

No. 23-70060

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

XC FOUNDATION

Plaintiff-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE

Defendant-Appellee.

On Appeal from the United States Tax Court
Docket No. 9189-21
Hon. Albert G. Lauber

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant XC Foundation declares that it does not have a parent corporation, nor is there any publicly held corporation that currently owns 10% or more of its stock.

Date: November 3, 2023

Respectfully Submitted,

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/s/Christina Weed
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INTRODUCTION

”No good deed goes unpunished”- Modern Proverb

This appeal illustrates how the law can revictimize a victim. Appellant, a Non-Profit entity, XC Foundation (“Appellant”), its officers, Wei Xu (“Xu”) and Chih Chiang (“Chiang”), were victims of a Ponzi Scheme, orchestrated by Certified Public Accountant, Jimmy Chen (“Chen”). Appellant met Chen when he was luring unsuspecting taxpayers all over the California Bay Area by marketing and providing seminars purporting to help taxpayers set up non-profit foundations. The seminars intentionally provided false and erroneous tax advice for a high fee. Xu and Chiang paid a substantial amount of money in exchange for Chen’s purported expertise, advice, and guidance. Through his representation under powers of attorney, Chen successfully set up and advised numerous 501(c)(3) non-profit entities under the Internal Revenue Code, including Appellant. Chen also set up Appellant’s non-profit with the California Franchise Tax Board. Appellant operated as a nonprofit as many nonprofits do by conducting numerous charitable events, obtaining, and providing donations and resources to those in need, and traveling for purposes of helping those in underserved communities. These good deeds did not go unpunished.

Subsequent to the set-up of Appellant as a non-profit entity, Chen was charged with 26 counts of tax fraud, in Santa Clara County, California as a result of setting up his own private charitable foundation for purposes of evading tax, and for advising

numerous people to do the same. Many taxpayers conducted themselves in the same way Xu and Chiang did at Chen's urging, but the Commissioner of the Internal Revenue Service ("IRS") seems to only intend to punish the victims in the instant matter. Only after Chen was charged with tax fraud did Appellant learn of Chen's improper practices. Shortly after it learned of this, Appellant was notified by Appellee, Commissioner of the IRS that it was selected for audit.

During the audit, Appellant provided substantial documentation showing that it operated as a private charitable foundation for numerous years and conducted numerous charitable events, obtained donations, and provided resources to those in need. At the commencement of the audit and before the Letter of Determination was issued, Appellant was "active" with the California Secretary of State. During the audit Appellant complied with every request made by Appellee. At some point, Appellee demanded more time to complete their investigation. Appellant was pressured by the auditor to extend the time to assess or face adverse results i.e., an automatic adverse determination. Appellant was trying to be cooperative with the investigation in order resolve the underlying matter and thus on or around July 1, 2020, executed Form- 872- Consent to Extend Time to Assess Tax. Appellant felt it had no other choice. Form-872 indicates, on its face and in bold, "signing this consent will not deprive the taxpayer(s) of any appeal rights to which they are entitled." Appellant's good faith execution resulted in disastrous harm to Appellant.

Subsequent to execution of Form- 872, on or around December 1, 2020, Appellant's active status was changed to suspended by the Secretary of State as determined by the Franchise Tax Board ("FTB). Shortly after suspension, on or around March 2, 2021, and as a result of the audit, Appellee issued a Notice of Determination ("NOD"), effectively revoking Appellants status as a non-profit. The standard NOD, like the one issued in the instant matter, advises Taxpayers at large, how to proceed if they disagree with the determination issued, including filing a petition with United States Tax Court, ("US Tax Court"). Based on this invitation, coupled with the fact that Form-872 expressly indicated that there would not be a deprivation of any appeal rights, Appellant duly filed its Petition in US Tax Court.

After filing its petition, Appellee filed its Answer and subsequently moved to dismiss Appellant's petition pursuant to the United States Tax Court Rule 60(c) ("Tax Rule 60(c)"), for "lack of jurisdiction." US Tax Court granted Appellee's motion and dismissed Appellant's petition because Appellant had recently been suspended by FTB and pursuant to Tax Rule 60(c), the capacity of a corporation to engage in litigation in the Court is determined by the law under which the corporation was organized. *NT, Inc. d.b.a. Natures Touch v. Commissioner*, 126 T.C. 191, 193 (2006); *David Dung Le, M.D., Inc. v. Commissioner*, 114 T.C. 268, 270 (2000), *aff'd*, 22 Fed. Appx. 837 (9th Cir. 2001).

Interpreting California law, US Tax Court has held that a California corporation that has had its powers, rights, and privileges suspended by California does not have the capacity to initiate litigation in the Court, nor prosecute or defend any part of a case. *David Dung Le*, 114 T.C. at 271-74. Where the corporate taxpayer lacks the capacity to both sue and defend against a suit in a state court, it likewise does not possess the capacity to litigate in the US Tax Court under Tax Court Rule 60(c). *David Dung Le*, 114 T.C. at 268; *Rosa v. Commissioner*, T.C. Memo. 1996-322; *Condo v. Commissioner*, 69 T.C. 149, 151-52 (1977). Since Appellant's corporate status was suspended by the California Secretary of State (December 1, 2020) at the time the Appellant filed its petition in in US Tax Court to appeal the NOD (case was filed May 28, 2021), Appellant did not have capacity to bring its petition before US Tax Court, despite the contrary indications on Form- 872, and instructions on the NOD. Furthermore, and even though Appellant is reinstated by the California Secretary of State by the FTB, subsequent reviver of Appellant's corporate powers will not restore its capacity to litigate this case since the date of any such reviver will be beyond the 90-day period in which a petition in this case was required to be filed. See *David Dung Le*, supra, at 274-276.

Appellant is no longer a suspended entity for purposes of the Secretary of State of California under the direction of the FTB; however, it is left without any remedy or recourse as it was revived subsequent the 90-day period in which a petition in this

case was required to be filed and is now dismissed from US Tax Court. In short, Appellee is able to aggressively pursue Appellant by assessing Appellant with a tax bill while Appellant cannot defend itself against Appellee.

JURISDICTIONAL STATEMENT

The United States Tax Court had jurisdiction in this case pursuant to IRC § 7428. The Court of Appeals has jurisdiction pursuant to 26 U.S.C. § 7482(a). Appellant appeals from order dated January 12, 2023. Appellant duly filed its Notice of Appeal on April 11, 2023. The Notice of Appeal was filed timely pursuant to 26 U.S.C. § 7483. Appellant appeals from an order disposing Appellant's case in its entirety.

STATUTORY AUTHORITIES

All relevant constitutional and statutory authorities are set out in the Addendum attached to this brief.

ISSUES PRESENTED

- I. Whether the United States Tax Court's dismissal of the Appellant's Petition Pursuant to Tax Court Rule 60 violate Appellant's due process rights?
- II. Whether the United States Tax Court's dismissal of the Appellant's Petition Pursuant to Tax Court Rule 60 violate Appellant's Eighth Amendment rights?
- III. Whether the United States Tax Court abuse its discretion in dismissing Appellant's petition?

STATEMENT OF THE CASE

Appellant appeals from US Tax Court after it was dismissed for lack of capacity pursuant to Tax Court Rule 60(c). In relevant part, Tax Court Rule 60(c) provides: “The capacity of a corporation to engage in such litigation shall be determined by the law under which it was organized. Pursuant to California authority, a California corporation that has had its powers, rights, and privileges suspended by the of California does not have the capacity to initiate litigation in the Court, nor prosecute or defend any part of a case.” *David Dung Le*, 114 T.C. at 271-74. Where the corporate taxpayer lacks the capacity to both sue and defend against a suit in a state court, it likewise does not possess the capacity to litigate in the US Tax Court under Tax Court Rule 60(c). *David Dung Le*, 114 T.C. at 268; *Rosa v. Commissioner*, T.C. Memo. 1996-322; *Condo v. Commissioner*, 69 T.C. 149, 151-52 (1977). Subsequent revival of Appellant’s corporate powers will not restore its capacity to litigate this case since the date of any such revival will be beyond the 90-day period in which a petition in this case was required to be filed. See *David Dung Le*, supra, at 274-276.

On March 2, 2021, Appellee issued Appellant a final adverse determination letter revoking its tax-exempt status retroactively to 2016. The determination letter is a standard form generated by Appellee and mailed to Taxpayers at large providing instructions on how to appeal. Appellant timely petitioned US Tax Court seeking a

declaratory judgment that the revocation was erroneous based on the notice received and coupled with Form- 872- Consent to Extend Time to Assess Tax and its bold printed statement indicating “signing this consent will not deprive the taxpayer(s) of any appeal rights to which they are entitled.” Appellee filed a Motion to Dismiss for Lack of Jurisdiction on the ground that petitioner lacked the legal capacity to initiate this case when the petition was filed and for the entire 90-day period during which the petition was required to be filed. Appellant was incorporated in the State of California in 2007. On February 26, 2008, the Appellee issued Appellant a determination letter recognizing it as exempt from Federal income tax under section 501(c)(3) and as a private foundation under section 509(a). On December 1, 2020, after it executed Form- 872 the FTB suspended Appellant’s corporate powers, rights, and privileges pursuant to the provisions of the California Revenue and Taxation Code. Appellant’s corporate powers have since been restored. On March 2, 2021, Appellee issued petitioner a final adverse determination letter revoking its tax-exempt status retroactively to January 1, 2016. The letter determined that Appellant, as of that date, no longer qualified for exemption from Federal income tax under section 509(a) as private foundation described in section 501(c)(3). On May 28, 2021, Appellant filed a petition seeking a declaratory judgment that the revocation was erroneous. On July 27, 2022, Appellee filed a Motion to Dismiss for Lack of Jurisdiction, alleging that Appellant lacked the capacity either to initiate litigation in

US Court or to prosecute any part of this case. On September 12, 2022, Appellant filed an Objection to the Motion. On January 12, 2023, the US Tax Court issued an order dismissing Appellant's case.

SUMMARY OF THE ARGUMENT

Form-872, and the invitation clearly indicted on the NOD, wholly violates Appellant's Procedural Due Process rights as Appellant was dismissed in US Tax Court, effectively depriving them of appeal rights after guarantees by the same indicting that no appeal rights are waived by the execution of the same.

Appellant received a Notice defective on its face, and subsequently were denied their right to a hearing.

Appellant's dismissal pursuant to US Tax Court Rule 60 violates Appellant's equal protection rights as similarly situated corporations in a majority of the United States would not have been dismissed despite their suspended status, thus allowing suspended entities in different states to have capacity to seek judicial relief.

Appellants dismissal Pursuant to US Tax Court Rule 60 violates Appellant's U.S. Constitutional Eighth Amendment rights as it is both cruel and unusual to punish the victim of a Ponzi Scheme by not affording victim in the matter, an opportunity to be heard. It is further cruel and unusual punishment for Appellee to request additional time to conduct their investigation, represent that Appellant would

not lose any appeals rights, issue a notice of determination, only for Appellant to be denied the opportunity to be heard.

The lower court abused its discretion with respect to the Form- 872, by indicating that the “appeal rights” to which Form- 872 refers are the rights to administrative appeal within the IRS, not the taxpayer’s ability to secure judicial review.

The court also abused its discretion with respect to constitutional arguments raised by Appellant in their opposition to Appellee’s Motion to Dismiss for Lack of Jurisdiction, by branding them “frivolous” and refusing to consider.

STANDARD OF REVIEW

This court reviews de novo US Tax Court’s dismissal for lack of capacity pursuant to US Tax Court Rule 60(c) as outlined in issues one through four. Tax court’s rulings on jurisdictional issues are reviewed de novo. Additionally, this court reviews for abuse of discretion US Tax Court’s decision to dismiss for lack of capacity without addressing Appellant’s constitutional arguments as outlined in issue five.

ARGUMENT

- I. Appellants dismissal from US Tax Court violates Appellant’s rights to Procedural Due Process.**

Procedural due process requires the government to use constitutionally adequate procedures to deprive someone of life, liberty, or property interests. U.S. Const. amend. XIV. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) The federal and state Due Process Clauses impose significant procedural limitations on federal, state and local adjudicating agencies. CA Constitution art I § 7. Fundamentally, an agency must provide private parties with *adequate notice* and *opportunity for a fair hearing*, meaning an opportunity to be heard at a meaningful time and in a meaningful manner.

To establish a procedural due process claim, a party must show: (1) the existence of a protected property interest at issue, (2) a deprivation of that protected property interest, and (3) that he or she was not afforded adequate procedures. *Paterek v. Vill. of Armada*, 801 F.3d 630.

A. Property Interest

A property interest is a legitimate claim of entitlement to a tangible benefit secured by "existing rules or understandings" (*Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). The US Supreme Court has held that one has a property interest in welfare benefits if she has the meet the proper statutory criteria (see *Goldberg v. Kelly*, 397 U.S. 254 (1970)). "due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. *Fuentes v. Shevin*, 407 U.S. 67, 88-89, 92 S.Ct. 1983, 1998-1999,

32 L.Ed.2d 556 (1972); *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). Likewise, Appellant had a protected property interest in 501(c) status it applied for and received, by not only meeting the proper requirements but also paying the proper fees. At the time of the signing of Form-872, the Appellant had a protected property interest.

B. Deprivation Protected Property Interest

The facts in the instant matter begin similarly to the ones in *Mathews*. Respondent Eldridge in that case received a questionnaire from a state agency in charged with the monitoring of his medical condition. *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976) The continued receipt of benefits was conditioned on the responses he provided coupled with medical records he received. Here, Appellate began an investigation, to determine if in fact Appellee should be eligible for 501(c)(3) status. Appellees continued status was conditioned on responses, coupled with their supporting documentation regarding their non-profit activities.

The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition. *Eldridge*, 424 U.S. 319, at 324

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish

his disability. *Id.* The state agency then made its final determination that he had ceased to be disabled in May 1972. *Id.* This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. *Id.* The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months. *Id.*

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability. *Ibid.* The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. *Id.*

During the course of the investigation, Appellee induced execution of Form-872 allowing Appellee more time to conduct their investigation. Appellant executed Form-872 primarily because it guaranteed no right would be waived and because it was concerned that, by not signing the form, they would automatically receive an adverse determination. Under the impression that all their rights and recourses were available, Appellant continued to comply with requests from

Appellee until they issued the NOD. The NOD contained information instructing, advising, and inviting, Appellant to appeal. Shortly prior the issuance of the NOD, Appellant became a suspended entity. Subsequent execution of Form-872, Appellant became a suspended entity for purposes of FTB. As a result of the execution of Form -872 and its misleading guarantee with respect to nonwaiver of rights to “any” claims Appellant was precluded for bringing a claim based on “lack of capacity.” Additionally, Appellant now has been deprived of its 501(c)(3) status. In the alternative, an equal deprivation to Appellant, is the requirement that it comply with an arbitrary assessment of tax if it wants to have 501(c)(3) status.

C. What Process Is Due.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). See, e. g. *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597 (1931). See also *Dent v. West Virginia*, 129 U.S. 114, 124-125 (1889). The “right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) The fundamental requirement of due process is the opportunity to be heard “at a meaningful time

and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). Once a protected liberty or property interest is identified, it is necessary to determine what process is due. The Supreme Court has determined that a hearing closely approximating a judicial proceeding is necessary before welfare benefits can be terminated. *Goldberg v. Kelly*, 397 U.S. 254 (1970). It has also ruled that a hearing is required before property may be seized, or essential services terminated. *Jones v. Flowers*, 547 U.S. 220 (2006). Further, it has held that a basic requirement of constitutional due process is a fair and impartial tribunal, which may be a court, an administrative agency, or a government hearing officer. The basic framework for analysis was provided in *Mathews* where the Court identified three factors to be considered: (1) the private interest affected by the challenged action; (2) the risk of an erroneous determination of this interest under existing procedures and the value of additional or alternative procedures; and (3) the government's interest, including the function involved and the fiscal and administrative burdens which would be imposed by the additional or alternative procedures. *Eldridge*, 424 U.S. 319, at 335. Due Process generally requires that the government provide notice and a meaningful opportunity to be

heard. The adequacy of the government's specific form of notice and hearing is determined using the *Mathews* test, balancing three factors:

1. The private interest affected by the challenged action.

The seriousness of the plaintiff's loss is a major factor in determining whether the process provided was sufficient. The court in *Shoemaker V. City of Howell* 795 F.3d 553 (6th Cir. 2015) determined that \$600 in fines and fees over 16 months was a relatively minor property interest. The plaintiff did not go hungry or lose his house because of the money added to his property taxes in fees and fines.

Here, Appellant is not losing some mere fee that it paid to obtain status. It is losing status which represents a total reclassification as an entity. Revocation leads to the loss of an entire nonprofit foundation. More importantly, Appellant is losing its ability to be heard and for judicial review.

2. The risk of erroneous deprivation.

The risk of erroneous deprivation pursuant to Rule 60(c) in matters like this, and all matters involving entities, is high. Here, Appellant is deprived of all its rights, and subject to the taking of their property due to an assessment by Appellee that cannot be contested. Appellant was dismissed by the Court after it filed its Petition and after Appellant filed its Answer, because Appellee realized that Appellant had no "Capacity." In the hypothetical that it would have been the

day before trial, Appellee could have filed its motion, and Appellant would be left without recourse.

More importantly and following the reasoning where “an ordinance that did not allow grass to grow over eight inches tall had little chance of wrongful application because the law had an objective, readily ascertainable standard.” *Shoemaker*, 795 F.3d at 561. Here, the law does not have an objective, readily ascertainable standard, as it varies from state to state, and can change depending on a status that can change throughout the litigation.

This result is devastating to any entity similarly situated. Further, Appellant is not requesting additional safeguards than that which already exist, it is simply requesting that it can actually be heard, particularly when there has been representation regarding an opportunity for appeal.

Further, in *Mathews*, “prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefore, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency’s tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg*, enable the recipient to “mold” his argument to

respond to the precise issues which the decisionmaker regards as crucial.”

Eldridge 424 U.S. 319 at 346 (1976).

Here, similar to a “tentative assessment” Appellant was issued a NOD; however, Appellant’s rights end at the issuance of the NOD, without any additional opportunities to submit additional evidence or arguments or enabling it to challenge directly the accuracy of information in its file as well as the correctness of the agency’s tentative conclusion. Appellant has no option but to take the assessment via NOD on its face. Additionally, the NOD itself is defective because it offers appeals rights; however no rights can be exercised. Accordingly, risk of erroneous deprivation is high.

3. The government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Under this requirement the court consider “weighing of fiscal and administrative burdens against the interests of a particular category of claimants” *Eldridge* 424 U.S. 319 at 346 (1976).

Here, certainly the cost to hear US Tax Court matters is high; however, this remedy is already in existence and the proper avenue for taxpayer’s to appeal determinations by Appellee. More importantly this is the exact remedy listed as part of the NOD further indicating that this is an anticipated “burden.”

Further, the cost to the US Tax Court is not wholly spared in matters like the instant matter. For instance in this case the court has already expended administrative costs in entering the case into its system, has expended time, money and effort in reviewing the petition, answer, only to dismiss pursuant to Rule 60(c).

“But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies “preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.” *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances. The essence of due process is the requirement that “a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.” *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123 at 171-172 (1951). All that is necessary is that the procedures be tailored, in light of the decision to be made,

to “the capacities and circumstances of those who are to be heard,” *Goldberg v. Kelly*, 397 U.S. 254, at 268-269 (1970), to insure that they are given a meaningful opportunity to present their case.” *Id.*

Here, Appellant in jeopardy of serious loss. The notice in this matter, the NOD, invited Appellant to appeal via US Tax Court, making the notice defective, as it really provided no rights despite the invitation. This does not even consider the fact that Form -872 guaranteed a non-waiver of “any” rights. Appellant has no opportunity to meet the notice. No opportunity to challenge the notices (in substance or procedure) . No opportunity to be heard. No opportunity to present their case.

Accordingly the government’s interest including the function involved and the fiscal burdens that the additional or substitute procedural requirements would entail are minimal.

4. Causation

Courts analyze causation under Section 1983 using common law tort principles. Causation requires proof of: Cause in fact. Sometimes referred to as "but for" cause or actual cause, cause in fact exists if the harm cannot result without the government action at issue. Proximate cause. Sometimes referred to as a legal cause, proximate cause exists if the harm was a reasonably foreseeable result of the

government action. *Powers v. Hamilton Cnty. Public Def. Comm'n*, 501 F.3d 592, 608-09 (6th Cir. 2007).

Here, Appellee demanded execution of Form-872, guaranteeing no waiver of “any” appeals rights, issued an NOD inviting appeal and did so based on the same. Subsequent filing of their Petition.

Accordingly, the dismissal pursuant to Rule 60(C) violated Appellants Rights to Procedural Due Process.

II. The United States Tax Court’s dismissal of Appellant Violates Appellant’s Eighth Amendment Rights.

The Eighth Amendment of the United States Constitution provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. Amend. 8. Courts generally analyze three prongs when evaluating whether a given sentence is cruel and unusual: (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for the same crime in other jurisdictions *Solem v. Helm*, 463 U.S. 277, 292 (1983). Thus, in determining whether a punishment is disproportionate to the crime under the cruel or unusual punishment provision of the constitution, the court begins by comparing the gravity of the offense and the severity of the sentence. If that leads to an inference of disproportionality, the court should then compare the sentence with the sentences

received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions to determine if it is cruel and unusual.

Harmelin v. Michigan, 501 U.S. 957 (1991).

There is no authority indicating that the cruel and unusual punishment provision applies exclusively in the criminal context. Accordingly, the analysis applies to Appellant.

A. The Gravity of the Offense and the Harshness of the Penalty

The harm caused by Appellant to society and other taxpayers at large, is minimal, Appellant's culpability is even less. The dismissal serves to revictimize the victim on two counts. First, Appellant is the victim of the underlying fraud perpetrated by Chen. Appellant was created by criminal mastermind, Certified Public Accountant Chen. Appellant paid large sums for Chen's guidance, only to later discover it received intentionally deceptive and erroneous advice from Chen.

The punishment that Appellant is now faced with is wholly disproportionate to Appellant's actions. Particularly, as Appellant paid good money for bad tax advice from a professional. Appellant had no ulterior motive in the set up of their 501(c)(3) entity the only motivation in their conduct was to help others through their non-profit; however, they were completely misled by the criminal mastermind of Chen.

Appellant's dismissal effectively revictimizes the victim as it is now barred from defending itself in Court.

Appellant executed Form- 872 in good faith, allowing Appellee more time to issue a determination with respect to the underlying matter. Appellant executed the form under the based upon Appellee's representation that it would lose no appeal rights, exactly as indicated, in bold font, by Appellees Form. A tax court petition is an appeal right. Form- 872 does not particularly or specifically preclude or identify the appeals rights it is referencing. If fact, it indicates "any" leading taxpayers to believe that they are not waiving any conceivable appeals rights. Appellant was suspended at the California level, subsequently executed the form, and within months of the suspension an adverse determination was issued. The same adverse determination invited Appellant to petition the tax court as a form of appeal to the determination. Appellant did just that, only to have its rights wholly violated. Appellants attempted to be helpful and complied with Appellee's requests was an exercise in futility.

B. The sentences imposed on other criminals in the same jurisdiction.

Tax Rule 60(c) defers the determination of corporation's capacity to bring suit to the states. As discussed, and pursuant to California law, suspended entities in California do not have capacity to proceed in US Tax court.

C. The sentences imposed for the same crime in other jurisdictions.

As indicated, Tax Rule 60(c) defers a corporation capacity to bring suit to the states. A majority of states allow upon the filing of the application for reinstatement

the corporate existence for all purposes shall be deemed to have continued without interruption from the date of the issuance of the certificate of dissolution, and the corporation shall stand revived with such powers, duties and obligations as if it had not been dissolved. This allows them the opportunity for judicial review.

The harshness of Tax Rule 60(c) as applied to these facts is certainly not proportional to the underlying wrong. For the foregoing reasons, appellants dismissal was unlawful and violative of their rights as taxpayers.

III. The United States Tax Court abused its discretion in dismissing Appellant's petition.

“An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.” *Rabkin v. Oregon Health Scis. Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); *see also Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013); *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 698 n.11 (9th Cir. 2011).). “Abuse-of-discretion review is highly deferential to the district court.” *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012). Under the abuse of discretion standard, the court reverses only when convinced that “the reviewed decision lies beyond the pale of reasonable justification under the circumstances.” *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016), *as amended* (Oct. 27, 2016) (internal quotation marks and citation omitted);

McCullough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 953 (9th Cir. 2011); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010) (citing *S.E.C. v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001)); *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (noting reversal under abuse of discretion standard is possible only “when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances”). The abuse of discretion standard requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. *See Hung Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017); *Kode v. Carlson*, 596 F.3d 608, 612–13 (9th Cir. 2010) (per curiam); *Grant v. City of Long Beach*, 315 F.3d 1081, 1091 (9th Cir. 2002), *opinion amended on denial of reh’g*, 334 F.3d 795 (9th Cir. 2003) (order).

A court abuses its discretion when a “...court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See Briseno v. Henderson*, 998 F.3d 1014, 1022 (9th Cir. 2021) (“A district court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact.” (alteration, quotation marks, and citation omitted)); *Am. Beverage Ass’n v. City & Cty. of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019) (en banc) (“A district court abuses its discretion if it rests its decision on an erroneous legal standard or on clearly erroneous factual findings.” (internal quotation

marks and citation omitted)); *Reed v. Lieurance*, 863 F.3d 1196, 1208 (9th Cir. 2017) (district court abused discretion in excluding certain testimony); *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011) (citing *Casey v. Albertson's Inc*, 362 F.3d 1254, 1257 (9th Cir. 2004)).

The US Tax Court abused its discretion with respect to its analysis of Form-872 and with respect to the constitutional arguments. The lower court dismissed that Appellant based on strict application of Tax Court Rule 60(c) and without any analysis of the underlying argument presented by Appellant.

With respect to Form- 872 and as indicated herein, the form clearly indicates in bold that the execution of the form does not constitute the waiver of “any” rights. The lower court indicated that Appellants “appeal rights” to which Form- 872 refers are the rights to administrative appeal within the IRS; however, this is exactly contradictory to the plain meaning of the word “any.” The fact that the form says “any” appeals rights certainly would not support this analysis or reasoning. The Form- 872 certainly does not explicitly indicate that the appeal rights it is referencing is an administrative appeal within the IRS. If Appellee did intend to have such narrow meaning of “any appeals rights” it should have so stated. Further, the words regarding appeals rights are in bold, as both a lure and a guarantee for taxpayers to sign, under the guise that no rights are waived. Appellants contention is further supported by the NOD, which contains US Tax Court as a form and mechanism to

appeal its determination. Further, US Tax Court supported reasoning by indicating that, “In any event, Form-872 preserves only those appeal rights to which the taxpayer “would otherwise be entitled” A corporation whose powers have been suspended under State law is not “entitled” to commence litigation in this Court.” wholly missing the point of Appellants objection to the motion to dismiss. Appellant was not suspended at the time of execution of the form; thus, Appellant was entitled to commence litigation in the US Tax Court.

Accordingly, the lower court’s dismissal was based on erroneous finding of a material fact of Appellant’s status for purposes of FTB at the time of the execution of Form-872, thus an abuse of discretion with respect to Form- 872.

Additionally, the US Tax Court abused its discretion by interpreting the meaning of “any” as it relates to Form-872 and dismissing Appellant despite its capacity to bring their petition and be heard in US Tax Court at the time of the execution of the same form.

The US Tax Court also abused its discretion with respect to constitutional arguments raised by Appellant in their opposition to Appellee’s Motion to Dismiss for Lack of Jurisdiction, by branding them “frivolous” and refusing to consider. The court wholly failed to apply any facts to any law. The court dismissed Appellant by reaching a conclusion in one fell swoop. Such act was an abuse of discretion.

CONCLUSION

For the foregoing reasons, the Court should reverse the Order of Dismissal of the United States Tax Court and reverse and remain for Appellant to defend itself in US Tax Court.

Date: November 3, 2023

Respectfully submitted,

WEED LAW GROUP, PC

/s/Christina Weed

Christina Weed, Esq.

*Attorneys for Plaintiff-Appellant,
XC Foundation*

STATEMENT OF RELATED CASES

9th Cir. Case Number(s) 23-70060

The undersigned attorney or self-represented party states the following:

I am unaware of any related cases currently pending in this court.

I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature: /s/ Christina Weed

Dated: November 3, 2023

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 23-70060

I am the attorney or self-represented party.

This brief contains 6,084 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief (*select only one*):

complies with the word limit of Cir. R. 32-1.

is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

it is a joint brief submitted by separately represented parties.

a party or parties are filing a single brief in response to multiple briefs.

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated _____.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: /s/ Christina Weed
(use "s/[typed name]" to sign electronically-filed documents)

Dated: November 3, 2023

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Appellant's Opening Brief** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate Electronic Filing System on November 3, 2023.

I certificate that I served the foregoing/attached **Appellant's Opening Brief** via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing System.

Date: November 3, 2023

By: /s/Christina Weed
Christina Weed

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U.S. CONST. amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Cal. Const. art. I, SEC. 7.

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this State, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979–80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial

resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this State and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.