

No. 23-70060

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

XC FOUNDATION,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

**ON APPEAL FROM THE ORDER
OF THE UNITED STATES TAX COURT**

ANSWERING BRIEF FOR THE COMMISSIONER

DAVID A. HUBBERT
Deputy Assistant Attorney General

JACOB EARL CHRISTENSEN (202) 307-0878
BETHANY B. HAUSER (202) 514-2830

Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

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ANSWERING BRIEF FOR THE COMMISSIONER

STATEMENT OF JURISDICTION

On March 2, 2021, the Commissioner of Internal Revenue issued to XC Foundation (the foundation) a final adverse determination letter revoking its tax-exempt status under Internal Revenue Code (I.R.C.) (26 U.S.C.) § 501(c)(3). (ER-358.) Within 90 days of that letter, on May 28, 2021, the foundation petitioned the Tax Court under I.R.C. § 7428 for a declaratory judgment regarding its tax-exempt status. (ER-35.) *See* I.R.C. § 7428(b)(3). At that time, however, and as further discussed in

the Argument, *infra*, the foundation lacked the capacity to sue or defend a suit under California law. *See generally Community Elec. Serv. of Los Angeles, Inc. v. Nat'l Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1239 (9th Cir. 1989), abrogated in part on separate issue by *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363–65 (9th Cir. 1990) (en banc) (overruling prior precedent interpreting Rule 11 sanctions); *David Dung Le, M.D., Inc. v. Commissioner*, 114 T.C. 268 (2000), *aff'd*, 22 F. App'x 837 (9th Cir. 2001). Because the foundation lacked the capacity to initiate this proceeding, the Tax Court found that there was no valid petition and dismissed this proceeding for lack of jurisdiction. (ER-2.)

The Tax Court order dismissing this case was entered on January 12, 2023. (ER-2.) Eighty-nine days later, on April 11, 2023, the foundation timely filed a notice of appeal to this Court. (ER-363.) *See* Fed. R. App. P. 13(a)(1)(A). This Court generally has jurisdiction to review an appeal from the Tax Court under I.R.C. § 7482(a)(1).

However, as discussed in more detail in the Argument, *infra*, the foundation lacked the capacity to file a notice of appeal until after the Tax Court decision became final, with the result that this Court lacks jurisdiction over this appeal.

STATEMENT OF THE ISSUE

Whether the Tax Court and this Court lack jurisdiction over the petition and the appeal, respectively, because under California law the foundation lacked the capacity to litigate at all pertinent times.

APPLICABLE STATUTES AND REGULATIONS

The statutes relevant to the disposition of this appeal are included as an addendum to this brief. *See* Fed. R. App. P. 28(f); 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

XC Foundation petitioned the Tax Court for a declaratory judgment stating that it was a tax-exempt entity under I.R.C. § 501(c)(3). *See* I.R.C. § 7428. Because the foundation's capacity to litigate was suspended by the State of California, the Tax Court dismissed the petition. The foundation brings this appeal.

1. Background

On or about December 13, 2017, the Santa Clara County District Attorney's Office charged Jimmy Chen, a Bay Area CPA, with

numerous counts of criminal tax fraud. (ER-23.)¹ As the foundation admits, these charges stemmed from Chen “setting up his own private charitable foundation for purposes of evading tax, and for advising people to do the same.” (ER-23.)

Appellant here is XC Foundation, a California corporation created by Chen about March 2007. (ER-23, ER-34.) Chen, acting on behalf of the foundation, also sought and obtained an administrative determination letter, dated February 2008, indicating that the IRS recognized the foundation as an organization described in I.R.C. § 501(c)(3). (ER-23; *see* ER-358.)

On May 1, 2019, the Commissioner informed the foundation that it had been selected for audit. (ER-24.) While the audit was ongoing, on July 1, 2020, the foundation and its corporate officers, husband and wife Wei Xu and Chih Chiang, signed an IRS Form 872, extending the time within which income or excise tax due for the foundation’s 2016 taxable year could be assessed. (ER-27, ER-28.) The Form 872 states

¹ *See* County of Santa Clara News Release, “CPA Charged With Aiding in Tax Fraud,” <https://perma.cc/3PWR-CNZU> (December 12, 2017).

that “signing this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.” (ER-28.)

On March 2, 2021, the Commissioner issued a final adverse determination letter revoking the foundation’s tax-exempt status under I.R.C. § 501(c)(3). (ER-358.) Although the revocation was retroactive to 2016, this determination is a determination of status, *not* a determination that income or excise taxes are due for the foundation’s 2016 tax year (or for any other period). (ER-358.)

In response to that adverse determination letter, on May 28, 2021, the foundation petitioned the Tax Court for a declaration that the revocation was erroneous and the foundation was exempt from federal income tax under I.R.C. § 501(c)(3). (ER-35, ER-37.) *See* I.R.C. § 7428.²

The Commissioner separately determined that Xu and Chiang owed excise taxes for self-dealing. (ER-16.) *See* I.R.C. § 4941; *see also*

² The foundation attached hundreds of pages of receipts, canceled checks, and other documentation to its petition, and reproduces these pages in its excerpts of record. (ER-58–355.) These documents were never admitted as evidence in this case, however. To the contrary, on August 26, 2021, the Tax Court issued a “Notice of Attachments in the Nature of Evidence” stating that “documents attached to the Petition you filed with this Court appear to be in the nature of evidence” and “advis[ing]” the foundation “that these documents have not been received into evidence by the Court.” (Doc. 5.)

Gladney v. Commissioner, 745 F.2d 955, 959 & n.6, 962 & n. 11 (5th Cir. 1984) (reviewing the history of the excise tax on self-dealing). The Xu and Chiang cases were docketed in the Tax Court as Nos. 550-21 and 575-21, respectively. (ER-16.)

2. The Commissioner's motion to dismiss and the foundation's response

The Commissioner moved to dismiss this proceeding for lack of jurisdiction, attaching to his motion a certificate of status from the California Secretary of State certifying that the foundation's powers, rights, and privileges had been suspended by the California Franchise Tax Board on December 1, 2020, and remained suspended as of December 16, 2021. (ER-29, ER-34.) Under California law, the Commissioner argued, the foundation lacked the capacity to file the petition upon which Tax Court jurisdiction in this case is premised. (ER-30–32.)

The foundation opposed the motion. (ER-9, ER-379, ER-380.) In its opposition, filed September 12, 2022, the foundation did not indicate that its corporate privileges had been revived or that it had any intention of seeking revivor. (ER-9–18.) Instead, the foundation argued that once it had executed the IRS Form 872 extending the time to

assess income and excise taxes for its 2016 tax year, its suspended status under California law became irrelevant to its capacity to litigate its federal tax-exempt status. (ER-12.) The foundation also argued that, by looking to California law to determine the status of a California corporation, Tax Court Rule 60 violates that corporation's constitutional rights to procedural due process and equal protection and that dismissal of the petition would be "cruel and unusual punishment" in violation of the Eighth Amendment. (ER-12–16.) Finally, the foundation argued that this case should be consolidated with the excise tax cases involving Xu and Chiang and that "failure to consolidate these three cases will create a massive burden on [the foundation], Xu, and Chiang," with the result that the foundation "will be deprived of the rights herein above." (ER-16, ER-17.)³

3. The Tax Court's memorandum opinion

The Tax Court granted the Commissioner's motion to dismiss. (ER-3.) The court held that, as an Article I court, it possesses jurisdiction "only to the extent conferred by Congress." (ER-5.) By

³ The Xu and Chiang cases (Tax Ct. Nos. 550-21 and 575-21) have since been resolved by stipulated decisions. The foundation does not refer to this litigation in its brief on appeal.

statute, the court held, to invoke the Tax Court's jurisdiction to issue a declaratory judgment regarding tax-exempt status under I.R.C.

§ 7428(b)(3), "an organization must file a petition with the Court within 90 days of the mailing of the final notice of adverse determination."

(ER-5.) Timeliness is not the only issue, the court held: "[r]egardless of whether its petition is timely filed, a petitioning party must have the capacity to commence and maintain litigation in this Court." (ER-5.)

When the petitioning party is a corporation organized under the law of a State, the Tax Court "look[s] to the law of that State to determine whether petitioner had the capacity to initiate this case." (ER-5.) And "[i]f a petitioner lacks the capacity to commence and maintain litigation in this Court," the Tax Court "must dismiss the case for lack of jurisdiction." (ER-5.)

Under California law, the Tax Court held, "a corporation cannot prosecute or defend an action during the period in which its corporate rights and powers have been suspended." (ER-6 (citing *David Dung Le, M.D., Inc. v. Commissioner*, 114 T.C. 268, 272 (2000), *aff'd*, 22 F. App'x 837 (9th Cir. 2001)).) The Tax Court observed that the controlling *David Dung Le* case had been dismissed because "the taxpayer's

corporate powers had not been reinstated when the taxpayer filed its petition or during the 90-day period when the petition was required to be filed.” (ER-6.) “The same analysis applies here,” the court held. (ER-6.) The foundation’s “corporate powers and privileges were suspended by the State of California on December 1, 2020” (ER-6), and the foundation “has supplied no evidence that its corporate powers have ever been restored.” (ER-4.) Because the IRS’s “final adverse decision letter was issued on May 2, 2021,” after the foundation’s corporate powers and privileges were suspended, the court concluded that “during the entire . . . period in which its petition was required to be filed,” the foundation “was . . . incapable of initiating or prosecuting a case” in the Tax Court. (ER-6.)

The Tax Court rejected the foundation’s argument that the Form 872 preserved its right to petition the Tax Court. (ER-6.) That form, the court observed, “preserves only those appeal rights to which the taxpayer ‘would otherwise be entitled.’” (ER-7 (quoting ER-28).) And, the court observed, a California “corporation whose powers have been suspended under State law is not ‘entitled’ to commence litigation in this Court.” (ER-7.) The court also rejected as “frivolous” the

foundation's arguments that, by looking to California law to determine its powers, the Tax Court had violated the California entity's "rights to procedural due process, equal protection, and to the protection against cruel and unusual punishment." (ER-7.)

4. Post-decision developments

The Tax Court opinion was entered on January 5, 2023; its order dismissing the case was entered on January 12, 2023. (ER-2, ER-3.)

The foundation filed a notice of appeal on April 11, 2023. (ER-363.)

In its brief on appeal, the foundation asserts that it "is no longer a suspended entity." (Br. 4.) No support is offered for this assertion.

Online records maintained by the California Secretary of State, however, indicate that XC Foundation's corporate status was revived by the California Franchise Tax Board on August 15, 2023.⁴

⁴ See <https://bizfileonline.sos.ca.gov/search/business>.

SUMMARY OF ARGUMENT

XC Foundation, the petitioner in the Tax Court and the appellant in this Court, is a California corporation. From December 2020 until August 2023, its capacity to litigate was suspended under California law. The suspension period encompasses both the filing of the Tax Court petition and the filing of the notice of appeal to this Court. Under California law, the revival of a corporation's corporate powers generally operates to retroactively validate its actions. Revivor will not, however, validate an action taken after the statute of limitations. Because the period within which the foundation could have filed the petition expired before the foundation's capacity to litigate was revived, the Tax Court petition in this case was invalid, and the Tax Court properly dismissed the case for lack of jurisdiction. Similarly, because the period within which the foundation could have filed a notice of appeal expired, and the Tax Court decision became final by statute, before the foundation's capacity to litigate was revived, this Court lacks appellate jurisdiction.

The foundation's counterarguments are misconceived. The foundation relies upon an IRS Form 872 it signed, which states that "signing this consent will not deprive the taxpayer(s) of any appeal

rights to which they would otherwise be entitled.” But the foundation’s capacity to litigate was suspended by operation of California law, *not* because the foundation signed the Form 872. The foundation also argues that the dismissal of its suit violates the Constitution. That argument, however, presupposes that by dismissing the petition, the Tax Court conclusively determined that the foundation is not a tax-exempt organization. To the contrary, because the Tax Court dismissed the petition, the court did not reach the merits of the issue, which therefore may be contested in other proceedings. The foundation’s constitutional arguments thus lack merit.

ARGUMENT

The Tax Court and this Court lack jurisdiction over the petition and the appeal, respectively, because the foundation lacked the capacity to litigate at all pertinent times

Standard of review

Decisions of the Tax Court are reviewed on the same basis as decisions in civil bench trials in the United States District Court. I.R.C. § 7482(a)(1); *Mazzei v. Commissioner*, 998 F.3d 1041, 1054 (9th Cir. 2021). Thus, the Tax Court’s conclusions of law are reviewed *de novo*. *Mazzei*, 998 F.3d at 1054. Whether a California corporation has the capacity to initiate a legal proceeding is an issue of law reviewed *de novo*.

A. The Tax Court correctly dismissed the petition because the corporation lacked the capacity to litigate

1. Tax Court jurisdiction depends upon a valid petition

The Tax Court is an Article I court of limited jurisdiction. *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *Gorospe v. Commissioner*, 451 F.3d 966, 968 (9th Cir. 2006); *Crim v. Commissioner*, 66 F.4th 999, 1001 (D.C. Cir. 2023). Its subject matter jurisdiction is granted and defined by the Internal Revenue Code. I.R.C. § 7442; *Gorospe*, 451 F.3d

at 968; *Estate of Branson v. Commissioner*, 264 F.3d 904, 908 (9th Cir. 2001).

The foundation initiated this Tax Court proceeding by filing a petition on May 28, 2021. (ER-35.) The petition was filed in response to an IRS letter dated March 2, 2021, containing a final determination that the petitioner did not qualify as an organization described in I.R.C. § 501(c)(3). (ER-35.)

I.R.C. § 7428 permits the Tax Court, the United States Court of Federal Claims, or the district court of the United States for the District of Columbia, as appropriate, to “make a declaration with respect to” an organization’s “continuing qualification” as a tax-exempt organization. I.R.C. § 7428(a)(1)(A) and flush language. A pleading initiating such a proceeding may be filed only “by the organization the qualification . . . of which is at issue,” after the exhaustion of administrative remedies, and within 90 days of the date the IRS mails the pertinent notice. I.R.C. § 7428(b)(1), (2), and (3).

The statutory grant of authority to issue declaratory judgments under I.R.C. § 7428 is conditioned on the filing of “an appropriate pleading.” I.R.C. § 7428(a) (flush language). Like all Tax Court

proceedings, declaratory judgment proceedings regarding the tax-exempt status of an organization are initiated by petition. Tax Ct. R. 211(a); *see also* I.R.C. § 7453 (“[t]he proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe”). Thus, in this matter, as in all Tax Court proceedings, “[a] valid petition is the basis of the Tax Court’s jurisdiction.” *Scar v. Commissioner*, 814 F.2d 1363, 1366 (9th Cir. 1987); *see also* Tax Ct. R. 210(c).

2. Under California law, at the time the petition was filed, the foundation lacked the capacity to litigate

In the Tax Court, “[t]he capacity of a corporation to engage in . . . litigation shall be determined by the law under which it was organized.” Tax Ct. R. 60(c); *Condo v. Commissioner*, 69 T.C. 149, 151 (1977); *accord* Fed. R. Civ. P. 17(b) (The “[c]apacity [of a corporation] to sue or be sued [shall be] determined by the law under which it was organized.”). This follows from the principle that, in the United States, “a private corporation in this country can exist only under the express law of the

state or sovereignty by which it was created.” *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 124–25 (1937).

The petitioner here is a California corporation formed in 2007. (ER-34.) On December 1, 2020, the California Franchise Tax Board suspended the foundation’s powers, rights, and privileges pursuant to the provisions of the California Revenue and Taxation Code. (ER-34.) See Cal. Rev. & T. Code §§ 23301, 23302. Under California law, a corporation may not prosecute or defend an action during the period it is suspended. *United States v. 2.61 Acres of Land*, 791 F.2d 666, 668 (9th Cir. 1985). The corporation may be sued, but it can neither sue nor defend, and it cannot appeal from an adverse decision. See generally *Suspension and Revivor*, 4 Witkin, *Cal. Proc. (Pleading)* § 87 (6th ed. 2023). This rule applies to California corporations attempting to litigate in the Tax Court just as it does in California courts. *David Dung Le, M.D., Inc. v. Commissioner*, 114 T.C. 268 (2000), *aff’d*, 22 F. App’x 837 (9th Cir. 2001).

The petition initiating this case was filed after those powers were suspended, on May 28, 2021. (ER-35.) As reflected in the record on appeal, the foundation’s powers, rights, and privileges remained

suspended at least until December 16, 2021. (ER-34.) Nothing in the Tax Court record indicates that the petitioner's corporate powers were ever reinstated. Under such circumstances, a California corporation lacks the capacity to litigate. *Boyle v. Lakeview Creamery Co.*, 9 Cal. 2d 16, 20 (1937). Accordingly, the Tax Court correctly held that the foundation was legally incapable of filing the petition (ER-6) and correctly dismissed this proceeding for lack of jurisdiction (ER-2).

3. The belated reinstatement of the foundation came too late to validate the petition retroactively

In its brief on appeal, the foundation now claims, without citation or support, that its powers have been reinstated. (Br. 4.) The website maintained by the California Secretary of State indicates that revivor took place on August 15, 2023, several months after this appeal was docketed in April 2023. Assuming *arguendo* that the foundation's powers were reinstated on August 15, 2023, the revivor was too late to save this declaratory judgment action.

Under California law, revivor typically permits the action to go forward as if the corporation's powers had never been suspended. *Traub Co. v. Coffee Break Serv., Inc.*, 66 Cal. 2d 368, 371 (1967). If a

limitations period has expired while the corporation is in suspended status, however, the reinstatement “will not validate retroactively the earlier filing.” *Community Elec. Serv. of Los Angeles, Inc. v. Nat’l Elec. Contractors Ass’n, Inc.*, 869 F.2d 1235, 1240 (9th Cir. 1989), abrogated in part on separate issue by *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363–65 (9th Cir. 1990) (en banc) (overruling prior precedent interpreting Rule 11 sanctions). The California Supreme Court has characterized such a case as “present[ing] a statute of limitations problem.” *Traub Co.*, 66 Cal. 2d at 372 (distinguishing *Cleveland v. Gore Bros., Inc.*, 14 Cal. App. 2d 681 (1936), on this basis); *see also Community Elec. Serv.*, 869 F.2d at 1240 (relying in part on this language from *Traub*); *cf. Revivor by Payment of Back Taxes*, 9 Witkin, *Summary of California Law* (Corps.) § 238 (11th ed. 2023) (“The statute of limitations is a substantive defense, and a revivor after it has run will not save the barred action.”).

As noted above, the petition in this case was required to be filed within 90 days of the date of the letter dated March 2, 2021, *i.e.*, by May 31, 2021. (ER-358.) The foundation’s corporate status was not revived (assuming it was revived at all) until well after that period had

closed. (ER-34.) Accordingly, the revival of the foundation's corporate powers came too late to retroactively validate the petition in this case.

It is the Government's position that the 90-day period of I.R.C. § 7428(b)(3) is jurisdictional. *See Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1095 (9th Cir. 2020) (finding a different 90-day period in the Tax Code to be jurisdictional). *But see Culp v. Commissioner*, 75 F.4th 196, 202 (3d Cir. 2023) (disagreeing with *Organic Cannabis*). A period need not be jurisdictional to constitute a statute of limitations, however. *E.g., Wilkins v. United States*, 598 U.S. 152, 163 (2023). And although a non-jurisdictional statute of limitations may be a waivable defense, it is not waived when, as here, the Commissioner raised the issue in a timely fashion, before the Tax Court decision, before the case went to trial, and before either party sought summary judgment on the merits. *See id.* at 157–58; *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). Notably, the Tax Court does not have a rule analogous to Fed. R. Civ. P. 8(c) requiring affirmative defenses to be raised in response to a pleading. *Cf. United States v. Gilbert*, 48 F.3d 1229 (9th Cir. 1995) (unpublished).

B. This Court lacks appellate jurisdiction because the notice of appeal was ineffective

Moreover, the foundation's reinstatement appears to have come so late that this Court lacks appellate jurisdiction. The Tax Court decision was entered on January 12, 2023 (ER-2), with the result that the 90-day period within which an appeal might have been taken, *see* Fed. R. App. P. 13(a)(1)(A), expired long before the August 15, 2023 date of revivor shown on the California Secretary of State website. The result is that the notice of appeal is ineffective. *Boyle v. Lakeview Creamery Co.*, 9 Cal. 2d 16, 20 (1937) (a suspended corporation has "no right to appeal from an adverse decision"). By statute, a Tax Court decision becomes final "[u]pon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time." I.R.C. § 7481(a)(1). The Tax Court decision dismissing this case therefore became final 90 days after the order was entered. I.R.C. § 7459(c) ("if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry"). *See R. Simpson & Co. v. Commissioner*, 321 U.S. 225, 230, *reh'g denied*, 321 U.S. 804 (1944) ("when under our rules our denial [of

certiorari] has become final, this statute [modern I.R.C. § 7481] deprives us of jurisdiction over the case”).

C. The foundation’s counterarguments are misconceived

1. The foundation misreads the Form 872 upon which it relies

Many of the foundation’s arguments in its brief on appeal rely on the Form 872 that it signed (ER-28) extending the time within which to assess income or excise tax for its 2016 tax year. (*See* Br.11–13, 19–22, 25–26.) Notably, this is not a suit regarding the foundation’s income or excise tax liability for its 2016 tax year, and the form does not directly pertain to the tax-exempt status issue presented in this I.R.C. § 7428 proceeding.

But even if the Form 872 were directly applicable to this proceeding, the foundation misplaces its reliance on that Form 872 because it simply misreads the text. The form states that “signing this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.” (ER-28.) In its brief on appeal, the foundation twice misquotes this language as “are entitled” (Br. 2, 7) rather than “would otherwise be entitled” (ER-28). The foundation

made the same mistake in the Tax Court, as the Tax Court pointed out in its memorandum opinion (ER-7).

Furthermore, as discussed above (and as the Tax Court noted (ER-7), regardless of whether it signs a Form 872, a California corporation whose powers have been suspended under state law is not “entitled” to commence litigation in the Tax Court. That is, it was not the “signing [of] this consent” (*i.e.*, the Form 872) that deprived the foundation of the ability to litigate in Tax Court. It was the foundation’s failure to comply with the requirements of California state law.

2. The foundation misunderstands the legal consequences of this proceeding

a. Introduction

The foundation’s further arguments on appeal fundamentally misunderstand the context of this proceeding. According to the foundation, after this proceeding, the foundation will have no “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.” (Br. 17.) As a result, the foundation argues, dismissal of this suit will lead to the

“loss of an entire nonprofit foundation” (Br. 15), with the result that the IRS will be “able to aggressively pursue [the foundation] by assessing [the foundation] with a tax bill while [the foundation] cannot defend itself against [the IRS]” (Br. 17).

These contentions are simply wrong. The foundation fundamentally misunderstands the role of a declaratory judgment action under I.R.C. § 7428 in federal tax administration. In fact, as we explain below, if the IRS were to assess taxes against the foundation (or one of its donors), the taxpayer could litigate its tax-exempt status as part of *de novo* judicial review of that tax liability. In addition, once it has the legal capacity to do so, the foundation may reapply to the IRS for a prospective determination of its tax-exempt status. Accordingly, the Tax Court’s order of dismissal will not result in “disastrous harm” to the foundation (Br. 2).

b. The administrative and judicial determination of tax-exempt status, in general

Under the Internal Revenue Code, an organization described in I.R.C. § 501(c)(3) is exempt from tax. I.R.C. § 501(a). Donations made to such an organization generally are deductible under I.R.C.

§ 170(c)(2). Whether an organization satisfies these statutory requirements is an issue that can be litigated and determined in the first instance by either the Tax Court in a federal tax deficiency suit, *see* I.R.C. §§ 6212, 6213, or by the appropriate federal District Court or the Court of Federal Claims in a tax refund suit, *see* I.R.C. § 7422, 28 U.S.C. § 1346. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746–47 & n. 21 (1974); *see also Bluetooth SIG Inc. v. United States*, 611 F.3d 617, 621 (9th Cir. 2010) (making a *de novo* determination of tax-exempt status under I.R.C. § 501(c)(6), without regard to an earlier administrative decision); *St. David’s Health Care Sys. v. United States*, 349 F.3d 232, 234 (5th Cir. 2003) (taxpayer’s 501(c)(3) status placed at issue in a tax refund suit).

The IRS has a longstanding practice of issuing advance rulings and determination letters that, in some cases, may be of use to taxpayers who wish to avoid litigation. *See* Treas. Reg. (26 C.F.R.) § 601.201(a); Rev. Proc. 2023-5, 2023-1 I.R.B. 265, 2023 WL 15575 (January 3, 2023). Such letters are not binding on the courts. I.R.C. § 6110(k)(3). Ruling letters are issued based on the taxpayer’s representations, rather than an investigation into the underlying facts,

and therefore may be revoked if the representations upon which they are based prove to be inaccurate. Treas. Reg. § 601.201(l)(2); Rev. Proc. 2023-5. Indeed, a “ruling . . . may be revoked or modified at any time in the wise administration of the taxing statutes.” Treas. Reg. § 601.201(l)(1); *see also* Rev. Proc. 2023-5.

Pursuant to this practice, the IRS has long issued letter rulings to organizations that appear to meet the statutory requirements for tax-exempt status. *See* Treas. Reg. § 601.201(n); Rev. Proc. 2023-5. The letter requested by the CPA Chen and issued to the foundation in 2008 was such a letter, as was the March 2, 2021 letter (ER-358), revoking the prior letter, that led to the foundation’s Tax Court petition.

In addition to issuing such letters, the IRS has also long exercised its discretion to provide advance assurance of deductibility to potential donors by maintaining a list of organizations that have received favorable determination letters. *See* Rev. Proc. 2018-32 § 3.01, 2018-23 I.R.B. 739, 2018 WL 2462877 (June 4, 2018). The list, previously published in a paper pamphlet called IRS Publication 78, is now available as a database, called the Tax Exempt Organization Search, that can be accessed via the IRS website. *See*

[https://www.irs.gov/charities-non-profits/tax-exempt-organization-](https://www.irs.gov/charities-non-profits/tax-exempt-organization-search)

[search](#). Donors without inside knowledge of an organization generally may rely on an organization's appearance in this database (or, previously, in the Cumulative List published in Publication 78) even if the organization's tax-exempt status later is revoked retroactively.

Treas. Reg. § 1.170A-9(f)(5)(ii); Rev. Proc. 2018-32 § 4.01.

When an organization is sustained by fundraising from outside donors, its appearance on this list, though not legally binding in a proceeding concerning either the donor's or the donee's tax liability, may be of great practical importance to the "flow of contributions" from third-party donors that sustains the organization. *Bob Jones Univ.*, 416 U.S. at 730. The practical importance of a letter determining tax-exempt status, and the organization's appearance in Publication 78, drove certain high-profile litigation in the 1970s, when the IRS began administrative proceedings to revoke the tax-exempt letter of Bob Jones University on the grounds that that school's then-policy of categorically denying admission on the basis of race violated public policy. *Bob Jones Univ.*, 416 U.S. at 735.

As a historical matter, the instant type of declaratory judgment proceeding was created in response to that litigation. The Government argued in court that the *Bob Jones* litigation was barred by the Anti-Injunction Act, I.R.C. § 7241(a), and outside the scope of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), because whether the university qualified as tax-exempt under I.R.C. § 501(c)(3) was an element of the university's tax liability. The Supreme Court agreed. *Bob Jones Univ.*, 416 U.S. at 727. As the Court explained, a taxpayer confronted with an income tax assessment after the administrative revocation of an administrative letter finding that it is tax exempt "may in accordance with prescribed procedures petition the Tax Court to review the assessment of income taxes." *Id.* at 746. Similarly, a foundation confronted with any type of tax may pay that tax, "exhaust the Service's internal refund procedures, and then bring a suit for relief." *Id.* As the Court further explained, "[t]hese review procedures offer the petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax-exempt status[.]" *Id.*

Recognizing the importance of the administrative determination of tax-exempt status to organizations like Bob Jones that rely on tax-

deductible donations from third parties (who, in turn, rely on Publication 78), Congress responded to the Court's opinion by enacting I.R.C. § 7428, which creates a remedy "[i]n a case of actual controversy involving . . . a determination by the Secretary . . . with respect to the . . . continuing qualification of an organization as an organization described in section 501(c)(3)." Pub. L. 94-455, Title XIII, § 1306(a) (1976); *see also id.* at § 1306(b)(8) (amending the Declaratory Judgment Act to remove the barrier recognized by the Court in the *Bob Jones* case); *Bob Jones Univ.*, 416 U.S. at 750 ("this matter is for Congress").⁵

The enactment of I.R.C. § 7428 did not, however, deprive courts of jurisdiction to determine in other proceedings whether an entity meets the terms of I.R.C. § 501(c)(3). The text of I.R.C. § 7428 does not state that the remedy created in that section is exclusive, and indeed, we are aware of no authority so stating. Courts hearing the argument have rejected it. *Zimmerman v. Cambridge Credit Counseling Corp.*, 409

⁵ I.R.C. § 7428(a)(1) also permits an organization to initiate a declaratory judgment action for an initial determination that it is qualified under I.R.C. § 501(c)(3). In this case, however, the IRS granted that initial determination administratively, in 2008, in response to a request filed on behalf of the foundation by the since-disgraced CPA Chen. (ER-23; *see* ER-358.)

F.3d 473, 477 (1st Cir. 2005) (the administrative determination of 501(c)(3) status “is not binding in subsequent litigation challenging the applying entity’s tax-exempt status”); *Richie v. Am. Council on Gift Annuities*, 943 F. Supp. 685, 692 (N.D. Tex. 1996).

Like the university in the *Bob Jones* case, the foundation here may obtain judicial review via other avenues. The dismissal of this declaratory judgment proceeding does not preclude the foundation from contesting the merits of its tax-exempt status in some future proceeding regarding its tax liability, nor would it prevent a donor from contesting the same issue in a suit regarding the deductibility of a donation. In addition, nothing prevents the foundation from reapplying to the IRS for a prospective determination of its tax-exempt status when it has the legal capacity to do so. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000); *Houston Law. Referral Serv., Inc. v. Commissioner*, 69 T.C. 570, 577-78 (1978) (“[a]n adverse decision in a declaratory judgment proceeding does not preclude the applicant from filing a new exemption application”).

c. Because the actual consequences of the dismissal are minimal, the foundation's constitutional arguments fail

Because its actual qualification as a tax-exempt entity under I.R.C. § 501(c)(3) may be challenged by the foundation (or one of its donors) in a subsequent suit regarding tax liability, the dismissal of this suit appears to be of little to no practical consequence for the foundation.⁶ Accordingly, the foundation's constitutional arguments are misplaced.

The dismissal of this suit does not violate constitutional due process. (See Br. 9–20.) The dismissal of this proceeding is not a decision on the merits and so will have no preclusive effect under principles of res judicata or collateral estoppel. As the Supreme Court has held, except when the cases involve the same tax liability for the same tax year, the judgment in a tax case “acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.” *Commissioner v. Sunnen*,

⁶ Unlike Bob Jones University, the foundation has never contended that it relied on fundraising from third-party donors who relied upon its appearance in the IRS database of tax-exempt organizations. Such behavior would be atypical for a foundation established by the CPA Chen.

333 U.S. 591, 598 (1948). A post-payment refund suit has long been held to provide adequate due process in a tax case, as the Supreme Court held in the case *Phillips v. Commissioner*, 283 U.S. 589, 596–97 (1931), a case upon which the foundation relies (Br. 13). Accordingly, due process is satisfied by the possibility that (if any tax liability is ever assessed against the foundation or its donors) the foundation or its donors may challenge its tax-exempt status in a future Tax Court or tax refund suit, as described by the Supreme Court in *Bob Jones*, 416 U.S. at 746–47 & n. 21.

The least plausible of the foundation’s misconceived arguments is its claim (Br. 20) that the order of dismissal here is a “cruel and unusual” criminal “sentence” in violation of the Eighth Amendment. The Tax Court’s order dismissing the petition simply is not a criminal sentence. Moreover, although the Eighth Amendment’s excessive fines clause may apply to certain civil penalties, *Austin v. United States*, 509 U.S. 602, 610 (1993), the Tax Court’s order of dismissal imposes no “fine” or monetary penalty of any kind. And, as described above, if additional taxes are assessed against the foundation, the foundation will be able to contest its tax-exempt status in a Tax Court suit or

refund suit regarding its own tax liability. The Tax Court appropriately rejected the foundation's constitutional arguments as "frivolous."

(ER-7.)

CONCLUSION

The order of the Tax Court was correct and should be affirmed.

Respectfully submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General

/s/ Bethany B. Hauser

JACOB EARL CHRISTENSEN (202) 307-0878
BETHANY B. HAUSER (202) 514-2830
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

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ADDENDUM

Internal Revenue Code

§ 170. Charitable, etc., contributions and gifts

(a) Allowance of deduction.—

(1) General rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

* * *

(c) Charitable contribution defined.—For purposes of this section, the term “charitable contribution” means a contribution or gift to or for the use of—

* * *

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B). Rules similar to the rules of section 501(j) shall apply for purposes of this paragraph.

* * *

§ 501. Exemption from tax on corporations, certain trusts, etc.

(a) **Exemption from taxation.**—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

* * *

(c) **List of exempt organizations.**—The following organizations are referred to in subsection (a):

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and

which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

* * *

§ 7428. Declaratory judgments relating to status and classification of organizations under section 501(c)(3), etc.

(a) Creation of remedy.—In a case of actual controversy involving—

(1) a determination by the Secretary—

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2),

* * *

(2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1),

upon the filing of an appropriate pleading, the United States Tax Court, the United States Court of Federal Claims, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Court of Federal Claims, as the case may be, and shall be reviewable as such. For purposes of this section, a determination with respect to a continuing qualification or continuing classification includes any revocation of or other change in a qualification or classification.

(b) Limitations.—

(1) Petitioner.—A pleading may be filed under this section only by the organization the qualification or classification of which is at issue.

(2) Exhaustion of administrative remedies.—A declaratory judgment or decree under this section shall not be issued in any proceeding unless the Tax Court, the Court of Federal Claims, or the district court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service. An organization requesting the determination of an issue referred to in subsection (a)(1) shall be deemed to have exhausted its administrative remedies with respect to a failure by the Secretary to make a determination with respect to such issue at the expiration of 270 days after the date on which the request for such determination was made if the organization has taken, in a timely manner, all reasonable steps to secure such determination.

(3) Time for bringing action.—If the Secretary sends by certified or registered mail notice of his determination with respect to an issue referred to in subsection (a)(1) to the organization referred to in paragraph (1), no proceeding may be initiated under this section by such organization unless the pleading is filed before the 91st day after the date of such mailing.

§ 7453. Rules of practice, procedure, and evidence

Except in the case of proceedings conducted under section 7436(c) or 7463, the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the Federal Rules of Evidence.

§ 7481. Date when Tax Court decision becomes final

(a) Reviewable decisions.—Except as provided in subsections (b), (c), and (d), the decision of the Tax Court shall become final--

(1) Timely notice of appeal not filed.—Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time * * *

Tax Court Rules of Practice and Procedure

Rule 60. Proper Parties; Capacity

* * *

(c) Capacity: The capacity of an individual, other than one acting in a fiduciary or other representative capacity, to engage in litigation in the Court shall be determined by the law of the individual's domicile. The capacity of a corporation to engage in such litigation shall be determined by the law under which it was organized. The capacity of a fiduciary or other representative to litigate in the Court shall be determined in accordance with the law of the jurisdiction from which such person's authority is derived.

Rule 210. General.

* * *

(c) Jurisdictional Requirements: The Court does not have jurisdiction of an action for declaratory judgment under this Title unless the following conditions are satisfied:

* * *

(3) A petition for declaratory judgment is filed with the Court within * * * the period specified in Code section 7428(b)(3) with respect to an exempt organization action. * * *

Rule 211. Commencement of Action for Declaratory Judgment

(a) Commencement of Action: An action for declaratory judgment shall be commenced by filing a petition with the Court. * * *

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