filed the previous cases listed in Doc. 32 at pages 2-5, challenging the IRS in "collection due process" cases under section 6330, deficiency cases under section 6213(a), and refund cases under section 7422. He contends that failure of his arguments was attributable to his failure, as a non-lawyer, to explain his arguments well.

Petitioner's 2019 income

As the parties have stipulated (Doc. 13, para. 2), during 2019 Mr. Swanson was employed by the McDuffie County Board of Education as a high school teacher, and he received compensation in the amount of $81,496.95. Mr. Swanson's Form W-2 for 2019 (see Ex. 1-J) reported wages in that amount. His end-of the-year earnings statement (Ex. 5-J) from the school board showed gross pay of $87,500.55, but to report the wages on Form W-2 in the smaller amount, the school board evidently subtracted from gross wages (and therefore treated as "pre-tax") the endof- the-year amounts for "TRS" ($5,236.56), "LIFE SH" ($409.97), and "VISION S" ($357.07), the total of which ($6,003.60) accounts for the difference.

Petitioner's Form 1040

Mr. Swanson filed his Form 1040, "U.S. Individual Income Tax Return", for 2019 (Ex. 2-J) in January 2020, several months before the due date on April 15, 2020. (Doc. 6, Answer, para. 17.) On that form, Mr. Swanson reported on line 4 the roughly $32,000 that he had received from his military pension, but he did not report his teaching wages on line 1. On his Form 1040 he also reported: on line 16 total tax of zero; on line 19 total payments of $7,921.32 (consisting of withholding from his pension of $1,666.71 of income tax, and withholding from his teaching wages of $4,997.66 of income tax and $1,257.60 of Medicare tax); and on line 20 an overpayment of $7,921.32, which is the approximate total of those three amounts, which he claimed as a refund.

With his Form 1040 (Ex. 2-J) Mr. Swanson also filed a Form 4852, "Substitute for Form W-2, Wage and Tax Statement * * *", which listed the same amounts of income and Medicare tax withholdings as his Form W-2 but listed wages as zero. (Ex. 2-J at 3). Line 9 explained the form as follows: "This job is my source of capital. This capital does not qualify as 'gross income' and the withholding payments made by this employer were erroneously withheld from money that is capital, not income. This W-2 was issued in error."

The IRS initially processed the 2019 return, allowed the claimed overpayment, and applied it to Mr. Swanson's unpaid tax liabilities for 2014 and 2016. In March 2020 (before the filing deadline for the 2019 return), the IRS sent him a letter explaining that application of his refund and stated, "You don't need

to do anything." (Ex. 6-J.)

No later than December 2021 the IRS became aware
of the frivolous positions that were reflected on Mr. Swanson's Form 1040, and the IRS sent to Mr. Swanson a letter warning that a $5,000 penalty (not at issue in this case) would be imposed if he did not correct it. (See Ex. 6-J.)

Examination, NOD, and petition

Upon examining Mr. Swanson's 2019 Form 1040, the IRS adjusted Mr. Swanson's Form 1040 to include his teaching compensation. (Ex. 3-J). The IRS sent to Mr. Swanson an NOD (Ex. 3-J) dated December 7, 2022, explaining the adjustments to his reporting, determining the resulting tax deficiency of $15,648 and the (later conceded) accuracy-related penalty of $1,797, and stating his balance due.

In March 2023 Mr. Swanson timely filed his petition—entitled "Petition for Redetermination of Deficiency". By that time he had received the opinions issued against him (discussed below) in Swanson v. United States, No. 119-013 (S.D. Ga. May 3, 2019), aff'd, No. 19- 11851 (11th Cir. Jan 7, 2020); Swanson v. Commissioner, No. 6837-20 (Tax Ct. bench op. Apr. 20, 2021), aff'd, No. 21-11576 (11th Cir. Oct. 5, 2021), and Swanson v. United States, No. 122-119 (S.D. Ga. May 15, 2022); and five months later he received the Eleventh Circuit's affirmance of that last District Court opinion in No. 23-11739 (11th Cir. Aug. 30, 2023). This case was eventually set for trial. Before trial the Commissioner filed a motion for sanctions under section 6673(a) (for Mr. Swanson's frivolous contentions), and Mr. Swanson filed a motion to shift the burden of proof under sections 7491(a) and 7522.

Trial

At trial Mr. Swanson was the only witness, and his testimony and additional exhibits (7-P through 9-P) supplemented the parties' stipulations.

OPINION

I. General legal principles

A. Burden of production and proof

1. Deficiency

Generally, the Commissioner's determination of a deficiency is presumed correct, and the taxpayer has the burden of proving it wrong. See Rule 142(a). The burden of proof on a factual issue may shift under section 7491(a), and as we noted, Mr. Swanson has filed a motion to shift the burden. However, there is not really any dispute about material factual issues as to which Mr. Swanson has submitted any "credible evidence", in the phrase of section 7491(a)(1).

In addition to section 7491(a)(1), Mr. Swanson cites section 7522(a). (See Doc. 26 at 2-3.) That statute, however, makes no provision for a shift in the burden of proof. With no visible connection to that statute, Mr. Swanson then quotes our holding that "the burden of proof will shift to the Commissioner if the taxpayer proves that the determinations [in an NOD] are arbitrary, capricious, or unreasonable" in City Line Candy & Tobacco Corp. v. Commissioner, 141 T.C. 414, 420 (2013), aff'd, 624 F. App'x 784 (2d Cir. 2015). There is no basis for holding that the NOD is "arbitrary, capricious, or unreasonable". Even if dollar amounts in the NOD were in error for the reasons Mr. Swanson urges, those supposed errors would not

implicate arbitrariness, capriciousness, or unreasonableness. There is therefore no basis for a shift in the burden of proof; and, again, there are no factual disputes that would cause a shift in the burden to make any difference in the outcome of this case.

We will deny Mr. Swanson's motion to shift the burden of proof.

2. Penalties

The Commissioner bears the burden of production with respect to the liability of an individual for any penalty or addition to tax. Sec. 7491(c). To satisfy his burden, the Commissioner must present sufficient evidence to show that it is appropriate to impose the penalty in the absence of available defenses. See Higbee v. Commissioner, 116 T.C. 438, 446 (2001). Once the Commissioner meets his burden of production on penalties, the taxpayer must ordinarily come forward with persuasive evidence that the Commissioner's showing is incorrect. Rule 142(a); Higbee, 116 T.C. at 447. Or he may defend against the penalty with a showing of "reasonable cause" and "good faith" under section 6664(c)(1).

3. "New matter"

However, the Commissioner has the burden of proof on "new matter". See Rule 142(a). In this case the addition to tax under section 6651(a)(1) for failure to file is "new matter" not raised in the NOD but pleaded in the Commissioner's amended answer (Doc. 17). The Commissioner therefore has not only the burden of production but also the burden of proof as to the addition to tax. And where a penalty is "new

matter", "respondent would bear the burden of proving the absence of reasonable cause to justify the imposition of that penalty." RERI Holdings I, LLC v. Commissioner, 149 T.C. 1, 39 (2017), aff'd sub nom. Blau v. Commissioner, 924 F.3d 1261 (D.C. Cir. 2019).

B. Treatment of frivolous arguments

Litigants who advance frivolous arguments in the Tax Court are not entitled to, and should not expect to receive, opinions rebutting their positions. Wnuck v. Commissioner, 136 T.C. 498 (2011). Under section 6673(a)(1), "the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000" for instituting proceedings primarily for delay, maintaining frivolous positions, or unreasonably failing to pursue available administrative remedies.

II. Income tax deficiency

The only issue underlying the tax deficiency determination is the taxability of Mr. Swanson's compensation for teaching. Section 61(a)(1) defines "gross income" broadly to mean "all income from whatever source derived, including (but not limited to) the following items: (1) compensation for services". Mr. Swanson's pay reported on Form W-2 was "compensation for [his teaching] services"--plainly required to be included in his "gross income" subject to income tax. We need discuss this issue further only to determine the validity of Mr. Swanson's return (for purposes of the addition to tax under section 6651(a)(1)) and his culpability (for purposes of the penalty of section 6673(a)) in making arguments in defense of his position. His arguments in this case

have consisted of the following four:

A. "Fair market value" of wages

In his original petition filed in March 2023, Mr. Swanson contended that only "[p]ayments in excess of the fair market value for Petitioner's service as a public schoolteacher must be reported as gross income on his form 1040". Doc. 1, para. 42. At trial he elaborated on this argument with citations to sections 317 (defining "property" to include money) and 83 ("Property transferred in connection with performance of services").

This is a restatement of a previously unsuccessful argument of Mr. Swanson's that was rejected and called "frivolous" by the District Court in Swanson v. United States, No. 119-013 (S.D. Ga. May 3, 2019) (Doc. 32 at 335), aff'd, No. 19-11851 (11th Cir. Jan 7, 2020). On appeal the U.S. Court of Appeals for the Eleventh Circuit summarized his argument as being to the effect that "employment earnings constitute a return of capital rather than income" (Doc. 32 at 423), and the court affirmed that the argument is "frivolous", noting that the contention is listed as frivolous in I.R.S. Notice 2010-33, 2010-17 I.R.B. 609 (Doc. 32 at 424-425).

In that previous case the Eleventh Circuit imposed a sanction on Mr. Swanson: "Because Swanson was forewarned about the frivolity of his position, we GRANT the Government's motion for sanctions and award $8,000 in sanctions", pursuant to Rule 38 of the Federal Rules of Appellate Procedure. (Doc. 32 at 429.)

Mr. Swanson nonetheless made the equivalent argument in Swanson v. United States, No. 122-119 (S.D. Ga. May 15, 2022) (Doc. 32 at 753), aff'd, No. 23-

11739 (11th Cir. Aug. 30, 2023) (Doc. 32 at 827). Again the District Court rejected the argument (Doc. 32 at 759-761), and again the Eleventh Circuit held that, as to Mr. Swanson's argument "that his wages as a school teacher are not taxable because they constitute a return of capital, this argument is plainly frivolous" (Doc. 32 at 833). The Eleventh Circuit imposed on Mr. Swanson under FRAP 38 another $8,000 sanction (Doc. 32 at 835).

When Mr. Swanson recently filed an amended petition (Doc. 14) in February 2024, he removed some of the statements relevant to this argument, but he has not explicitly disclaimed the argument, and his amended petition retains the assertion that "[i]t is impossible to determine a dollar value for 'wages' without a statutory definition." (Doc. 14, para. 31.) Likewise, Mr. Swanson's pretrial memorandum asserts that "the 'wages' on his W-2 (which should be called capital) do not qualify as 'gross income.'" (Doc. 29 at 2.) He thus continues to make this frivolous "capital" argument, but with additional vocabulary and citations.

Mr. Swanson has previously made an additional argument against the taxability of his wages (but he seems not to make here) based on the Apportionment Clause. The Tax Court rejected the argument and called it "frivolous" in Swanson v. Commissioner, No. 6837-20 (Tax Ct. bench op. Apr. 20, 2021) (Doc. 32 at 162), aff'd, No. 21-11576 (11th Cir. Oct. 5, 2021). On appeal the Eleventh Circuit likewise held the argument "frivolous" (Doc. 32 at 258) and imposed under FRAP 38 a third $8,000 sanction (Doc. 32 at 260).

B. Subtitle C "wages"

Mr. Swanson has pleaded in his amended petition that "Petitioner's 'wages,' for purposes of chapter 1, means $0.00." (Doc. 14, para. 30.) He seems to contend (see Doc. 14, para. 6; Doc. 29 at 3-5) that his wages from teaching are not within "gross income" for purposes of the income tax because "wages" is a term defined in Subtitle C (for employment tax purposes, see section 3401(a)) and not in Subtitle A (for income tax purposes). The various employment tax provisions, which were enacted to reach only certain income, do indeed define the income to which they pertain--i.e., "wages". That truism, however, does not affect the fact that the definition of "gross income" for income tax purposes is a broad term that includes "all income from whatever source derived, including (but not limited to) the following items: (1) compensation for services". Sec. 61(a)(1). Mr. Swanson's wages were "compensation for [his teaching] services"—plainly included in his "gross income" subject to income tax.

Mr. Swanson's amended petition urges that "Commissioner ignored the statutory limitation in I.R.C. § 61(a), 'Except as otherwise provided in this subtitle,' when he calculated Petitioner's income tax deficiency by using employment tax statutes from Subtitle C." Section 61(a) does indeed begin with the phrase "Except as otherwise provided in this subtitle" (i.e., in Subtitle A), but there is no provision in Subtitle A that excludes wages from gross income. Mr. Swanson's argument that his wages are excluded from gross income for income tax purposes because of a supposed exception in section 61(a) is frivolous.

C. Improper reductions to "gross income"

Mr. Swanson also seems to contend (see Doc. 14, para. 5; Doc. 29 at 5-6; Doc. 24 at 3-7) that the amount of his wages that the IRS used for computing his gross income was incorrectly reduced, and that this somehow invalidates the IRS's deficiency determination. This, too, is frivolous. The evidence does show that his "gross pay" for 2019 was $87,500.55 (Ex. 5-J), and this is the amount that Mr. Swanson apparently contends the IRS should have used. Instead, the IRS used "$81,496" (see Doc. 13 at 5 of 15), which is the number (rounded down) that appears in Box 1 of Mr. Swanson's Form W-2 as reported by his employer--i.e., "81,496.95" (see Ex. 1 J)--a number that was apparently derived (by the employer) by subtracting from gross pay certain payroll deductions identified by the employer as "TRS", "LIFE SH", and "VISION S". Some such employee payments of premiums are properly made "pre-tax", see, e.g., Leyh v. Commissioner, 157 T.C. 86, 88 (2021), but apparently Mr. Swanson believes (and we can assume) that these reductions of his income as reported were improper for income tax purposes and that therefore his gross income is understated on Form W-2 (prepared by his employer) and on the IRS's NOD.

This contention goes nowhere. Even if the NOD (like the Form W-2 on which it was based) was incorrect in understating Mr. Swanson's compensation amount as $81,496, that would simply constitute an error on the NOD. It would not invalidate the NOD. The Code explicitly contemplates that, after the IRS has determined an income tax deficiency, the Tax Court can "redetermin[e] ... the deficiency". Sec. 6213(a). When Mr. Swanson filed his

"Petition for Redetermination of Deficiency", he thereby requested the Tax Court to do just that. An error in the NOD does not result in a zero deficiency; it calls for a corrected, "redetermined" deficiency. It would be absurd indeed if, when the IRS understated a taxpayer's income and therefore determined too small a tax deficiency, the remedy would be that the taxpayer would owe even less of a deficiency--i.e., zero. The Code does not reflect this absurdity, and Mr. Swanson's argument is frivolous. He was unable to propose a calculation of his taxable income from teaching under his theory of the Code, but he did propose that it was not (as he had reported) zero.

D. Uniformity clause

Mr. Swanson contends (Doc. 14, paras. 7-8; Doc. 29 at 7-9; Doc. 24 at 7-8) that the uniformity clause in Article I, section 8, clause 1 of the U.S. Constitution requires that income taxes "shall be uniform throughout the United States", whereas Puerto Rico is unconstitutionally exempted from the income tax. He says that therefore the IRS's deficiency "determination ... should not be sustained." (Doc. 29 at 7-9.) At trial he did not renew this argument, but he did not disclaim it. The argument is wrong for at least two reasons:

First, Article I, section 8, clause 1 authorizes Congress to impose four things—"Taxes, Duties, Imposts, and Excises"—but the Uniformity Clause addresses only three things—"Duties, Imposts, and Excises"—thereby notably excluding "Taxes". Consequently, it appears that "the qualification of uniformity is imposed, not upon all taxes which the Constitution authorizes, but only on duties, imposts, and excises." Knowlton v. Moore, 178 U.S. 41, 88

(1900). The income tax that was later authorized by the Sixteenth Amendment was characterized as "taxes on incomes".

Second, the Supreme Court held as recently as 2022, that under the Constitution, Congress is permitted to treat Puerto Rico differently. U.S. v. Vaello Madero, 596 U.S. 159, 162–63 (2022).

Our reasoning should sound familiar to Mr. Swanson. He previously made this argument unsuccessfully before the District Court and the Court of Appeals in Swanson v. United States, No. 122-119 (S.D. Ga. May 15, 2022) (Doc. 32 at 753), aff'd, No. 23-11739 (11th Cir. Aug. 30, 2023) (Doc. 32 at 827)—i.e., the case, discussed above, in which he also made his "capital" argument. The Eleventh Circuit has already held against him on this issue for those two reasons--and explicitly found his appeal "frivolous" (Doc. 32 at 833); and, as we noted above, the Eleventh Circuit imposed on Mr. Swanson an $8,000 penalty.

None of Mr. Swanson's four arguments breathes any life into the frivolous proposition that he does not owe income tax on his wages.

III. Addition to tax under section 6651(a)(1)

Section 6651(a)(1) authorizes the imposition of an addition to tax for failure to file a timely return (unless the taxpayer proves that such failure is due to reasonable cause and is not due to willful neglect). The amount of the addition is a percentage of the amount of tax required to be shown on the return—5% per month up to 5 months, for a maximum of 25% (but after reducing the amount by the withholding credits). There is no dispute that Mr. Swanson filled out a Form 1040, signed it, and submitted it to the IRS before the due date, and those facts would ordinarily

resolve this issue in his favor. However, the Commissioner contends that the document he filed was not a valid return, because of the frivolous positions that underlie the numbers on the return.

To determine whether a taxpayer has filed a valid tax return, the Tax Court follows the four-fold test enunciated in Beard v . Commissioner, 82 T .C . 766, 777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986), under which, "First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury." Mr. Swanson's Form 1040 (Ex. 2-J) clearly met the second and fourth of these: It purports to be a return, and he signed it "Under penalties of perjury". However, the Eleventh Circuit previously considered this issue in connection with equivalent returns that Mr. Swanson filed for 2016 and 2017, and the court held that, under the Beard test, his returns did not meet "the requirement of 'represent[ing] an honest and reasonable attempt to satisfy the requirements of the tax law,'" Swanson v. United States, No. 19-11851 (11th Cir. Jan. 7, 2020) (Doc. 32 at 426-427), aff'g No. 1:19-cv- 00013 (S.D. Ga. May 3, 2019) (Doc. 32 at 336). We follow here the Eleventh Circuit's reasoning and hold that Mr. Swanson's Form 1040 did not constitute a return for purposes of section 6651(a)(1) and that he is therefore potentially liable for the 25% addition to tax for failure to file.

Mr. Swanson contends, however, that he had "reasonable cause" to believe that he had filed a valid return; and as we noted above, the Commissioner has the burden of proof on this reasonable cause issue. We conclude that the Commissioner did not meet this

burden. It is important to be clear that the issue under section 6651(a)(1) is the taxpayer's "reasonable cause" for thinking that he had fulfilled his filing requirement, not reasonable cause under section 6664(c) for thinking that his inaccurate return was accurate. He filed early a filled-out Form 1040; and the IRS thereafter processed his return and, before the due date of the return, advised him that "You don't need to do anything." (Ex. 6-J at 1.) In view of the burden of proof being on the Commissioner, we find that Mr. Swanson had reasonable cause for supposing that he had filed a valid return. (We do not find that the position he reported on the return was valid, nor that he necessarily even thought that it was, but that he thought had filed a valid return.)

IV. Section 6673 penalty

Mr. Swanson's position was plainly frivolous and is therefore potentially subject to the penalty of section 6673(a)(1), in an amount as high as $25,000. To guide our discretion in deciding whether to impose a section 6673(a)(1) penalty and, if so, in what amount, this Court "has considered any relevant facts and circumstances", including (but not limited to) a dozen possible circumstances we listed in Leyshon v. Commissioner, T.C. Memo. 2015-104, 109 T.C.M. 1535, 1540- 1542 (2015), aff'd, 649 Fed. Appx. 299 (2016).

A. Analysis of facts and circumstances

In Mr. Swanson's favor, we note that he has complied with our deadlines. In particular, he cooperated with the Commissioner in stipulating the facts of the case. He did not attempt to conceal his

B. Mr. Swanson's arguments

In his opposition (Doc. 24) to the Commissioner's motion for sanctions (Doc. 18), Mr. Swanson makes two arguments that lack merit:

> "First, Petitioner has never brought a case to trial in this Court where the proceedings were judged to be deserving of a sanction."

Strictly speaking, this artful statement, if read narrowly, is arguably true. That is, "this Court", the Tax Court, has itself not yet imposed a sanction on Mr. Swanson in any of his cases. However, as we noted above, on an appeal from one of his Tax Court cases, the Eleventh Circuit held his Apportionment argument "frivolous" (Doc. 32 at 258) and imposed under FRAP 38 an $8,000 sanction. Swanson v. Commissioner, No. 21-11576 (11th Cir. Oct. 5, 2021) (Doc. 32 at 260), aff'g No. 6837-20 (Tax Ct. bench op. Apr. 20, 2021) (holding the argument "frivolous" (Doc. 32 at 162)).

More important, someone who makes frivolous contentions in the Tax Court is not immunized from penalty just because he has never before been penalized in the Tax Court. Someone could become more culpable by ignoring prior penalties, but he is not entitled to ignore judicial warnings and keep making frivolous arguments just because the Court has shown him forbearance in the past.

> "Second, the arguments that petitioner makes in this case do not appear on Notice 2010-33 and, to petitioner's knowledge, have never been judged by any court to be frivolous."

This contention involves two faulty assertions. First, the listing of an argument in Notice 2010-33 constitutes a warning to taxpayers, but it does not constitute a comprehensive list of frivolous positions,

since such a list would be "effectively limitless." Wnuck v. Commissioner, 136 T.C. 498, 502 (2011). One cannot prove that a position is not frivolous by showing that it does not appear in the Notice.

Second, it is flatly incorrect that "the arguments that petitioner makes in this case ... have never been judged by any court to be frivolous." In Mr. Swanson's own cases the Eleventh Circuit found "frivolous" his "fair market value" / "capital" arguments. As for his other two contentions, we think that this is the first case in which those contentions have come to decision before the court, and it seems likely that this is the only reason that they have not previously been held frivolous. All of his arguments in support of his position are frivolous.

He has previously had sanctions imposed on him by the Court of Appeals—i.e., three $8,000 sanctions totaling $24,000. If deterrence were the only consideration for deciding the amount of the penalty, the fact that $24,000 in sanctions has not deterred him yet might call for the maximum of $25,000 to be imposed here. But in light of the considerations we note above in his favor, and out of reluctance to impose against a teacher's salary the full force of the penalty, we will impose a penalty of $15,000.

V. Conclusion

Mr. Swanson received compensation for his labor in 2019, for which he owes Federal income tax. We will accordingly sustain the tax deficiency of $15,648. We will not sustain the addition to tax of section 6651(a)(1) in the amount of $2,246.25 because the Commissioner failed to carry his burden to disprove reasonable cause for nonfiling of the return. Moreover, Mr. Swanson's assertion of frivolous

arguments warrants imposition of a $15,000 penalty under section 6673(a)(1). Decision to that effect will be entered in favor of the Commissioner.

This concludes the Court's oral Findings of Fact and Opinion in this case.

(Whereupon, at 3:02 p.m., the above-entitled matter was concluded.)