

No. 17-1028

IN THE
Supreme Court of the United States

MICHAEL H. WU and CHRISTINE T. WU
Plaintiffs-Petitioners
v.
UNITED STATES OF AMERICA
Defendant-Respondent

On Petition for a Writ of Mandamus to
the United States Court of Appeals for
the Seventh Circuit

PETITION FOR REHEARING

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I. PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioners respectfully petition this Court for rehearing of its February 26, 2018 order denying the petition for the writ of mandamus in this case.

The ground(s) of the petition is that petitioners did not previously present that the Internal Revenue Service ("IRS") explains the plain meaning of "taxable income (i.e., Line 43 on Form 1040)", which is the term prescribed in 26 U.S.C. § 441.(a), as "adjusted gross income (i.e., Line 38)" reduced by the sum of "deduction(s) (i.e., Line 40)" and "exemptions (i.e., Line 42)".

26 U.S.C. § 6011 said that any person shall make a return according to (i) regulations, and (ii) tax return forms (and instructions) that explain the requirements of the Internal Revenue Code and regulations.

The Internal Revenue Code said that (i) the taxable income (i.e., form 1040, line 43), which is the adjusted gross income (i.e., line 38) reduced by the sum of (a) your deduction (i.e., line 40) and (b) the exemption(s) (i.e., line 42), shall be computed on the basis of the taxpayer's taxable year, (*see* 26 U.S.C. § 441.(a)); and (ii) the total tax (i.e., line 60), which includes the excise

tax on IRAs (i.e., line 58), of all individual taxpayers shall be imposed as of the close of such taxpayer's taxable year (i.e., the 15th day of April following the close of the calendar year), (*see* 26 U.S.C. §§ 4973(a) and (b); 408(d)(4) and (5); and 6072).

The question presented for review is whether the Internal Revenue Code imposes the excise tax on IRAs as of the end of December 31 for each taxable year?

II. REASONS FOR GRANTING REVIEW

The Internal Revenue Code imposes that, for each taxable year, (i) the gross income (of individual taxpayer), or your total income (i.e., form 1040, line 22), shall be computed as of the end of the calendar year (i.e., December 31); and (ii)(a) federal income tax, or your total tax (i.e., line 60), shall be computed, and (b) U.S. Individual Income Tax Return (i.e., form 1040) shall be made, as of the end of the taxable year (i.e., the return-filing deadline).

For individual retirement accounts ("IRAs"), 26 U.S.C. § 408(d)(2)(C) said that the period to compute the taxable amount from IRA distributions (i.e., form 1040, line 15b), which is the net income described in 26 U.S.C. § 408(d)(4)(C), is as of the close of the calendar

year in which the taxable year begins, for each taxable year. (*See* Case 14-cv-03925, Dkt. 37 at pp.11-12).

For this case, the \$200,000 each of the IRA excess contributions, and the net income attributable to such contributions, were received on March 23, 2010. (*See* Pet. at p.11). Thus, the net income from the IRAs shall not be computed as of the close of December 31, 2009 in which taxable year 2009 began, but rather shall be computed as of the close of December 31, 2010 in which taxable year 2010 began, because such net income was not received by the end of calendar year 2009, and, therefore, shall not be treated as part of the total income of taxable year 2009 (i.e., 2009 Form 1040, line 22), but rather shall be treated as part of the total income of taxable year 2010 (i.e., 2010 Form 1040, line 22), (*see* Case 14-cv-03925, Dkt. 99, ¶1.19, and ¶II.(a).5).

For this case, the period to compute the 6% of excise tax imposed on the amount of the excess contributions to the Wus' IRAs, which is additional tax on IRAs (i.e., form 1040, line 58) is not as of the close of calendar year 2009 or 2010 (i.e., December 31), but rather is as of the close of taxable year 2009 (i.e., April 15, 2010), because additional tax on IRAs is not part of

the total income (i.e., line 22), but rather is part of the total tax (i.e., line 60). (*See* 26 U.S.C. § 4973(a)).

However, the lawyer(s) retained by the US Department of Justice (i.e., the government) said that (i) individual's taxable year 2009 is typically the period from January 1, 2009 to December 31, 2009,¹ which is a manifest error of law or fact, because 26 U.S.C. § 441(a) said that taxable income (i.e., form 1040, line 43) shall be computed on the basis of the taxpayer's taxable year, which typically is the period from April 16, 2009 to April 15, 2010, and (ii) the Internal Revenue Code imposes the 2009 excise tax as of the end of calendar year 2009 (i.e., December 31, 2009),² which is also a manifest error of law of fact, because 26 U.S.C. § 4973(a) imposes the 2009 excise tax (i.e., form 1040, line 58) as of the end of taxable year 2009 (i.e., April 15, 2010), which is the period to compute the total tax (i.e., line 60), not as of the end of calendar

¹ The lawyer said that "[i]ndividual taxpayers typically have a taxable year of January 1 through December 31". (*See* Case 16-1660, Dkt. 8 at p.4, n.3).

² The lawyer said that "the Internal Revenue Code imposes the excise tax as of the end of each taxable year – i.e., December 31, 2009", (*see* Case 16-1660, Dkt. 8 at p.3, ¶1), and 26 U.S.C. § 441(d) said that "the term "calendar year" means a period of 12 months ending on December 31."

year 2009 (i.e., December 31, 2009), which is the period to compute the total income (i.e., line 22).

The issue of the misrepresentation or obfuscation in the opinion reported at *Wu v. United States*, 835 F.3d 711, is that the lawyer(s) retained by the government is allowed to misrepresent that (i) Publication 590,³ which documents regulations (i.e., the most important internal revenue rules), is informal IRS publication; and (ii) tax return forms and instructions,⁴ which explain the requirements of the Internal Revenue Code and regulations, change the plain meaning of tax statutes; (*see* 26 U.S.C. § 6011). (*See* Case 16-1660, Dkt. 8 at p.24, n.10).

More specifically, such lawyer(s) misrepresented because IRS, in Publication 590 and instructions, which are not informal IRS publication, (*see* n.3 and n.4), said that, for each taxable year, the excise tax on IRAs (i.e., form 1040, line 58) shall be computed as of the close of the taxable year (i.e., the date described in 26 U.S.C. § 408(d)(4)), (*see* 26 U.S.C. § 4973(a)), which does not change the plain meaning of tax statutes, because (i) the taxable income (i.e., line 43) shall be

³ Publication 590 documents internal revenue rules (including regulations). (*See* Pet. at p.19, and n.6; and 26 CFR 601.601).

⁴ (*See* 26 CFR 601.602).

computed on the basis of the taxpayer's taxable year, (*see* 26 U.S.C. § 441.(a)), (ii) such taxable income depends of the adjusted gross income (i.e., line 37 or 38), (iii) such adjusted gross income depends on the total income (i.e., line 22) and the IRA deduction (i.e., line 32), (iii) the allowable deduction, (*see* 26 U.S.C. § 4973(b)(1)(B)), depends on the amount contributed for the taxable year, (*see* 26 U.S.C. § 4973(b)(1)(A)), and (iv) such amount contributed shall be determined as of the close of the date described in 26 U.S.C. § 408(d)(4) because the deadline to distribute any of the amount contributed for the taxable year is the date described in 26 U.S.C. § 408(d)(4), (*see* 26 U.S.C. § 4973(b)).

III. DISCUSSION

The Internal Revenue Code imposes the excise tax on IRAs (i.e., form 1040, line 58) as of the close of the date described in 26 U.S.C. § 408(d)(4), (*see* 26 U.S.C. §§ 4973(a) and (b); and 408(d)(5)), not as of the close of the calendar year in which the taxable year begins, which is the period to compute exclusively the taxable amount from IRA distributions (i.e., line 15b), (*see* 26 U.S.C. § 408(d)(2)(C) and (4)(C)), for each taxable year. (*See* ¶II *supra*).

26 U.S.C. § 4973(b) said that the term “excess contributions” means the sum of the amount determined under 26 U.S.C. § 4973(b)(1) and that determined under 26 U.S.C. § 4973(b)(2).

26 U.S.C. § 4973(b) said that “any contribution which is distributed from the individual retirement account ... in a distribution to which section 408(d)(4) applies shall be treated as an amount not contributed” because that (i) individual taxpayers typically have a taxable year of April 16 through April 15 following the close of the calendar year to compute the taxable income (i.e., form 1040, line 43), (*see* 26 U.S.C. § 441.(a)), and (ii) the Internal Revenue Code typically imposes the total tax (i.e., line 60) (including the excise tax on IRAs (i.e., line 58)) as of the close of the taxable year (i.e., the return-filing deadline), (*see* 26 U.S.C. §§ 408(d)(4) and 6072).

However, the lawyer(s) retained by the government said that (i) “[i]ndividual taxpayers typically have a taxable year of January 1 through December 31”, (*see* n.1), (ii) “the Internal Revenue Code imposes the excise tax as of the end of [December 31 for each taxable year]”, (*see* n.2), and (iii) “[f]or the Wus to benefit from § 408(d)(4), they would have had to withdraw their

Excess Contributions (made in 2007) by the due date for their 2007 income tax return (April 15, 2008)", (*see* Case 16-1660. Dkt. 8 at p.26), which is a manifest error of law or fact, because, according to what such lawyer said, any distribution received from January 1, 2008 to April 15, 2008 is not a distribution for taxable year 2007 which ended on December 31, 2007, and, therefore, cannot benefit from § 408(d)(4) after the Internal Revenue Code imposed the excise tax for taxable year 2007 at the end of December 31, 2007, but rather is a distribution for taxable year 2008 which started on January 1, 2008, and, therefore, can only benefit from § 408(d)(5) before the Internal Revenue Code imposed the excise tax for taxable year 2008 at the end of December 31, 2008, (*see* Cases 14-cv-03925, Dkts, 37 and 40, ¶I.3.A; and 16-1660, Dkt. 8 at pp.31-32, ¶I.C.2).

In other word, in order for any distribution received from January 1, 2008 to April 15, 2008 to benefit from 26 U.S.C. § 408(d)(4) for taxable year 2007, (i) individual taxpayers typically shall have a taxable year of April 16, (*see* 26 U.S.C. § 408.(d)(5)), through April 15 following the close of the calendar year, (*see* 26 U.S.C. § 408.(d)(4)), and (ii) the Internal Revenue

Code shall impose the excise tax as of the close of the date described in 26 U.S.C. § 408(d)(4) (i.e., the taxable year) for each taxable year, (*see* 26 U.S.C. § 4973(a)), because the Internal Revenue Code and the IRS shall not know which taxpayer will distribute how much out of the IRAs and on which day between January 1 and April 15 following the close of the calendar year as of the close of the calendar year (i.e., December 31) before the taxpayer files a return, but shall know that as of the close of the taxable year (i.e., the return-filing deadline) after such taxpayer files a return.

And 26 U.S.C. § 4973(b)(2) said that the amount determined for taxable year 2008 can be reduced by the sum of—(A) the distributions out of the account for taxable year 2009 which were included in the gross income of the payee under section 408(d)(1), which is \$0 in this case;⁵ (B) the distributions out of the account for taxable year 2009 to which section 408(d)(5) applies, which is \$200,000 each in this case, because (1) said \$200,000 was received after the date described in section 408(d)(4) for taxable year 2008 (i.e., April 15,

⁵ The distributions described in 26 § 4973(b)(2)(A) are distributed out of deductible contributions, which are the amount paid to IRA and claiming IRA deduction with the IRS for any taxable year, (*see e.g.*, 14-cv-03925, Dkt. 37, Ex. 2, 2009 Form 1040, line 32).

2009), (*see* § 408(d)(5)(A)(i)), and (2) no deduction has been allowed under section 219 with respect to such excess contribution, (*see* § 408(d)(5)(A)(ii)); (*see* Case 14-cv-03925, Dkt. 124 at pp.15 and 17, 2009 Forms 5329, line 12); and (C) the excess (if any) of the maximum amount allowable as a deduction under section 219 for taxable year 2009 over the amount contributed, which is unimportant in this case.

Thus, the IRS said that the excise tax imposed on the IRAs for taxable year 2009 is \$0 because the excess contributions determined for taxable year 2008 were received before the Internal Revenue Code imposed the excise tax for taxable year 2009 at the end of April 15, 2010. (*See* Case 14-cv-03925, Dkt. 34, Ex. B-3).

In sum, the Internal Revenue Code does not impose the excise tax on IRAs as of the end of December 31 for each taxable year.

IV. CONCLUSION

For the foregoing reasons, petitioners request the Court to grant their petition for rehearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael H. Wu and Christine T. Wu", written over a horizontal line.

Michael H. Wu and Christine T. Wu

In the Supreme Court of the United States

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Plaintiffs-Petitioners,

v.

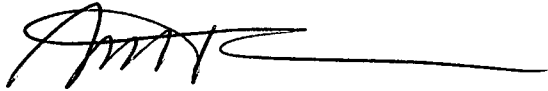
UNITED STATES OF AMERICA,
Defendant-Respondent,

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CERTIFICATE

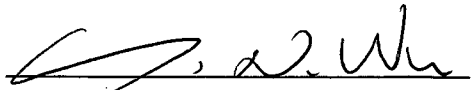
Petitioners certify that the ground(s) of the petition is that they did not previously present that the Internal Revenue Service ("IRS") explains the plain meaning of "taxable income (i.e., Line 43 on Form 1040)", which is the term prescribed in 26 U.S.C. § 441.(a), as "adjusted gross income (i.e., Line 38)" reduced by the sum of "deduction(s) (i.e., Line 40)" and "exemptions (i.e., Line 42)".

Signatures:



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