161 T.C. 58–112

UNITED STATES TAX COURT

REPORTS

Vol. 161 No. 4

October 1, 2023, to
October 31, 2023

UNITED STATES TAX COURT
WASHINGTON, D.C.

JUDGES OF THE UNITED STATES TAX COURT

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KATHLEEN KERRIGAN

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[1] Special Trial Judge Fried took the oath of office on October 10, 2023.

OCTOBER TABLE OF CASES

	Page
Caan, James E., Estate	77
Caan, Scott, Trustee, Special Administrator	77
Jacaan Administrative Trust	77
Kraske, Wolfgang Frederick	104
Whistleblower 8391-18W	58

REPORTS

OF THE

UNITED STATES TAX COURT

WHISTLEBLOWER 8391-18W, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 8391-18W. Filed October 16, 2023.

In 2006 an audit team for R opened an examination for T. In 2008 P submitted to R's Whistleblower Office (WBO) a claim for an award, identifying T as a participant in a dividend tax withholding scheme. In 2009 the audit team received information relating to T, of which P was the source. The WBO concluded that the audit team used P's information during the pre-existing examination of T and that proceeds were collected as a result of this action. In 2018 the WBO issued to P a final determination that P was entitled to a mandatory award of 22% of the collected proceeds. P contends that the WBO abused its discretion by not determining an award of 30%. P also contends the WBO abused its discretion by not paying the 22% while P challenged the withholding of the remaining 8%, by not paying interest on the award due to P, and by applying a sequestration reduction to P's proposed award. *Held*: The WBO did not abuse its discretion with regard to P's claim

identifying T. *Held, further*, I.R.C. § 7623(b) does not provide for the payment of interest on a mandatory award to a whistleblower.

Kaitlyn T. Devenyns, *T. Barry Kingham*, and *Jason D. Wright*, for petitioner.

George E. Heuring, Jr., *Eric R. Skinner*, *Stephanie S. Washington*, and *Jadie T. Woods*, for respondent.

OPINION

NEGA, *Judge*: On September 20, 2018, petitioner filed a Motion for Partial Summary Judgment (petitioner's Partial Motion). On July 10, 2020, respondent filed a Motion for Summary Judgment (respondent's Motion). On September 8, 2021, petitioner filed a Motion for Summary Judgment (petitioner's Motion).

On February 28, 2022, petitioner lodged a Motion to Supplement the Record (petitioner's First Motion to Supplement). By Order issued July 21, 2022, we granted petitioner's First Motion to Supplement in part and ordered that the parties file "a first supplement to the administrative record that shall include sub-exhibit 2-P of Exhibit B, the letter relating to claim number 2010-000949 in Exhibit F, and Exhibits A, C, D, E, G, H, I, K, M, and N"; petitioner's First Motion to Supplement was otherwise denied. On August 24, 2022, the parties filed the First Supplement to the Administrative Record.

On September 7, 2022, petitioner filed a Motion to Supplement the Administrative Record (Second Motion to Supplement). By Order issued February 16, 2023, the Court granted petitioner's Second Motion to Supplement and ordered that the parties file "a second supplement to the administrative record that shall include Exhibits O, P, and Q." On March 17, 2023, the parties filed the Second Supplement to the Administrative Record. In April and May 2023 the parties filed supplemental briefs, responses, and replies to address the two supplements to the administrative record, as ordered by the Court on March 3, 2023.

For the reasons set forth below, we will deny petitioner's Partial Motion, deny petitioner's Motion, and grant respondent's Motion.

Background

I. *Petitioner's Background and the Senate Investigation*

Petitioner was an employee of Redacted 3 from 1995 until June 2005. In 2003–04, petitioner became aware of various tax strategies being employed and marketed by Redacted 3. Generally, these transactions involved the establishment of trading platforms that permitted offshore hedge funds to avoid paying taxes on dividends received from entities in the United States. Petitioner does not have a tax background and was not involved in the marketing, development, promotion, or implementation of Redacted 3's tax transactions.

In June 2005 petitioner contacted the Criminal Investigation Division (CID) of the Internal Revenue Service (IRS), making allegations against Redacted 3 regarding a dividend withholding tax scheme and submitting two binders of Redacted 3 internal documents related to the withholding tax issue. On July 25, 2005, petitioner filed an initial Form 211, Application for Award for Original Information, referencing the information that he had previously submitted to CID. The Form 211 identified a taxpayer other than Redacted 2, 4, or 5 and does not form the basis of this case. Petitioner met with CID officials from June 2005 through May 2006 to discuss the withholding tax scheme issue.

On or about March 21, 2006, petitioner submitted Form 211 that identified Redacted 2 as a participant in the dividend tax withholding scheme.

On June 3, 2006, the IRS campus in Ogden, Utah, received from petitioner two Forms 211 making allegations against taxpayers other than Redacted 2, 4, and 5 regarding the withholding tax issue. These Forms 211 do not form the basis of this case.

In October 2007, after a year of no contact by the IRS regarding his submissions, petitioner began meeting with members of the U.S. Senate's Permanent Subcommittee on Investigations (PSI). In November 2007 petitioner provided documents to the PSI, and from November 2007 through September 2008 petitioner continued to work with the PSI by explaining the documents, structures, and strategies and by identifying key players from various companies involved in the withholding tax issue.

In 2008 the PSI conducted a hearing on withholding tax on dividends paid to non-U.S. residents. As part of this hearing, the PSI issued a report entitled "Dividend Tax Abuse: How Offshore Entities Dodge Taxes on U.S. Stock Dividends" (Senate PSI Report). The Senate PSI Report discusses multiple financial institutions, including Redacted 2. The Senate PSI Report discusses two types of transactions relevant to the instant case: total return swap (TRS) transactions and securities or stock lending (SL) transactions. These transactions were used by U.S. financial institutions, including Redacted 2, to avoid withholding taxes on dividends received from U.S. corporations in which its foreign clients were invested.

On October 2, 2008, petitioner submitted a claim for reward package consisting of Form 211, a six-page cover letter, and nine exhibits. The claim concerned the withholding tax schemes employed by all of the taxpayers addressed in the Senate PSI Report, including Redacted 2. In late October 2008 members of the PSI contacted respondent's Whistleblower Office (WBO) to turn over the information obtained during the PSI hearing. On October 27, 2008, IRS personnel met with PSI officials to inventory the information obtained from the Senate hearing, including two CD–ROMs of information provided by petitioner.

On December 9, 2008, IRS Large Business & International (LB&I) (formerly Large and Mid-Size Business (LMSB or LB)) counsel notified the LB&I Financial Services group that they had received the PSI/whistleblower information, which included taxpayer-specific information related to the dividend withholding tax scheme.

II. *Petitioner's Claim*

On December 15, 2008, the WBO received from petitioner a bulk claim submission containing Forms 211 regarding multiple taxpayers related to the information submitted to the PSI concerning the dividend withholding tax scheme, including the Form 211 that forms the basis for the instant case concerning Redacted 2, 4, and 5. In that Form 211, petitioner alleged that Redacted 2, 4, and 5 participated in the dividend withholding tax scheme that he had exposed to the PSI.

On January 9, 2009, the WBO assigned legacy claim No. 29-92347 to petitioner's claim submission related to

Redacted 2, 4, and 5 (petitioner's claim). Petitioner's claim was assigned claim No. 2010-000949 when it was migrated to the WBO's new e-Trak claim system.

III. *Audit of Redacted 2, 4, and 5*

In June 2006 an LB&I audit team, Field Team 1197, secured for examination Redacted 4's and Redacted 5's Forms 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, for the taxable year 2003. LB&I Revenue Agent Steven A. Alperin of Field Team 1197 prepared an Examiner's Risk Analysis Worksheet for Redacted 4 and Redacted 5, identifying nonresident alien withholding taxes under sections 1441, 1442, 1446, and 1461,[1] including the SL transactions, as issues to be examined for taxable year 2003 (and taxable years 2004 through 2006, if applicable).

In March 2008, LB&I Field Team 1197 requested and secured for examination Redacted 4's and Redacted 5's Forms 1042 for taxable years 2004 through 2006. On March 12, 2008, Computer Audit Specialist Team Manager Richard Goldstein approved Form 4764, Coordinated Examination Program Audit Plan, for Computer Audit Specialist Henry Klein's assistance to the audit team for Redacted 4's taxable years 2004 through 2006.

On April 11, 2008, the audit team, including Howard J. Klionsky, held a telephone conference to discuss the TRS transaction issue. On May 27, 2008, Mr. Klionsky prepared Form 4764B, Examination Plan Issue Leadsheet (Exam Plan Leadsheet), for Redacted 5's Form 1042 for taxable year 2003, for Issue 01441.01-02, Liability of Withholding Agent, relating to dividends received.

On July 22, 2008, Mr. Klein received Redacted 5's response to the TRS transaction issue from Mr. Klionsky. In September 2008, Mr. Klein prepared Form 4564, Information Document Request, requesting computer files from Redacted 2 for its 2006 taxable year.

[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, regulation references are to the *Code of Federal Regulations*, Title 26 (Treas. Reg.), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

On October 24, 2008, the audit team personnel held a meeting to discuss the TRS transaction issue. On November 6, 2008, the audit team personnel held another meeting on the TRS transaction issue.

On November 25, 2008, Mr. Alperin prepared Exam Plan Leadsheets for Redacted 4's and Redacted 5's Forms 1042 for taxable years 2003 through 2006 for Issue 01441.00-00, Withholding of Tax on Nonresident Aliens. Also on November 25, 2008, Mr. Alperin prepared Exam Plan Leadsheets for Redacted 5's Forms 1042 for taxable years 2003, 2004, and 2006 for Issue 01441.00-00, Withholding of Tax on Nonresident Aliens.

On December 4, 2008, audit team personnel conducted a workshop on the TRS transaction issue.

On January 5, 2009, Kyunghee Piraino, the subject matter expert for LB&I whistleblower claims, emailed members of the audit team to inform them that they were being granted access to the PSI database for documents from the PSI's investigation related to Redacted 2 and that petitioner was the source of the PSI information. On January 7, 2009, the audit team received a copy of Redacted 5's TRS schedules that were previously requested by Mr. Klionsky. As part of its ongoing examinations of Redacted 4 and Redacted 5, the audit team reviewed the PSI documents, including documents related to the trading activity conducted by Redacted 2 with respect to the TRS transactions and the SL transactions. The audit team used information from the PSI database to request information from Redacted 2 through Information Document Requests.

The audit team determined that Redacted 4 and Redacted 5 had failed to properly withhold taxes on dividends paid to its foreign-based clients related to the TRS transactions for taxable years 2000 through 2012. In June 2014, the IRS entered into Forms 906, Closing Agreement on Final Determination Covering Specific Matters, with Redacted 4 and Redacted 5 for taxable years 2003 through 2010. The total amount of proceeds collected from Redacted 2 was $88,023,225.01, comprising $72,719,718.85 from Redacted 4 for the SL transactions and $15,303,506.16 from Redacted 5 for the TRS transactions. Redacted 4 and Redacted 5 made payments to the

IRS based on the amounts set forward in the Closing Agreements on June 16, 2014.

IV. *The WBO's Determination*

On or about September 24, 2014, the audit team completed Form 11369, Confidential Evaluation Report on Claim for Award, for petitioner's claim. The Form 11369 was prepared and executed by audit team member John Topping and signed by his manager, Gerald Charles. The Form 11369 noted in relevant part that: (1) the taxpayer was already under audit or investigation for the tax year or years identified by the whistleblower; (2) the information provided led to adjustments in the audit or investigation plan for this type of issue, such as expanding the scope of transactions to be examined or including specific transactions the whistleblower identified in the sample; (3) the whistleblower contributed to the development of facts in the audit or investigation because the IRS used the information provided to develop specific document requests or other inquiries of the taxpayer; and (4) some or all of the information provided by the whistleblower came from judicial or administrative proceedings, government reports, hearings, audits or investigations, or the media.

The Form 11369 was forwarded to the WBO on September 24, 2014, and it included a narrative describing petitioner's contribution to the identification of the issues to be examined or investigated and relevant documents from the withholding tax examinations of Redacted 4 and Redacted 5.

Felipe Castellanoz, a senior tax analyst with the WBO who managed petitioner's claim, reviewed the Form 11369 package submitted by the audit team. Upon review of the Form 11369 package, Mr. Castellanoz concluded that respondent used petitioner's information during a pre-existing administrative action and that proceeds were collected as a result of this action.

In January 2016, pursuant to the WBO's then-current procedures, Mr. Castellanoz began monitoring activity for Redacted 4's and Redacted 5's 2003 through 2008 taxable years on the IRS's Integrated Data Retrieval System (IDRS). Because Redacted 4's returns for taxable year 2013 were being controlled for a possible examination, Mr. Castellanoz concluded that he would need to continue monitoring the target

taxpayers in IDRS before an award determination could be made by the WBO.

In June 2016 the WBO received Form 11369 for Redacted 4's taxable year 2013. The Form 11369 states that petitioner's claim "was reviewed for the limited purpose of determining applicability to DOJ Swiss Banking Program activity involving this bank and its U.S. customers with Swiss accounts. Alleged activity is unrelated to bank's U.S. customers with Swiss accounts." Because there was no connection between petitioner's claim and the DOJ Swiss Banking Program, petitioner's information was not used in an action relating to the DOJ Swiss Banking Program.

In September 2017 on the basis of IDRS research Mr. Castellanoz determined that LB&I Field Team 1197 had secured for examination Redacted 4's Form 1042 for the taxable year 2013; the examination was related to the Form 11369 received by the WBO in June 2016 and was closed in July 2017 as "Survey After Assignment." Also in September 2017 Mr. Castellanoz conducted an analysis of Redacted 4's and Redacted 5's Transcript and Payment Reconciliations for taxable years 2003 through 2005, which confirmed that LB&I initiated the examinations of Redacted 4 and Redacted 5 before obtaining access to the PSI database. After undertaking this research, Mr. Castellanoz determined that there were no ongoing withholding tax examinations of Redacted 4 and Redacted 5. Accordingly, on September 26, 2017, Mr. Castellanoz submitted a draft Award Recommendation Memorandum (ARM) to his manager, Steven Mitzel, recommending that petitioner receive an award of 22% of the proceeds collected using petitioner's information.

On September 26, 2017, Mr. Mitzel returned the draft ARM to Mr. Castellanoz to expand on the reasons for proposing an award percentage different from that used in prior claims filed by petitioner with regard to other taxpayers involving the same dividend withholding tax issues. As a result of Mr. Mitzel's comments, on September 26, 2017, Mr. Castellanoz emailed Ms. Piraino to have her ask LB&I Field Team 1197 when and for what reasons it started examining Redacted 4's and Redacted 5's Forms 1042.

On November 2, 2017, Ms. Piraino forwarded the audit team's answers to Mr. Castellanoz. LB&I Field Team 1197

responded that the PSI/whistleblower information did not lead the audit team to examine the target taxpayers' Forms 1042 for taxable years 2003 through 2006 because it was a "subsequent year examination," and that, in addition to the TRS transactions and the SL transactions, the audit team was examining other unrelated issues for Redacted 4's and Redacted 5's Forms 1042 for taxable years 2003 through 2008.

On November 14, 2017, Mr. Castellanoz revised his ARM to expand on the reasons he had recommended a different award percentage for petitioner's claim (22%) as compared to petitioner's other claims with the same withholding tax issues (30%). Mr. Castellanoz noted that petitioner's other claims had been handled differently. The audit team for petitioner's claim was already pursuing the dividend withholding tax issues for Redacted 4 and Redacted 5 when they received the PSI/whistleblower information.

The WBO relied on the documents in Form 11369, research conducted by the WBO, and communications from the audit team to establish that, before receiving access to the PSI database on or about January 5, 2009, the audit team had already identified and were already examining the dividend withholding tax issues, specifically the SL transactions and the TRS transactions, entered into by Redacted 4 and Redacted 5, respectively.

The WBO determined that a positive factor existed to increase the award percentage from the minimum award of 15%, in accordance with section 7623(b), the regulations under section 7623, and internal guidance at *Internal Revenue Manual* 25.2.2 (Aug. 7, 2015). The revised ARM summarized petitioner's claim and concluded:

> The Service collected additional proceeds in the amount of $88,023,225.01 from REDACTED 2 as a result of actions taken based on the whistleblower's information. The information provided identified taxpayer behavior that the Service was unlikely to identify. The information provided by the whistleblower was specific and responsible for the identification of the taxpayer and the understanding of the transaction. I recommend an award percentage of 22% of the proceeds collected based on the whistleblower information.

On January 3, 2018, the WBO issued a Preliminary Award Recommendation Letter (PARL) to petitioner, proposing an award of $18,084,957.47 based on an award percentage of

22% of collected proceeds. The PARL also noted that the Budget Control Act of 2011, as amended by the American Taxpayer Relief Act of 2012, requires automatic reductions for sequestration[2] based on the amount determined by the Office of Management and Budget (OMB) for the year in which the payment is made. Attached to the PARL were a Summary Report, a Response to Summary Report, and a Confidentiality Agreement for petitioner's review. The Summary Report determined that a positive factor existed to justify an increase to 22% because "[t]he information provided identified connections between transactions, or parties to transactions, that enabled the IRS to understand tax implications that might not otherwise have been understood."

On January 17, 2018, the WBO received an executed Response to Summary Report and Confidentiality Agreement, wherein petitioner requested a more detailed explanation for the preliminary award recommendation and an opportunity to review the supporting documents.

On January 19, 2018, the WBO issued a Detailed Award Recommendation Letter (DARL) to petitioner, providing greater detail on the proposed preliminary award recommendation. Attached to the DARL was a Detailed Report and a Response to Detailed Report for petitioner's review. The Detailed Report stated in relevant part:

> The field team had already identified REDACTED 2's withholding tax issues prior to receiving the PSI/whistleblower information for consideration. They had opened the taxpayers 200312-200512 F-1042 withholding tax returns for exam and they had identified the TRS-dividend withholding issue prior to receiving the information. However, the PSI/whistleblower information did assist the field team in developing the withholding tax issues. The information helped the team identify connections between the lending and swap transactions which enabled them to better understand the withholding tax implications. The field team used the PSI/whistleblower information to request information from

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[2] Sequestration is a measure by which Congress enforces mandatory spending cuts across most government programs and agencies during the budgetary process. Budget Control Act of 2011, Pub. L. No. 112-25, §§ 101–103, 125 Stat. 240, 241–46, *amended by* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 901, 126 Stat. 2313, 2370 (codified as amended at 2 U.S.C. § 901(a) (2012)). The applicability of the sequestration and the sequestration percentage are based on the government fiscal year when the award is paid, with the procedures for this calculation set out by statute. *See* 2 U.S.C. § 901(a).

REDACTED 2 through IDRs. Therefore, the award amount is increased to 22%.

On February 9, 2018, the WBO received an executed Response to Detailed Report, wherein petitioner asked to schedule an appointment to review the supporting documents underlying the preliminary award recommendation. On March 12, 2018, petitioner's counsel sent a letter challenging the preliminary award recommendation that petitioner receive an award based on 22% of proceeds collected from the actions against Redacted 4 and Redacted 5. The letter stated, inter alia, that petitioner doubted the claim that the audit team raised the TRS transaction issue without the PSI/whistleblower information; claimed petitioner should receive at least 30% of the proceeds from the SL transaction issue; questioned the delay in proposing the award; claimed petitioner should benefit from the target taxpayers' ceasing the SL transactions and TRS transactions in 2008; and requested the amount of the award based on 22% of collected proceeds be paid immediately while petitioner challenged the withholding of the remaining 8%.

On March 21, 2018, Mr. Castellanoz prepared a revised ARM after considering petitioner's assertions in the March 12, 2018, letter. The revised ARM proposed to maintain the recommended award of 22% of collected proceeds. Specifically, the revised ARM noted that "[t]here is no indication anyone within the IRS alerted Field Team 1197 about the TRS/Stock Lending issues involving REDACTED 2. The field team has specifically stated that the whistleblower's pre-2008 contacts with the IRS regarding the TRS withholding issues was not the reason they began pursuing these issues."

On April 2, 2018, the WBO sent petitioner a Final Determination Under Section 7623(b) (Final Determination) that petitioner is entitled to an award of $18,084,957.47 based on an award percentage of 22% of collected proceeds. The Final Determination again noted that the award was subject to an automatic sequestration reduction of a percentage determined annually by the OMB in the year of payment. The Final Determination reiterated the WBO's conclusion that the "information provided identified connections between transactions, or parties to transactions, that enabled the IRS to understand tax implications that might not have otherwise been understood."

On May 3, 2018, petitioner timely filed his Petition with this Court.

Discussion

I. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, time-consuming, and unnecessary trials. *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(a)(2); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). The summary judgment standard provided in Rule 121 has a slightly different application when reviewing whistleblower award determinations because "we must confine ourselves to the administrative record to decide whether there has been an abuse of discretion." *Van Bemmelen v. Commissioner*, 155 T.C. 64, 78 (2020); *see also* Rule 121(j). In a so-called record rule whistleblower case, "summary judgment serves as a mechanism for deciding, as a matter of law, whether the [WBO's] action is supported by the administrative record and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Van Bemmelen*, 155 T.C. at 79.

II. *Legal Background*

Section 7623 provides for awards to individuals (commonly referred to as whistleblowers) who submit information to the IRS about third parties who have underpaid their taxes or otherwise violated the internal revenue laws. Section 7623(a) authorizes discretionary payments in certain circumstances, while section 7623(b) provides for nondiscretionary (i.e., mandatory) awards. Under section 7623(b)(1), a whistleblower generally is entitled to a mandatory award if the Secretary of the Treasury proceeds with an administrative or judicial action based on information provided by the whistleblower and collects proceeds as a result of the action. The whistleblower is entitled to receive an award of at least 15%, but not more than 30%, of the proceeds collected, depending on

"the extent to which the individual substantially contributed to such action." § 7623(b)(1).

The Tax Court is a court of limited jurisdiction and may exercise jurisdiction only to the extent authorized by Congress. *Kasper v. Commissioner*, 137 T.C. 37, 40 (2011); *Judge v. Commissioner*, 88 T.C. 1175, 1180–81 (1987); *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). Section 7623(b)(4) confers on our Court jurisdiction over any appeal of a determination that a whistleblower is entitled to an award under section 7623(b)(1). *Whistleblower 972-17W v. Commissioner*, 159 T.C. 1 (2022).

Our scope of review of whistleblower award determinations is properly limited to the administrative record, and the applicable standard of review is for abuse of discretion. *Kasper v. Commissioner*, 150 T.C. 8, 20, 22 (2018); *see Whistleblower 769-16W v. Commissioner*, 152 T.C. 172, 177 (2019). Further, in reviewing whistleblower award determinations, we follow the *Chenery* doctrine so as to judge the propriety of the WBO's determination solely on the grounds it actually relied on in making its determination. *See Kasper*, 150 T.C. at 23–24; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943).

Consequently, in reviewing a whistleblower award determination for abuse of discretion, we do not substitute our judgment for the WBO's but rather decide "whether the agency's decision was 'based on an erroneous view of the law or a clearly erroneous assessment of the facts.'" *Kasper*, 150 T.C. at 23 (quoting *Fargo v. Commissioner*, 447 F.3d 706, 709 (9th Cir. 2006), *aff'g* T.C. Memo. 2004-13).

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Whistleblower 769-16W, 152 T.C. at 178 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

III. *The Parties' Cross-Motions for Summary Judgment*

The question central to both motions is whether the WBO abused its discretion in recommending an award of 22% instead of 30%. Petitioner argues that the WBO acted arbi-

trarily and capriciously in recommending a 22% award, when, in other claims involving the “same issue,” he received a 30% award. On the other hand, respondent contends that the WBO did not abuse its discretion when applying a 22% award because its determination was sufficiently supported by the administrative record and within the bounds of reasoned decision making. We agree with respondent.

Under the administrative proceedings for award determinations, the WBO is to prepare and send to the whistleblower a preliminary award recommendation containing a PARL, a summary report, an award consent form, and a confidentiality agreement. Treas. Reg. § 301.7623-3(c)(2).

The whistleblower has 30 days from the date the WBO sends the PARL to respond by agreeing to the preliminary award recommendation (and thus waiving any and all administrative and judicial appeal rights), requesting a detailed report and opportunity to review supporting documentation, adding comments to the administrative claim file, or taking no action. *Id.* subpara. (3).

Should the whistleblower request the opportunity to review information from the administrative claim file, the whistleblower will then have 30 days from the appointment date to submit comments to the WBO on the detailed report and the documents reviewed, which will then be added to the administrative claim file and reviewed by the WBO when making its award determination. *Id.* subpara. (5).

After participation in the whistleblower administrative proceeding has concluded and there has been a final determination of tax (as defined in Treasury Regulation § 301.7623-4(d)(2)), the WBO will determine the award amount under section 7623(b)(1), (2), or (3) and Treasury Regulation §§ 301.7623-1 through 301.7623-4, on the basis of its review of the administrative claim file. Treas. Reg. § 301.7623-3(c)(6). As referenced above, as part of this review the WBO is tasked with analyzing an individual’s claim by applying the rules provided in Treasury Regulation § 301.7623-4(c) to the administrative claim file to determine an appropriate award percentage. *Id.* para. (a)(1). The WBO must consider all relevant factors in determining whether an award will be paid, and, if so, the award amount. *Id.* subpara. (2).

The regulations provide lists of positive and negative factors to help determine the whistleblower's award percentage. *See* Treas. Reg. § 301.7623-4(b). Application of the following nonexclusive positive factors may support increasing the award percentage:

> (i) The whistleblower acted promptly to inform the IRS or the taxpayer of the noncompliance.
>
> (ii) The information provided identified an issue or transaction of a type previously unknown to the IRS.
>
> (iii) The information provided identified taxpayer behavior that the IRS was unlikely to identify or that was particularly difficult to detect through the IRS's exercise of reasonable diligence.
>
> (iv) The information provided thoroughly presented the factual details of tax noncompliance in a clear and organized manner, particularly if the manner of the presentation saved the IRS work and resources.
>
> (v) The whistleblower (or the whistleblower's legal representative, if any) provided exceptional cooperation and assistance during the pendency of the action(s).
>
> (vi) The information provided identifies assets of the taxpayer that could be used to pay liabilities, particularly if the assets were not otherwise known to the IRS.
>
> (vii) The information provided identified connections between transactions, or parties to transactions, that enabled the IRS to understand tax implications that might not otherwise have been understood by the IRS.
>
> (viii) The information provided had an impact on the behavior of the taxpayer, for example by causing the taxpayer to promptly correct a previously-reported improper position.

Id. subpara. (1). On the other hand, the application of the following nonexclusive factors may support decreasing the award percentage:

> (i) The whistleblower delayed informing the IRS after learning the relevant facts, particularly if the delay adversely affected the IRS's ability to pursue an action or issue.
>
> (ii) The whistleblower contributed to the underpayment of tax or tax noncompliance identified.
>
> (iii) The whistleblower directly or indirectly profited from the underpayment of tax or tax noncompliance identified, but did not plan and initiate the actions that led to the underpayment of tax or actions described in section 7623(a)(2).
>
> (iv) The whistleblower (or the whistleblower's legal representative, if any) negatively affected the IRS's ability to pursue the action(s), for example by disclosing the existence or scope of an enforcement activity.
>
> (v) The whistleblower (or the whistleblower's legal representative, if any) violated instructions provided by the IRS, particularly if the violation caused the IRS to expend additional resources.

> (vi) The whistleblower (or the whistleblower's legal representative, if any) violated the terms of the confidentiality agreement described in [Treas. Reg.] § 301.7623-3(c)(2)(iv).
>
> (vii) The whistleblower (or the whistleblower's legal representative, if any) violated the terms of a contract entered into with the IRS pursuant to [Treas. Reg.] § 301.6103(n)-2.
>
> (viii) The whistleblower provided false or misleading information or otherwise violated the requirements of section 7623(b)(6)(C) or [Treas. Reg.] § 301.7623-1(c)(3).

Treas. Reg. § 301.7623-4(b)(2). The regulations further provide that

> [i]f the IRS proceeds with any administrative or judicial action based on information brought to the IRS's attention by a whistleblower, such whistleblower shall, subject to paragraphs (c)(2) and (3) of this section, receive as an award at least 15 percent but not more than 30 percent of the collected proceeds resulting from the action (including any related actions) or from any settlement in response to such action. The amount of any award under this paragraph depends on the extent of the whistleblower's substantial contributions to the action(s).

Treas. Reg. § 301.7623-4(c)(1)(i).

Starting the analysis at 15%, the WBO will analyze the administrative claim file using the enumerated positive factors to determine whether the whistleblower merits an increased award percentage of 22% or 30%. *Id.* subdiv. (ii). The WBO will then analyze the contents of the administrative claim file using the enumerated negative factors to determine whether the whistleblower merits a decreased award percentage of 15%, 18%, 22%, or 26%. *Id.* Thus, the WBO *may* increase or decrease the award percentage on the basis of the presence and significance of any positive or negative factors. *Id.*

The regulations also caution that the application of the positive and negative factors "cannot be reduced to a mathematical equation." *Id.* Rather, the "factors are not exclusive and are not weighted and, in a particular case, one factor may override several others." *Id.* Further, while the presence and significance of positive factors may offset those of negative factors, the absence of a negative factor does not itself constitute a positive factor. *Id.* Likewise, "the [WBO] may determine separate award percentages on an action-by-action basis and apply the separate award percentages to the collected pro-

ceeds attributable to the corresponding actions." Treas. Reg. § 301.7623-4(a)(2).

Petitioner urges us to find that the WBO abused its discretion in recommending a lower award percentage (22%) in the present claim compared to the award percentage recommended in claims against other taxpayers involving the same dividend withholding tax scheme (30%). Petitioner also urges a more formal "adjudication" of the positive factors identified during the WBO's review of the instant claim, assigning error to the WBO's ultimate determination that one positive factor's presence and significance warranted an increased award percentage. Petitioner's arguments miss the mark.

When applying the positive and negative factors, the WBO is vested with broad discretion and must exercise its judgment in determining the appropriate award percentage for each claim before it. *See Luu v. Commissioner*, T.C. Memo. 2022-126, at *12 ("While Congress provides for a mandatory award for information brought by a whistleblower, ultimately the award amount is left to the IRS since Congress has provided an award range of 15% to 30% dependent upon the level to which the whistleblower 'substantially contributed' to the actions by the IRS."); *see also* Treas. Reg. § 301.7623-4(c)(1)(ii) ("The Whistleblower Office *may* increase the award percentage based on the presence and significance of positive factors." (Emphasis added.)). The positive and negative factors do not require comparisons or consistency between claims, even if brought by the same whistleblower or involved in a common scheme. *See* Treas. Reg. § 301.7623-4(b). On the facts here, the award percentage recommended in petitioner's other claims is simply not a consideration in the determination of the appropriate award percentage for petitioner's claim.

Further, while petitioner notes that each claim involves the "same" dividend withholding tax issue, the mere fact that the claims arise from a common scheme does not ipso facto make each claim identical. To the contrary, the record before us shows that petitioner's claim here, unlike petitioner's other claims that were responsible for the identification of taxpayers, was supported by valuable supplemental information to an audit that was already opened. *Cf. Apruzzese v. Commissioner*, T.C. Memo. 2019-141, at *10, *13 (finding no abuse of discretion in WBO's determination of 22% award

where whistleblower provided information that contributed to already-initiated audit), *aff'd*, 811 F. App'x 1 (D.C. Cir. 2020). Rather than acting inconsistently in recommending a 22% award, Mr. Castellanoz considered the administrative claim file, sought additional information from the audit team, and addressed comments from his manager to expand on the differing percentages among petitioner's claims. At each step of his review of petitioner's claim, Mr. Castellanoz exercised reasoned judgment in reaching his determination that a 22% award was appropriate.

Our task is to review the WBO's determination and to uphold it unless we find the final determination to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Luu*, T.C. Memo. 2022-126, at *22. Here, we find that the WBO did not err in recommending a 22% award. Thus, we will grant respondent's Motion and deny petitioner's Motion.

IV. *Petitioner's Partial Motion*

Petitioner's Partial Motion alleges that the WBO additionally erred by (1) not paying the 22% immediately while petitioner challenged the remaining unpaid 8%; (2) not paying interest on the award due to petitioner; and (3) applying a sequestration reduction to petitioner's award proposal. We will briefly address each in turn.

A. *Immediate Payment of 22%*

Regarding petitioner's first argument, the regulations make clear that three events must occur before the payment of a whistleblower award: (1) there is a final determination against the target; (2) the WBO makes a determination of the award relating to that tax and communicates that determination to the whistleblower in a determination letter; and (3) all appeals of the WBO's determination are final or the whistleblower has executed a consent form agreeing to the WBO's determination and waiving his right to appeal it. Treas. Reg. § 301.7623-4(d)(1); *see Lewis v. Commissioner*, 154 T.C. 124, 132 (2020). Petitioner declined to execute a consent form and instead exercised his right to appeal the WBO's award determination to this Court. As a result, all appeals of the WBO's determination are not yet final, and thus peti-

tioner has no present entitlement to a payment of 22% of the proceeds.

B. *Interest*

Turning to petitioner's second argument, we find no support for his assertion that he is entitled to interest on his award. The plain text of section 7623(b) does not provide for the payment of interest, and substantive canons of construction preclude any expansive reading of the provision's silence on the issue. In addition to the general rule that courts must construe waivers of immunity strictly in favor of the sovereign, *see McMahon v. United States*, 342 U.S. 25, 27 (1951), the so-called no-interest rule imposes a further level of strictness, *see Lib. of Cong. v. Shaw*, 478 U.S. 310, 318 (1986) ("When Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly . . . ."). "[T]he sovereign is not liable for interest unless there is a statutory requirement or a contract to pay it." *Busser v. United States*, 130 F.2d 537, 538 (3d Cir. 1942) (first citing *Tillson v. United States*, 100 U.S. 43 (1879); and then citing *United States v. North Carolina*, 136 U.S. 211 (1890)). Here, there is no such explicit statutory requirement. Although section 6611 provides an explicit statutory requirement for the payment of interest, it is limited to overpayments of tax. There is no overpayment at issue in this case. Accordingly, petitioner is not entitled to interest on his award.[3]

C. *Sequestration*

As to petitioner's final argument, it is not an abuse of discretion to apply the sequestration reduction when paying a whistleblower award. *Lewis*, 154 T.C. at 141. Accordingly, we find that the WBO did not err in the application of a sequestration reduction to petitioner's award.

Finding no abuse of discretion, we will thus deny petitioner's Partial Motion.

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[3] To the extent that petitioner cites the Takings Clause of the Constitution, we likewise find this argument unpersuasive; a section 7623 claim does not create a private property interest. *See Lewis*, 154 T.C. at 138 n.11.

Conclusion

We have considered all remaining arguments the parties made, and, to the extent not addressed, we conclude they are irrelevant, moot, or meritless.

To reflect the foregoing,

An appropriate order and decision will be entered.

ESTATE OF JAMES E. CAAN, DECEASED, JACAAN ADMINISTRATIVE TRUST, SCOTT CAAN, TRUSTEE, SPECIAL ADMINISTRATOR, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 14783-18. Filed October 18, 2023.

Decedent (D) held two IRAs with UBS. Both IRAs were governed by a custodial agreement between D and UBS. One of the IRAs held a partnership interest (P&A Interest) in the P&A Fund, a hedge fund. The custodial agreement between D and UBS stated that it was D's responsibility to provide UBS with the P&A Interest's yearend fair market value (FMV) every year. When D did not satisfy this responsibility for tax year 2015, UBS notified D that it had distributed the P&A Interest to him pursuant to the relevant terms of the custodial agreement. P claims such a distribution did not occur. UBS issued Form 1099–R to D, reporting a distribution. UBS valued the P&A Interest at $1,910,903, which was its 2013 FMV and the last FMV known to UBS. (R admitted in his posttrial briefs that UBS misvalued the P&A Interest.) More than a year after the notification from UBS, D's financial advisor, acting on D's behalf, liquidated the P&A Interest and contributed the cash proceeds to D's IRA at ML, an investment manager. On his 2015 income tax return, D reported an IRA distribution but claimed that it was nontaxable as a rollover contribution under I.R.C. § 408(d)(3). R disagreed and issued a notice of deficiency, determining that there was a taxable distribution. D then requested that R issue a private letter ruling to waive the 60-day period for rollover contributions. *See* I.R.C. § 408(d)(3)(A)(i), (I). D also filed a Petition with this Court for redetermination of his 2015 income tax deficiency. *See* I.R.C. § 6213(a). During the pendency of this case, R declined to issue the private letter ruling, stating that the 60-day period could not be waived because D was required to contribute the P&A Interest (not cash) to ML in order for the

distribution to be nontaxable as a rollover contribution. *See* I.R.C. § 408(d)(3)(A)(i); *Lemishow v. Commissioner*, 110 T.C. 110, 113 (1998), *supplemented* by 110 T.C. 346 (1998); Treas. Reg. § 1.408-4(b)(1). *Held*: The P&A Interest was distributed to D in tax year 2015 within the meaning of I.R.C. § 408(d)(1). *Held, further*, the P&A Interest was not contributed to ML in a manner that would qualify as a rollover contribution under I.R.C. § 408(d)(3). *Held, further*, under I.R.C. § 408(d)(1), D is taxable for 2015 on the P&A Interest's value at the time of the distribution. *Held, further*, the value of the P&A Interest at the time of the distribution was $1,548,010. *Held, further*, we have jurisdiction under I.R.C. § 6213(a) to review R's denial of D's I.R.C. § 408(d)(3)(I) request for a waiver of the 60-day period for rollover contributions. *Held, further*, we review a denial of a request for a waiver under I.R.C. § 408(d)(3)(I) for abuse of discretion. *Held, further*, R did not abuse his discretion in denying P a waiver under I.R.C. § 408(d)(3)(I).

Steven Ray Mather, for petitioner.
Mark A. Nelson and *Sarah A. Herson*, for respondent.

COPELAND, *Judge*: James E. Caan was an actor whose successful Hollywood and television career lasted over six decades and proved very lucrative. Throughout his career Mr. Caan focused on his acting roles, leaving to his business managers and financial advisors the tasks of managing his wealth and his day-to-day financial affairs.

This case concerns a portion of the late actor's wealth, namely, two individual retirement accounts (IRAs) that he held at the Union Bank of Switzerland (UBS). One IRA held cash, mutual funds, and stock in exchange-traded funds. The other held similar assets as well as a partnership interest in P&A Multi-Sector Fund, L.P., a hedge fund (P&A Interest and P&A Fund, respectively).

IRAs are not limited to holding traditional assets such as cash, bonds, and publicly traded securities; they can still qualify for tax advantages while holding alternative assets, such as non-publicly traded partnership interests like the P&A Interest. However, in that case the Internal Revenue Service (IRS) requires that the IRA's trustee or custodian report the fair market value of the alternative assets yearly, valued as of December 31 of the preceding year (yearend fair market value).

See I.R.C. § 408(i);[1] Treas. Reg. § 1.408-5; 2014 Instructions for Forms 1099–R and 5498, at 20, 22 (directing trustees and custodians to report the yearend fair market value of IRA assets "that are not readily tradable on an established US or foreign securities market or option exchange, or that do not have a readily available [fair market value]"). The custodial agreement that governed Mr. Caan's two IRAs at UBS reflected that requirement; it was Mr. Caan's responsibility to provide UBS with the yearend fair market value of the P&A Interest every year. In 2015 Mr. Caan did not provide UBS with the P&A Interest's 2014 yearend fair market value; as a result, UBS refused to continue serving as the P&A Interest's custodian and sent a letter to Mr. Caan notifying him of a distribution of the P&A Interest. UBS then issued Mr. Caan a Form 1099–R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., which reported to the IRS a distribution of the P&A Interest. UBS used the P&A Interest's 2013 yearend fair market value, which was the last yearend fair market value known to UBS, as the value of the distribution.

Also in 2015, but before UBS sent the distribution letter to Mr. Caan, the wealth management advisor who managed both of Mr. Caan's IRAs resigned from UBS and began a similar role at Merrill Lynch, Pierce, Fenner, and Smith, Inc. (Merrill Lynch). That advisor—Michael Margiotta—then convinced Mr. Caan to transfer both IRAs to Merrill Lynch under his management. All assets in both IRAs, except for the P&A Interest, were subsequently transferred to a single IRA at Merrill Lynch through the Automated Customer Account Transfer Service (ACATS).[2] Since the P&A Interest was ineligible

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[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C. or Code), in effect at all relevant times, regulation references are to the *Code of Federal Regulations*, Title 26 (Treas. Reg.), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

[2] The ACATS is a service run by the National Securities Clearing Corporation. It "automates, expedites, and standardizes procedures for the transfer of many types of securities . . . in a customer account from one brokerage firm and/or bank to another." Office of the Comptroller of the Currency, *Asset Management Operations and Controls* 41 (2011), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/asset-mgmt-ops-controls/pub-ch-asset-mgmt-ops-controls.pdf.

for transfer through ACATS, Mr. Margiotta directed the P&A Fund to liquidate the P&A Interest and transfer the cash proceeds to the Merrill Lynch IRA. That liquidation and cash transfer did not occur until almost a year after UBS notified Mr. Caan that it had distributed the P&A Interest.

On his federal income tax return for tax year 2015, Mr. Caan reported a distribution of the P&A Interest but claimed that it was nontaxable. The Commissioner of Internal Revenue (Commissioner) disagreed with that position and, in a notice of deficiency dated April 30, 2018, determined an income tax deficiency of $779,915 for tax year 2015 and a section 6662(a) accuracy-related penalty of $155,983. Mr. Caan then filed a Petition with this Court for redetermination of his 2015 income tax deficiency. *See* I.R.C. § 6213(a). Shortly before filing that Petition, Mr. Caan requested a private letter ruling from the IRS granting him a waiver of the 60-day period for rollovers of IRA distributions (60-day rollover period). *See* I.R.C. § 408(d)(3)(I). The IRS denied that request on the grounds that Mr. Caan did not meet the "same property" requirement in section 408(d)(3)(A)(i) and (D). *See Lemishow v. Commissioner*, 110 T.C. 110, 113 (1998) (applying the "same property" requirement of section 408(d)(3) under similar circumstances to deny the taxpayer's claim of a tax-free rollover), *supplemented by* 110 T.C. 346 (1998).

We must decide whether UBS distributed the P&A Interest to Mr. Caan in tax year 2015, and if so, whether that distribution was taxable.

FINDINGS OF FACT

Mr. Caan resided in California both when he filed his Petition (July 30, 2018) and at his date of death (July 6, 2022). His will listed the Jacaan Administrative Trust, dated November 17, 1993 (Trust), as the sole beneficiary of his estate. Scott Caan is the Trust's trustee. As a result, in an Order dated November 7, 2022, we appointed Scott Caan the Special Administrator of Mr. Caan's estate for purposes of this case only. The record does not reflect Scott Caan's state of domicile at the time the Petition was filed nor at Mr. Caan's date of death.

I. *Background*

A. *James Caan*

Mr. Caan was an actor who rose to prominence playing Sonny Corleone in *The Godfather*, released in 1972. He had a long and distinguished career in both film and television, with acting roles in over 100 films and television series from 1961 until his death in 2022. Such an active career created substantial demands on his time and caused him to rely on outside professional assistance for many aspects of his personal life.

B. *Philpott, Bills, Stoll, and Meeks, LLP*

One of the areas of his personal life for which Mr. Caan sought professional assistance was management of his financial affairs. From 1999 until at least the date of trial, Philpott, Bills, Stoll, and Meeks, LLP (PBSM), a firm based in Encino, California, served as his business manager. PBSM's duties included maintaining Mr. Caan's bank accounts, sending and receiving correspondence, paying his bills, preparing his federal and state income tax returns, representing him before the IRS and any relevant state tax agencies, and acting as liaison between Mr. Caan and the various attorneys, financial advisors, insurance agents, and other professionals who assisted him.

As part of its duties, PBSM would receive all of Mr. Caan's mail. A PBSM employee would open the mail and determine its character; personal mail would be forwarded to Mr. Caan, while mail pertaining to his financial affairs would be forwarded to the PBSM employee in charge of his account. At some point, the financial affairs mail was also scanned into PBSM's document retention system. From 2002 to 2017 Enza Cohn was the PBSM employee in charge of managing Mr. Caan's account. After she left PBSM in 2017, that role passed to David Butler. Ms. Cohn and Mr. Butler are both certified public accountants.

C. *Michael Margiotta*

Michael Margiotta is a wealth management advisor who first met Mr. Caan in 2001 while working for Credit Suisse.

At the time, Mr. Caan maintained two IRAs at Credit Suisse managed by his cousin, Paul Caan. During 2001 Paul Caan decided to transition from managing investments for wealthy individuals to managing institutional investments, and he transferred management of the IRAs to Mr. Margiotta.

Mr. Margiotta worked at Credit Suisse until 2004. He then worked at Smith Barney & Co. until 2008, UBS until June 2015, and Merrill Lynch up through the date of trial.

II. *Individual Retirement Accounts*

A. *UBS*

During 2008 UBS became the custodian of the two IRAs owned by Mr. Caan; from 2008 to June 2015 Mr. Margiotta managed those IRAs. One IRA held a portfolio of cash, mutual funds, and exchange-traded funds; the other IRA held a similar portfolio in addition to the P&A Interest.

1. *Custodianship*

A custodial agreement between UBS and Mr. Caan governed both IRAs. Article IV of the custodial agreement, titled "Investments," states, in pertinent part:

> [T]he Client [Mr. Caan] acknowledges, agrees, understands and warrants the following with respect to any non-publicly traded investment (the "Investment") the Custodian [UBS] allows the Client to hold in the IRA:
>
> . . . .
>
> The Client must furnish to the Custodian in writing the fair market value of each Investment annually by the 15th day of each January, valued as of the preceding December 31st, and within twenty days of any other written request from the Custodian, valued as of the date specified in such request. The Client acknowledges, understands and agrees that a statement that the fair market value is undeterminable, or that cost basis should be used is not acceptable and the Client agrees that the fair market value furnished to the Custodian will be obtained from the issuer of the Investment (which includes the general partner or managing member thereof). The Client acknowledges, understands and agrees that if the issuer is unable or unwilling to provide a fair market value, the Client shall obtain the fair market value from an independent, qualified appraiser and the valuation shall be furnished on the letterhead of the person providing the valuation. The Client acknowledges, understands and agrees that the Custodian shall have no obligation to investigate or determine whether the fair market value so furnished is the correct fair market value (without regard to any actual or constructive knowledge

> that the Custodian may otherwise have), but if the Custodian otherwise has a different value for such Investment, the Custodian may use such other value in its reports to the Client and to the Internal Revenue Service if the Custodian (in its sole discretion) so chooses. The Client acknowledges, understands and agrees that the Custodian shall rely upon the Client's continuing attention, and timely performance, of this responsibility. The Client acknowledges, understands and agrees that if the Custodian does not receive a fair market value as of the preceding December 31, the Custodian shall distribute the Investment to the Client and issue an IRS Form 1099–R for the last available value of the Investment.

(The P&A Interest was considered a "non-publicly traded investment" under the custodial agreement.) The custodial agreement also provides that it "shall be construed and administered in accordance with the laws of the State of New York, without regard to the choice of law principles thereof."

2. *UBS's Requests for the P&A Interest's 2014 Yearend Fair Market Value, Resignation, and Notification of Distribution*

In March 2015 UBS sent a letter addressed to the P&A Fund's operations manager, requesting the P&A Interest's 2014 yearend fair market value. It did not receive a response from the P&A Fund (which claims that it never received the letter).

In August 2015 UBS sent a letter addressed to the "James E Caan Traditional IRA," in care of PBSM, at PBSM's address in Encino, California. The letter stated, in pertinent part:

> As the custodian for your IRA, we [UBS] are required by the U.S. Department of the Treasury to obtain a yearend fair market value (FMV) for each investment held in your UBS IRA. As a condition to UBS holding [the P&A Interest] in your IRA, you agreed to obtain the FMV each year. We attempted to contact the issuer of the investment, but we have not yet received the 2014 FMV for the [P&A Interest].
>
> **Our request**
>
> Please contact the issuer(s) directly and request that they complete the attached form providing the 2014 FMV of the [P&A Interest] . . . **by September 21, 2015.** . . . .
>
> If you are unable to obtain a value from the issuer, you may use a qualified independent appraiser to provide the fair market value. We cannot accept fair market values that are not provided by the issuer or an appraiser.

> **Why this is important**
>
> To remain compliant with Treasury regulations, **we will need to resign as IRA custodian of the investment if we do not receive the fair market value of [the P&A Interest]**. The resignation will be recorded as an in-kind distribution; there will be no actual disbursement of funds directly to you. We will send you an IRS Form 1099–R in January 2016 based on the most recent value of the [P&A Interest] in our records.

UBS did not receive a response to that letter from either Mr. Caan or PBSM.

In October 2015 UBS sent a notice addressed to the "James E Caan Traditional IRA," in care of PBSM, at PBSM's address. The notice advised Mr. Caan that UBS had not received a response to its August 2015 letter. The notice warned that as a result, UBS would resign as the P&A Interest's custodian on November 23, 2015. Neither Mr. Caan nor PBSM responded to that notice.

In December 2015 UBS sent a confirmation letter addressed to the "James E Caan Traditional IRA," in care of PBSM, at PBSM's address. That letter stated, in pertinent part:

> As a follow-up to our October 21, 2015 correspondence to you [Mr. Caan], we [UBS] did not receive the 2014 yearend fair market value of [the P&A Interest] . . . . As a result, we have distributed the [the P&A Interest] to you as required by U.S. Treasury regulations.[3]
>
> . . . .

[3] No regulation directly imposes such a requirement. However, if an IRA trustee or custodian cannot provide an updated fair market value of an alternative investment, it is subject to penalties. *See* I.R.C. § 6721(a) (imposing a penalty of $250 for "each failure" to timely file an information return or to accurately include all required information); I.R.C. § 6693(a) (imposing a $50 penalty for "each failure" to comply with certain reporting requirements for IRAs and other tax-favored accounts). Section 408(i) requires IRA trustees and custodians to file reports with the Secretary of the Treasury "with respect to contributions (and the years to which they relate), distributions aggregating $10 or more in any calendar year, *and such other matters as the Secretary may require*." (Emphasis added.) *See also* Treas. Reg. § 1.408-5(b)(5) (requiring IRA trustees and custodians to report to the IRS "[s]uch other information as the Commissioner may require"). The 2014 Instructions for Forms 1099–R and 5498, at 20, directed IRA trustees and custodians to report the 2014 yearend fair market value of "[a]ssets held in an IRA that are not readily tradable on an established US or foreign securities market or option exchange, or that do not have a readily available [fair market value]."

> The distribution has been recorded as an in-kind distribution; there has been no actual disbursement of funds directly to you. We will send you an IRS Form 1099–R in January 2016 based on the most recent value of the [P&A Interest in our records] . . . . When you file your taxes, this distribution may need to be reported as taxable income for 2015; it may also be subject to a 10% early distribution penalty.
>
> Please consult with your tax advisor regarding your personal circumstances. . . . You will now need to contact the issuer of the investment [i.e., the P&A Fund] and instruct them to re-register the [P&A Interest] into your individual name . . . .
>
> . . . .
>
> **You have only 60 days from our November 25 resignation to complete a rollover to a new IRA trustee or custodian, or the distribution may be taxable to you.** As we previously noted, there are non-UBS affiliated or endorsed IRA trust companies that may be willing to hold [the P&A Interest]. Two firms that have indicated to us an interest in holding [assets like the P&A Interest] in IRAs are Millenium Trust Company and PENSCO Trust Company.

UBS thereafter ceased sending account statements for both IRAs; and it did indeed issue a Form 1099–R, reporting to the IRS that it distributed the P&A Interest to Mr. Caan in 2015. It valued the distribution at $1,910,903, which was the P&A Interest's 2013 yearend fair market value.

B. *Merrill Lynch*

In June 2015 Mr. Margiotta resigned from UBS and began working for Merrill Lynch. Four months later, in October 2015, he convinced Mr. Caan to transfer the UBS IRAs to Merrill Lynch under his management. After Mr. Caan executed the requisite paperwork, all assets in both IRAs were transferred through ACATS to a single IRA at Merrill Lynch, except for the P&A Interest, which was ineligible for ACATS.

III. *Postdistribution Events*

A. *Events Occurring Before the Filing of Mr. Caan's 2015 Income Tax Return*

In March 2016 Ms. Cohn sent the following email message to Tina Fowler, Mr. Margiotta's assistant at Merrill Lynch: "The P&A investment for James Caan still lists UBS. Shouldn't we change this to [Merrill Lynch]?" Ms. Fowler's response stated, in relevant part:

> I need to reach out to . . . the transfer department to get some info but what I do know (based on the notes I see) is this position was NOT able to be held at Merrill [Lynch] but we were able to update the broker of record to [Michael Margiotta at Merrill Lynch] and the position is not linked to [Mr. Caan's] IRA at UBS any longer.

Seven months later, in October 2016, Ms. Cohn sent an email to Mr. Margiotta, asking: "Have we been able to get everything moved over from UBS on Caan?" Mr. Margiotta responded: "There's nothing at UBS, the P&A fund has UBS listed as the custodian of record of his IRA and when he signs [the necessary documents], we can change that to Merrill [Lynch] as custodian."

B. *2015 Income Tax Return*

PBSM prepared Mr. Caan's income tax return for tax year 2015, which was timely filed.[4] Line 15a of that return disclosed $2,299,567 in IRA distributions; line 15b reported only $388,664 of that amount as taxable. In other words, a distribution of the P&A Interest was disclosed, but it was reported as nontaxable.[5]

C. *Events Occurring After the Filing of Mr. Caan's 2015 Income Tax Return*

In December 2016 Mr. Margiotta prepared a request, addressed to the P&A Fund, for a complete liquidation of the P&A Interest and the transfer of the cash proceeds to the Merrill Lynch IRA. After Mr. Caan executed that request, the P&A Fund processed it in three separate wire transfers made on three separate dates: $1,375,000 on January 23, 2017; $80,000 on March 15, 2017; and $77,605.46 on June 21, 2017, for a total of $1,532,605.46.

In November 2017 the IRS sent to PBSM's address a Notice CP2000, Changes to your 2015 Form 1040, addressed to Mr. Caan. The notice proposed to include the distribution of the P&A Interest in gross income as a taxable IRA distribution. PBSM's receipt of that notice caused a flurry of action from Mr. Butler, who at the time was the PBSM employee in charge of Mr. Caan's account. Mr. Butler directed another PBSM em-

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[4] This tax return has PBSM's address listed as Mr. Caan's home address.

[5] $2,299,567 – $388,664 = $1,910,903.

ployee to send a protest letter, disputing the notice on the ground that UBS issued the Form 1099–R in error. Mr. Butler then sent emails to Mr. Margiotta and UBS representatives requesting that UBS amend its Form 1099–R. After much back and forth, UBS sent Mr. Butler a letter denying his request for it to send an amended Form 1099–R because it was not provided the P&A Interest's 2014 yearend fair market value (despite requesting the value four times), and no evidence was received indicating that the P&A Interest was rolled over to another IRA within 60 days from the distribution date.

IV. *Petition to the Tax Court and Request for a Private Letter Ruling*

In April 2018 the Commissioner issued Mr. Caan a notice of deficiency for tax year 2015, determining an income tax deficiency of $779,915 on the basis that there had been a taxable distribution of the P&A Interest. The Commissioner also determined that Mr. Caan was liable for a section 6662(a) accuracy-related penalty of $155,983.

On July 27, 2018, Mr. Caan sent a request for a private letter ruling, asking the IRS to waive the requirement that a rollover of an IRA distribution be made within 60 days from the date of the distribution. *See* I.R.C. § 408(d)(3)(A)(i), (I). Three days later, on July 30, 2018, Mr. Caan filed a Petition with this Court for redetermination of his 2015 income tax deficiency. *See* I.R.C. § 6213(a).

In September 2018, during the pendency of this case, the IRS responded to Mr. Caan's request for a private letter ruling, declining to issue such a ruling on the grounds that the P&A Interest was liquidated and cash proceeds were then contributed to the Merrill Lynch IRA. It reasoned that the liquidation and subsequent cash contribution ran afoul of the "same property" requirement of section 408(d)(3)(A)(i) and (D), which meant that a waiver of the 60-day rollover period could not be granted.

OPINION

After concessions,[6] we must decide the following four issues:

1. Whether UBS distributed the P&A Interest to Mr. Caan in tax year 2015.

2. If the P&A Interest was distributed, whether that distribution is nontaxable because it was rolled over into another IRA within the 60-day rollover period.

3. If the P&A Interest was distributed, what its value was at the time of the distribution.

4. If the P&A Interest was distributed, whether we can review the IRS's refusal to issue a private letter ruling waiving the 60-day rollover period under section 408(d)(3)(I); if so, what our standard of review is; and under that standard, whether we should uphold the IRS's refusal to issue Mr. Caan such a private letter ruling.

I. *Burden of Proof*

Generally, we presume that the Commissioner's determinations in a notice of deficiency are correct, and the taxpayer bears the burden of proving those determinations incorrect. *See* Rule 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933).[7]

The Estate contends that this case involves unreported income and asks us to impose a burden of production on the Commissioner to produce evidence connecting Mr. Caan with the receipt of unreported income (the P&A Interest). It is true that in unreported income cases the Commissioner must either establish a minimal evidentiary showing connecting the taxpayer with the alleged income-producing activity or

[6] In a Stipulation of Settled Issues dated April 13, 2021, the parties agreed that the Estate of James E. Caan (Estate) is not liable for the section 6662(a) accuracy-related penalty.

[7] Under section 7491(a), the burden of proof shifts to the Commissioner with respect to a factual issue where the taxpayer (1) produced credible evidence regarding that issue; (2) complied with the Code's substantiation and record-keeping requirements; and (3) complied with the IRS's reasonable requests for information. *See also Higbee v. Commissioner*, 116 T.C. 438, 440–41 (2001). The Estate does not contend that section 7491(a) applies, so we do not consider it here.

demonstrate that the taxpayer actually received unreported income. *Walquist v. Commissioner*, 152 T.C. 61, 67 (2019); *see also Weimerskirch v. Commissioner*, 596 F.2d 358, 362 (9th Cir. 1979), *rev'g* 67 T.C. 672 (1977). Only once the Commissioner makes the required threshold showing does the burden shift to the taxpayer, to prove by a preponderance of the evidence that the Commissioner's determinations are arbitrary or erroneous. *Walquist*, 152 T.C. at 67–68.

However, this case does not involve unreported income. UBS issued Mr. Caan a Form 1099–R, reporting a distribution of the P&A Interest to the IRS. Mr. Caan likewise reported a distribution of the P&A Interest on his 2015 income tax return, and he claimed that the distribution was nontaxable. This fact defeats the Estate's contention that the deficiency determination involves unreported income. The IRS did not determine that Mr. Caan failed to report a distribution of the P&A Interest; it merely disagreed with his claim that the distribution was nontaxable. Thus, the rule enunciated in *Walquist* does not apply here.

Although this case is not based on unreported income, it is based on an information return. Section 6201(d) provides:

> In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary [of the Treasury] . . . by a third party and the taxpayer has fully cooperated with the Secretary . . . the Secretary shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return.

The Estate reasonably challenges the accuracy of UBS's Form 1099–R. However, reasonable evidence in the record supports the Commissioner's determination that a taxable distribution of the P&A Interest occurred (in particular, the series of correspondence from UBS to Mr. Caan). The Commissioner has therefore met his burden of production under section 6201(d). Accordingly, the Estate continues to bear the burden of proving that the Commissioner erred in determining that a taxable distribution occurred.

II. *IRAs*

The Estate argues that UBS never distributed the P&A Interest to Mr. Caan. It also argues that, even if UBS did distribute the P&A Interest, Mr. Caan contributed it to his

Merrill Lynch IRA in a manner that would qualify as a nontaxable rollover contribution under section 408(d)(3). We will first discuss the legal background governing IRAs and then decide the merits of these two arguments.

A. *What Is an IRA?*

Section 408 is the main Code provision governing IRAs. It was enacted as part of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2002(b), 88 Stat. 829, 959, in furtherance of Congress's goal "to create a system whereby employees not covered by qualified retirement plans would have the opportunity to set aside at least some retirement savings on a tax-sheltered basis." *Campbell v. Commissioner*, 108 T.C. 54, 63 (1997); *see also Orzechowski v. Commissioner*, 69 T.C. 750, 754–56 (1978), *aff'd*, 592 F.2d 677 (2d Cir. 1979).

Section 408(a) provides that an IRA is "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the [requirements enumerated in paragraphs (1) through (6)]." *See also* Treas. Reg. § 1.408-2(b) (explaining those enumerated requirements in further detail). Section 408(h) further provides that for purposes of section 408:

> a custodial account shall be treated as a trust if the assets of such account are held by a bank (as defined in subsection (n)) or [an IRS-approved nonbank entity], and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subsection (a). For purposes of [the Code], in the case of a custodial account treated as a trust . . . the custodian of such account shall be treated as the trustee thereof.

See also Treas. Reg. § 1.408-2(d). Thus, in enacting section 408, Congress gave taxpayers a choice as to the form of their IRA: a trust IRA or a custodial IRA.

A trust IRA is, at its core, a trust. The taxpayer is the settlor, a bank (or an approved nonbank entity)[8] is the trustee,

[8] Section 408(a)(2) requires the trustee to be "a bank . . . or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of [section 408]." A plain reading of section 408(a)(2) suggests that the phrase "such other person" could mean that an individual

and an individual (initially the settlor) is the beneficiary. The settlor executes a written trust instrument that meets the section 408(a) requirements and thereby establishes a trust IRA.

A custodial IRA is established by the dual operation of section 408(a) and (h) and is not a trust but a custodial relationship between the taxpayer and an IRS-approved custodian. *See, e.g.*, *Walsh v. Benson*, No. 05-290J, 2006 U.S. Dist. LEXIS 59251, at *8–11 (W.D. Pa. Aug. 18, 2006) (concluding that a qualifying custodial account is merely treated as a trust for purposes of section 408(a)). To form a custodial IRA, the taxpayer executes a written custodial agreement that meets the requirements enumerated in section 408(a)(1) through (6). Once the custodial agreement is executed, section 408(h) treats the custodial agreement as a trust instrument and the custodian as a trustee, which allows for section 408(a) to apply, thereby creating a custodial IRA.

There is a practical difference between trust IRAs and custodial IRAs, as the U.S. District Court for the Western District of Missouri explained:

> The practical difference between "a trust as IRA" and "a custodial account as IRA" involves the duties of the financial institution where the IRA is created. If the IRA is a trust, the institution has a fiduciary responsibility with respect to the investment. If the IRA is a custodial account, the institution's duty is to hold and safeguard the investment; there is no duty with respect to investment decisions. The practical distinction is that a custodial account's investment decisions can be dictated by the IRA owner/beneficiary.

United States v. Stover, 731 F. Supp. 2d 887, 901 (W.D. Mo. 2010), *aff'd*, 650 F.3d 1099 (8th Cir. 2011).

Trust IRAs and custodial IRAs have the same three tax attributes, which together constitute the tax-deferral system that Congress created: (1) cash contributions are generally deductible; (2) accretions from the IRA's assets are not taxable (except for section 511 unrelated business income); and (3) distributions are taxable.[9] *See* I.R.C. §§ 219(a) and (b), 408(d)(1), (e)(1); *Taproot Admin. Servs., Inc. v. Commissioner*,

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that the IRS has approved could be an IRA trustee. However, the regulations make clear that "such other person" means a nonbank entity; in other words, the trustee must be either a bank (as defined in section 408(n)) or an IRS-approved nonbank entity. *See* Treas. Reg. § 1.408-2(b)(2)(i), (e)(2)(i)(A).

[9]The first and third attributes are not shared by Roth IRAs. *See* I.R.C. § 408A. The IRAs at issue are not Roth IRAs.

133 T.C. 202, 206 (2009), *aff'd*, 679 F.3d 1109 (9th Cir. 2012); *Campbell*, 108 T.C. at 64; *Orzechowski*, 69 T.C. at 755; Treas. Reg. § 1.219-1(a).

Section 408 merely creates a framework for IRAs. Nothing in section 408 or the regulations thereunder prohibits the parties to a trust or custodial agreement from negotiating the terms of that agreement, so long as the agreement includes the terms required by section 408 and the regulations. Thus, when we decide the merits of a deficiency determination involving an IRA, the text of both section 408 and the agreement itself may be relevant.

B. *Rollover of IRA Distributions and the "Same Property" Rule*

In addition to creating a tax-deferral system through IRAs, Congress provided for nontaxable rollovers of IRA distributions, by which taxpayers can transfer investments from one IRA to another without incurring tax. *See* I.R.C. § 408(d)(3); *Lemishow*, 110 T.C. at 113. When a taxpayer requests an IRA distribution, that distribution is nontaxable if "the entire amount received (including money and any other property) is paid into an [IRA] . . . for the benefit of such individual not later than the 60th day after the day on which he receives the . . . distribution." I.R.C. § 408(d)(3)(A)(i). A taxpayer may also choose to roll over only a portion of the distribution, in which case only the portion that is contributed to another IRA within the 60-day rollover period qualifies as a nontaxable rollover contribution, *see* I.R.C. § 408(d)(3)(D), and the noncontributed portion must be included in income, *see* I.R.C. § 408(d)(1).

If the distribution consists of noncash property, the taxpayer must contribute that exact same property in order for the distribution to be considered a nontaxable rollover contribution under section 408(d)(3)(A)(i). *See Lemishow*, 110 T.C. at 113; Treas. Reg. § 1.408-4(b)(1) (stating that a distribution is nontaxable only if "the entire amount received (including the *same* amount of money and any other property) is paid into an [IRA]" (emphasis added)). In other words, the taxpayer cannot change the character of the noncash property. Taxpayers are also limited to one nontaxable rollover of an

IRA distribution per one-year period, whether it be a full or partial rollover. I.R.C. § 408(d)(3)(B).[10]

III. *Issues to Be Decided*

A. *Was the P&A Interest Distributed?*

During 2008 Mr. Caan opened two custodial accounts with UBS. These accounts were governed by a written custodial agreement between UBS and Mr. Caan. Since the agreement met the requirements of section 408(a), both custodial accounts qualified as IRAs by operation of section 408(a) and (h).

The custodial agreement's Article IV, a portion of which is excerpted *supra* pp. 82–83, sets forth the terms of UBS's custodianship of the P&A Interest. The pertinent terms are the following: (1) It was Mr. Caan's responsibility to provide UBS with the P&A Interest's yearend fair market value by January 15 of each year; (2) it was Mr. Caan's responsibility to attempt to obtain the P&A Interest's yearend fair market value from the P&A Fund directly, and if he could not obtain it from the P&A Fund, to provide UBS with an appraisal from "an independent, qualified appraiser"; and (3) if Mr. Caan did not fulfill his duty of providing UBS with the P&A Interest's yearend fair market value for a given year, then UBS would distribute the P&A Interest to him and issue him a Form 1099–R reflecting "the last available value" of the P&A Interest.

Mr. Caan clearly did not provide UBS with the P&A Interest's 2014 yearend fair market value by January 15, 2015, because in March 2015 UBS sent a letter to the P&A Fund requesting that value. After receiving no response from the P&A Fund, in August 2015 UBS sent Mr. Caan (through PBSM) a letter requesting the P&A Interest's 2014 yearend fair market value and giving him 30 days to respond. Mr. Caan did not respond to that letter, leading UBS to send him a notice that the P&A

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[10] This limitation does not apply to trustee-to-trustee transfers such as transfers through ACATS, because IRA assets are directly transferred from one IRA trustee or custodian to another IRA trustee or custodian. *See* Rev. Rul. 78-406, 1978-2 C.B. 157; *see also Bobrow v. Commissioner*, T.C. Memo. 2014-21, at *13 n.5. Such transfers do not result in a distribution within the meaning of section 408(d)(3)(A) because the IRA assets transferred are not within the direct control or use of the taxpayer. *See* Rev. Rul. 78-406, 1978-2 C.B. 157; *see also Bobrow*, T.C. Memo. 2014-21, at *13 n.5.

Interest would be distributed and later a confirmation letter that the interest was distributed as of November 25, 2015. The confirmation letter also explained the definite and potential consequences of UBS's resignation as the P&A Interest's custodian, including that UBS would issue Mr. Caan a Form 1099–R reporting a distribution.

These letters show that UBS went above and beyond what the custodial agreement required of it. It had no obligation to contact the P&A Fund to obtain the P&A Interest's 2014 yearend fair market value, yet it did so on Mr. Caan's behalf. It also sent Mr. Caan a request for that value and gave him over 30 days to respond. Although the onus was on Mr. Caan to provide UBS with the P&A Interest's 2014 yearend fair market value, UBS nevertheless tried to help him in fulfilling his duties under the custodial agreement. After receiving no response to its multiple requests, UBS acted well within its rights under the custodial agreement by resigning as the P&A Interest's custodian and distributing the P&A Interest in kind. It even went further by recommending that Mr. Caan contact his tax advisor, reminding him of the 60-day rollover period, and providing him with the names of two firms willing to serve as custodians of the P&A Interest. We therefore determine that UBS distributed the P&A Interest to Mr. Caan on November 25, 2015.

The Estate argues that UBS's distribution of the P&A Interest was a "phantom distribution," alleging that UBS resigned as the P&A Interest's custodian—and purported to "distribute" the interest—without notifying Mr. Caan, PBSM, or Mr. Margiotta. The Estate further alleges that UBS merely generated, without actually mailing, the letters that requested the P&A Interest's 2014 yearend fair market value and only later notified Mr. Caan of a purported distribution. In support of this argument, the Estate relies heavily on the trial testimony of Ms. Cohn and Mr. Margiotta. Both witnesses testified that they had never seen the relevant letters from UBS until this litigation had begun and had not known about UBS's making the distribution.

We do not find that portion of either witness' testimony credible. As the trier of fact, we may credit testimony in full, in part, or not at all. *See Neonatology Assocs., P.A. v. Commissioner*, 115 T.C. 43, 84 (2000), *aff'd*, 299 F.3d 221 (3d Cir.

2002). In this instance, the letters were produced in a logical order, each referencing the prior one, and they were all maintained by UBS in its files. The last of the letters, which discussed the in-kind distribution, was followed by the promised Form 1099–R; moreover, all further IRA account statements from UBS ceased. We find it highly unlikely that PBSM received all mail from UBS—statements, the Form 1099–R, and other correspondence—except for the key letters (which were addressed to PBSM). Additionally, the March 2016 email between Ms. Cohn and Mr. Margiotta suggests that both of them knew of UBS's representations that it had distributed the P&A Interest. It seems far more likely that there was simply a lack of communication and coordination between the professionals overseeing Mr. Caan's affairs, especially given the timing of UBS's letters, Mr. Margiotta's move from UBS to Merrill Lynch, and the emails between Mr. Margiotta and Ms. Cohn. If all parties believed that UBS was still the P&A Interest's custodian, why did no one follow up with UBS when it ceased to mail account statements for the IRAs? And why, if everyone was indeed blindsided by the Form 1099–R, did no one promptly follow up with UBS regarding it? (That followup did not occur until after the IRS issued its Form CP2000.) The Estate has offered no satisfactory explanation to fill these holes in its theory.

The Estate further argues that no distribution occurred because Mr. Caan was never placed in actual or constructive receipt of the P&A Interest. We disagree. Under the constructive receipt doctrine "funds [or other property] which are subject to a taxpayer's unfettered command and which he is free to enjoy at his option are constructively received by him whether he sees fit to enjoy them or not." *Estate of Brooks v. Commissioner*, 50 T.C. 585, 592 (1968); *see also Corliss v. Bowers*, 281 U.S. 376, 378 (1930); Treas. Reg. § 1.451-2(a). UBS's December 2015 confirmation letter asked Mr. Caan to contact the P&A Fund and "instruct them to re-register the [P&A Interest] into [his] individual name." We understand that sentence of the letter to mean that, beginning on November 25, 2015, Mr. Caan could have presented that letter to the P&A Fund and instructed it to re-register the P&A Interest in his

name without needing any further involvement from UBS.[11] As well, Mr. Caan could have rolled over the P&A Interest into an IRA managed by any other custodian or trustee willing to accept it. The presence of these options means that Mr. Caan had unfettered control over the P&A Interest and was therefore in constructive receipt of it.

Lastly, the Estate attempts to discredit UBS's resignation by contending that no resignation or distribution occurred under California trust law. This argument is a nonstarter for two reasons: (1) Mr. Caan's relationship with UBS was a custodial relationship, not a trust relationship, and (2) the custodial agreement states that it is governed by New York law, not California law.

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[11] The P&A Interest is a partnership interest, which means that UBS served two roles: (1) it was the P&A Interest's custodian, a role governed by a custodial agreement, and (2) it was a partner in a partnership, a role governed by relevant state law and/or a partnership agreement. The parties stipulated the custodial agreement (which we admitted into evidence), but neither party attempted to introduce a partnership agreement nor any evidence indicating which state's partnership law applied. Normally, we would examine the partnership agreement's text and the relevant state's partnership or property law to decide whether the December 2015 confirmation letter indeed placed Mr. Caan in constructive receipt of the P&A Interest. However, since we do not have the benefit of such sources here, we must decide whether UBS distributed the P&A Interest (and placed Mr. Caan in constructive receipt of it) on the basis of what we do have in the record. The Commissioner, in his notice of deficiency, determined that UBS distributed the P&A Interest. This determination enjoys the presumption of correctness, and the Estate bears the burden of proving this determination erroneous. *See* Rule 142(a); *Welch v. Helvering*, 290 U.S. at 115. On the one hand, we have the testimonies of Ms. Cohn and Mr. Margiotta that the Estate uses to support its argument that a distribution never occurred. On the other hand, we have a deficiency determination that a distribution did occur, which is entitled to the presumption of correctness. That determination is further supported by the text of the custodial agreement and the UBS letters to Mr. Caan excerpted *supra* pp. 82–85. Our finding that Ms. Cohn and Mr. Margiotta did not credibly testify that they had never seen the letters before and did not know about the distribution eliminates the sole evidence in support of the Estate's argument, shifting the weight of the evidence in favor of the Commissioner. We therefore conclude that the December 2015 confirmation letter served as the document which conveyed the partnership interest from UBS to Mr. Caan.

B. *Was the P&A Interest Contributed in a Manner That Would Qualify as a Rollover Contribution Under Section 408(d)(3)?*

Section 408(d)(3)(A)(i) provides that an IRA distribution is not taxable if "the entire amount received (including money and any other property)" is contributed into another IRA within 60 days of the distribution. The taxpayer may not change the character of any noncash distributed property between the time of the distribution and the time of the contribution. *See Lemishow*, 110 T.C. at 113; Treas. Reg. § 1.408-4(b)(1).

In the previous section, we determined that UBS distributed the P&A Interest to Mr. Caan on November 25, 2015. Sixty days from that date was January 24, 2016. Since the latter date was a Sunday, the 60-day deadline was extended to "the next succeeding day which is not a Saturday, Sunday, or a legal holiday." I.R.C. § 7503. Thus, Mr. Caan had until January 25, 2016, to contribute the P&A Interest to another IRA.

We acknowledge that Mr. Caan executed a request in October 2015 to transfer all assets in his two UBS IRAs to Merrill Lynch and that all assets other than the P&A Interest were transferred through ACATS shortly thereafter. Troublesome here is how the P&A Interest was handled. Mr. Margiotta (acting on Mr. Caan's behalf) submitted a withdrawal request to the P&A Fund in December 2016, asking it to fully liquidate the P&A Interest and remit the proceeds directly to the Merrill Lynch IRA. This action occurred over a year after the UBS distribution. The P&A Fund then remitted a total of $1,532,605.46 in three separate wire transfers between January 23 and June 21, 2017.

There are three problems with the way the P&A Interest was handled. First, and most importantly, in liquidating the P&A Interest Mr. Caan changed the character of the property; yet section 408(d)(3)(A)(i) required him to contribute the P&A Interest itself, not cash, to another IRA in order to preserve its tax-deferred status. *See Lemishow*, 110 T.C. at 113; Treas. Reg. § 1.408-4(b)(1). Second, the contribution of the cash proceeds from the liquidation occurred long after the January 25, 2016, deadline. And finally, the P&A Fund's three transfers to the Merrill Lynch IRA constituted three separate contributions; yet section 408(d)(3)(B) allows for only one rollover

contribution in any one-year period, making only the first transfer potentially eligible for a tax-free rollover.

As discussed *supra* pp. 92–93, our caselaw and the regulations have interpreted section 408(d)(3)(A)(i) to require the *same* money or the *same* property to be transferred in a rollover, rather than merely similar property or property of equivalent value. *See Lemishow*, 110 T.C. at 113; Treas. Reg. § 1.408-4(b)(1). In *Lemishow*, we discussed the legislative history supporting this interpretation:[12]

> Both rollover provisions [viz, section 408(d)(3) and section 402(c), the latter of which governs rollovers from employment-based tax-deferred plans, *see* I.R.C. § 401, to any of a number of tax-deferred plans, including IRAs] were enacted as part of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, sec. 2002(b), (g)(5), 88 Stat. 829, 959–964, 968–969. The purpose of allowing a tax-free rollover from a retirement plan to an IRA was to facilitate portability of pensions. Conf. Rept. 93-1280 (1974), 1974-3 C.B. 415, 502; H. Rept. 93-807 (1974), 1974-3 C.B. (Supp.) 236, 265. The purpose of the IRA-to-IRA transfers was to permit flexibility with respect to the investment of an IRA. H. Rept. 93-807, *supra*, 1974-3 C.B. (Supp.) at 374; S. Rept. 93-383 (1973), 1974-3 C.B. (Supp.) 80, 214. With respect to rollovers, the legislative history repeatedly speaks in terms of "this same money or property" and "the same amount of money (or the same property)", both for distributions from an IRA and from a qualified plan. H. Rept. 93-807, *supra*, 1974-3 C.B. (Supp.) at 374–375; Conf. Rept. 93-1280, *supra*, 1974-3 C.B. at 502. [Treasury Regulation § 1.408-4(b)], describing rollovers from IRA to IRA, uses the language "if the entire amount received (including the same amount of money and any other property) is paid into an" IRA.
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> Based on the language of the statutory provisions and the legislative history of those provisions, we hold that petitioner's use of the [cash] distributions from his Keogh and IRA's [sic] to purchase stock which he then contributed to the Smith Barney IRA does not constitute a tax-free rollover contribution under section 402(c) or 408(d)(3), respectively.

Lemishow, 110 T.C. at 113 (footnotes omitted).

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[12] In *Lemishow*, 100 T.C. at 111, the taxpayer had maintained Keogh plans (which generally allow larger annual contributions than do IRAs but must be funded only with income earned through self-employment, *see* I.R.C. §§ 402(c), 415) and IRAs with two different banks. He requested cash distributions from both account types, which he then used to purchase stock. *Lemishow*, 110 T.C. at 111. He then opened an IRA with Smith Barney Shearson and contributed the stock to that IRA. *Id.* at 111–12. Distributions from Keogh plans are governed by section 402, while distributions from IRAs are governed by section 408. The fact that the taxpayer requested distributions from two different retirement vehicles meant that we had to interpret the rollover provisions of both section 402 and section 408.

Section 402, however, is distinct from section 408 in that Congress enacted a limited exception to the "same property" rule in the Revenue Act of 1978, Pub. L. No. 95-600, § 157(f)(1), 92 Stat. 2763, 2806–07. Thus, section 402(c)(6) allows for property to be sold and the proceeds to be contributed to an IRA in a tax-free rollover, whereas there is no similar exception for IRAs governed by section 408. Congress enacted section 402(c)(6) as a means to address a perceived hardship for those taxpayers attempting to roll over investments from section 401 qualified plans but having difficulty finding a trustee willing to accept property in kind. *See* Staff of J. Comm. on Tax'n, 95th Cong., General Explanation of the Revenue Act of 1978, JCS-7-79, at 110 (J. Comm. Print 1979). However, Congress did not enact an analogous provision for IRAs. We are unsure why Congress sought to alleviate this hardship for section 401 qualified plans without making a parallel fix for IRAs. However, our job is to apply the terms of statutes, not revise or update them. *United Therapeutics Corp. v. Commissioner*, 160 T.C. 491, 516 (2023) (citing *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)). And when Congress includes certain language in one provision but omits it in another, we presume that the inclusion and exclusion are intentional. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))); *see also Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85–86 (2017) (same).

The text of section 408(d)(3)(A)(i), the legislative history behind section 408(d)(3), our caselaw, and the regulations all make clear that Mr. Caan was required to contribute the P&A Interest, not cash, to the Merrill Lynch IRA in order to preserve its tax-deferred status. Because he did not do so, we hold that the cash proceeds from the liquidation of the P&A Interest were not contributed in a manner that would qualify as a nontaxable rollover contribution under section 408(d)(3)(A)(i).

C. *What Is the 2014 Yearend Fair Market Value of the P&A Interest?*

On the Form 1099–R that reported to the IRS the distribution of the P&A Interest, UBS claimed that the value of the P&A Interest was $1,910,903, which was the 2013 yearend fair market value. The Estate generally argues that that Form 1099–R is incorrect because UBS never distributed the P&A Interest and the value it reported was erroneous. The Commissioner agrees with the Estate that the P&A Interest was misvalued. He urges us to adopt a value of $1,548,010, which was the ending capital account balance reported by the P&A Fund on Schedule K–1, Partner's Share of Income, Deductions, Credits, etc., for tax year 2015. He believes that the 2015 ending capital account balance serves as the best approximation of the P&A Interest's value at the time of the distribution because the distribution occurred on November 25, 2015, and the ending capital account balance was Mr. Caan's capital account balance as of December 31, 2015.

In its briefs, the Estate does not argue against the Commissioner's proposal, focusing instead on arguing that the Form 1099–R is "a useless, inaccurate, [and] unreliable document." Since the value the Commissioner proposes closely matches the aggregate 2017 liquidation amount of $1,532,605.46, and since the Estate does not propose a different value, we hold that the value of the P&A Interest at the time of the distribution was $1,548,010.

D. *Did the IRS Err in Not Granting a Waiver of the 60-Day Rollover Period Under Section 408(d)(3)(I)?*

Three days before filing the Petition, Mr. Caan sent a private letter ruling request to the IRS, asking it to waive the 60-day rollover period. *See* I.R.C. § 408(d)(3)(A)(i), (I); Rev. Proc. 2003-16, 2003-1 C.B. 359 (prescribing the procedures by which taxpayers may request a waiver under section 408(d)(3)(I)). After considering the request, the IRS declined to issue a private letter ruling on the grounds that waiving the 60-day rollover period would be inconsequential, in light of the same property requirement. Mr. Margiotta (acting on Mr. Caan's behalf) liquidated the P&A Interest and contributed the cash proceeds to the Merrill Lynch IRA. In so doing,

Mr. Caan ran afoul of the same property requirement. *See supra* pp. 97–99. Thus, the IRS reasoned that even if it were to grant a waiver of the 60-day rollover period, the cash contribution to the Merrill Lynch IRA could not be respected as a rollover contribution, since the IRS cannot waive the same property requirement. The Estate disagrees with the IRS's reasoning, contending that a waiver under section 408(d)(3)(I) should have been granted given the facts and circumstances of this case.

Section 408(d)(3)(I) provides that the IRS "may waive the 60-day requirement . . . where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement." The parties' disagreement over whether the IRS appropriately declined to issue a waiver under section 408(d)(3)(I) presents two antecedent questions: (1) Does our Court have jurisdiction to review such a denial, and (2) if we do have jurisdiction, what is our standard of review? These are both questions of first impression for our Court.

1. *Jurisdiction to Review Denials of Waivers Under Section 408(d)(3)(I) and Standard of Review*

In *Trimmer v. Commissioner*, 148 T.C. 334, 345–49 (2017), we considered similar questions in a case similar to this one. *Trimmer* concerned section 402, which governs distributions from a qualified plan known as an employees' trust.[13] A short background on section 402 is helpful in understanding what transpired in *Trimmer*. Section 402(a) provides that a distribution from an employees' trust is "taxable to the distributee, in the taxable year of the distributee in which distributed." Section 402(c) allows for rollover contributions similar to how section 408(d)(3) allows for rollover contributions for IRAs. Section 402(c)(1) excludes from gross income distributions from an employees' trust that are thereafter contributed "to an eligible retirement plan." Section 402(c)(3)(A) provides that such a contribution must be made no later than 60

[13] An employees' trust is a "trust created or organized in the United States" that is "part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries." I.R.C. § 401(a).

days "following the day on which the distributee received the property distributed." Section 402(c)(3)(B) allows the IRS to "waive the 60-day requirement . . . where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement."

One of the taxpayers in *Trimmer* held retirement accounts in two employees' trusts. *Trimmer*, 148 T.C. at 336. This taxpayer received a distribution from each of his two retirement accounts. *Id.* He then deposited the two distribution checks into a joint bank account he held with his wife. *Id.* Over 10 months later, on the advice of his tax return preparer, he opened an IRA and rolled over the two distributions into his new IRA. *Id.* at 336–37. On his joint income tax return, he reported the two distributions but claimed that they were nontaxable. *Id.* at 337. The IRS sent him a letter proposing, among other things, to include the two distributions in income. *Id.* In his response to the IRS's letter, the taxpayer explained his circumstances, which included a mental health issue, and asked for a waiver of the 60-day rollover period. *Id.* at 338. The IRS summarily denied the request in a boilerplate response. *See id.* at 338–39.

In deciding that we had jurisdiction to review the IRS's denial of a hardship waiver under section 402(c)(3)(B), we stated:

> Nothing in section 402(c)(3) expressly precludes judicial review, nor does the legislative history reveal any such congressional intent. To the contrary, because the denial of a hardship waiver can affect directly the existence and amount of any asserted deficiency—as it does in this case—the procedures Congress has established for judicial review of the Commissioner's deficiency determinations logically contemplate review of such a denial as one element of the deficiency determination.

Trimmer, 148 T.C. at 346–47 (footnote omitted) (citing *Estate of Gardner v. Commissioner*, 82 T.C. 989, 996 (1984)). We therefore concluded that our jurisdiction to redetermine deficiencies under section 6213(a) includes jurisdiction to review any discretionary agency actions that would affect the deficiency amount. *Trimmer*, 148 T.C. at 348; *Estate of Gardner*, 82 T.C. at 999. We also concluded, on the basis of our prior caselaw, that the appropriate standard of review is abuse of discretion. *Trimmer*, 148 T.C. at 348.

Our reasoning in *Trimmer* applies here as well. Sections 402(c)(3)(B) and 408(d)(3)(I) are worded identically. Neither the text of section 408(d)(3) nor its legislative history precludes judicial review; and whether the Commissioner grants a waiver under section 408(d)(3)(I) is a discretionary determination that would affect a taxpayer's deficiency. We therefore extend our holding in *Trimmer*, 148 T.C. at 345–49, to denials of waivers under section 408(d)(3)(I). In other words, we hold that we do have jurisdiction to review the Commissioner's denial of a waiver under section 408(d)(3)(I) and that we review such a denial for abuse of discretion. *See Trimmer*, 148 T.C. at 348; *Mailman v. Commissioner*, 91 T.C. 1079, 1084 (1988) ("The standard of review most appropriate in the case of a failure to grant a waiver is . . . whether [the Commissioner] abused his discretion."); *Estate of Gardner*, 82 T.C. at 1000; *see also* 5 U.S.C. § 706(2)(A) (providing that generally a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

2. *Did the Commissioner Abuse His Discretion in Declining to Waive the 60-Day Rollover Period Under Section 408(d)(3)(I)?*

As we explained above, the IRS declined to issue a waiver under section 408(d)(3)(I) because Mr. Caan liquidated the P&A Interest after the distribution from UBS and, in so doing, ran afoul of the same property requirement, *see* I.R.C. § 408(d)(3)(A)(i); *Lemishow*, 110 T.C. at 113, which the IRS cannot waive. We hold that denying a waiver on that basis is not an abuse of discretion. It cannot be an abuse of discretion for the IRS to deny a waiver where granting the waiver would not have helped the taxpayer in any way.

The Estate urges us to adopt an equitable resolution to this case. Although we are sympathetic to the Estate's situation, we are not a court of equity, and we cannot ignore the statutory law to achieve an equitable end. *See Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *Stovall v. Commissioner*, 101 T.C. 140, 149–50 (1993). This case is a quintessential example of the pitfalls of holding nontraditional, non-publicly traded assets in an IRA. Failure to follow the labyrinth

of rules surrounding these assets can mean forfeiting their tax-advantaged status.

IV. *Conclusion*

We hold that the P&A Interest was distributed in tax year 2015 within the meaning of section 408(d)(1). We further hold that Mr. Caan did not thereafter contribute the P&A Interest in a manner that would qualify as a nontaxable rollover contribution under section 408(d)(3), because he changed the character of the property when he liquidated the P&A Interest. We agree with the Estate that UBS misvalued the P&A Interest, and we hold that its value was $1,548,010 at the time of the distribution. But we disagree with the Estate that the Commissioner abused his discretion in declining to issue a waiver of the 60-day rollover period, as such a waiver would not have helped Mr. Caan in this case.

We have considered all of the arguments made by the parties and, to the extent they are not addressed herein, we consider them moot, irrelevant, or without merit.

To reflect the foregoing,

Decision will be entered under Rule 155.

WOLFGANG FREDERICK KRASKE, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 27574-15. Filed October 26, 2023.

P's 2011 and 2012 returns were examined by a tax compliance officer (TCO) with the IRS Small Business and Self-Employed Division who on June 2, 2014, issued P a Letter 692 (15-day letter) proposing deficiencies as well as penalties pursuant to I.R.C. § 6662(a) and (b)(2) for both years. The 15-day letter advised P that if he disagreed with the proposed adjustments, he could, within 15 days of the letter's date, request a conference with the IRS Office of Appeals (Appeals) by providing the TCO with a list of disagreed items, upon receipt of which his case would be forwarded to Appeals. On July 16, 2014, P mailed a letter to the TCO requesting Appeals consideration, which was received by the TCO on July 24, 2014. On July 21, 2014, the TCO's immediate supervisor gave written

approval for the imposition of the I.R.C. § 6662(a) and (b)(2) penalties for both years. P's case was thereafter forwarded to Appeals, which received it on August 12, 2014. P was unable to reach a settlement with Appeals, and on July 28, 2015, R issued P a notice of deficiency determining, inter alia, that he was liable for penalties pursuant to I.R.C. § 6662(a) for both years. *Held*: The holding of the Court of Appeals for the Ninth Circuit, where an appeal in this case would ordinarily lie, in *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th 1066 (9th Cir. 2022), *rev'g and remanding* 154 T.C. 68 (2020), concerning the timeliness of the written supervisory approval of a penalty required by I.R.C. § 6751(b), is squarely on point, and, pursuant to *Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), we will follow it. *Held, further*, the written supervisory approval for the penalties at issue, which were subject to deficiency procedures, was timely, as the TCO's immediate supervisor gave approval before the case was transferred to Appeals, while she retained discretion to approve or to withhold approval of the penalties.

Wolfgang Frederick Kraske, pro se.

Alexander D. DeVitis and *Christine A. Fukushima*, for respondent.

GALE, *Judge*: In a separate opinion in this case, *Kraske v. Commissioner*, T.C. Memo. 2023-128, we sustained deficiencies of $11,464 and $11,403 in petitioner's federal income tax for taxable years 2011 and 2012, respectively. As petitioner reported income tax of $10,719 and $12,716 for those years, respectively, respondent determined that petitioner is liable for a penalty for each year pursuant to section 6662(a) and (b)(2)[1] for an underpayment attributable to a substantial understatement of income tax. In this Opinion we decide whether petitioner is so liable.

FINDINGS OF FACT

Some of the facts are stipulated and are so found. The First Stipulation of Facts, First Supplemental Stipulation of Facts, and the attached Exhibits are incorporated herein by this reference. Petitioner resided in California when he timely filed his Petition.

[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times. We round all monetary amounts to the nearest dollar.

An examination of petitioner's returns for the 2011 and 2012 taxable years was conducted by a tax compliance officer (TCO) with the Internal Revenue Service (IRS) Small Business and Self-Employed Division. On June 2, 2014, the TCO issued petitioner Letter 692 (15-day letter) proposing adjustments resulting in (1) a deficiency in tax of $11,464 and a penalty pursuant to section 6662(a) and (b)(2) of $2,293 for 2011; and (2) a deficiency of $11,403 and a penalty pursuant to section 6662(a) and (b)(2) of $2,281 for 2012. The 15-day letter advised petitioner that if he disagreed with the proposed adjustments, he could request a conference with the IRS Office of Appeals (Appeals) by providing the TCO with a list of the disagreed items, upon receipt of which his case would be forwarded to Appeals.[2] The 15-day letter further advised that if petitioner did not respond within 15 days, a notice of deficiency would be issued.

Almost a month after the deadline for responding, on July 16, 2014, petitioner mailed a letter to the TCO stating his disagreement with the principal proposed adjustment, which was received by the TCO on July 24, 2014.[3] Also on July 16, as recorded in the TCO's activity record for petitioner's case, the TCO—not having received a response to the 15-day letter from petitioner after having been promised it several times—closed the case as unagreed and forwarded it to the group manager, her immediate supervisor.

On July 21, 2014, the group manager reviewed the case, signed civil penalty approval forms approving the assertion of the section 6662(a) substantial understatement penalty for 2011 and 2012, and approved the case for closure.

After receipt of petitioner's response on July 24, 2014, his case was forwarded to Appeals. Appeals' case activity record states that the case was received on August 12, 2014, and

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[2] On July 1, 2019, the Office of Appeals was renamed the Independent Office of Appeals. *See* Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019). We will use the name in effect at the times relevant to this case, i.e., the Office of Appeals or Appeals.

[3] The parties stipulated that petitioner's letter was "submitted" on July 16, 2014. The letter, a copy of which was also stipulated, is dated July 16, 2014, and bears a "Received" stamp of the Small Business and Self-Employed Division dated July 24, 2014. On the basis of the foregoing evidence we find that the letter was mailed on July 16, 2014, and received by the TCO on July 24, 2014.

assigned to an Appeals officer on August 28, 2014. Petitioner was unable to reach a settlement with Appeals, and on July 28, 2015, a notice of deficiency was issued to petitioner reflecting the same adjustments as in the 15-day letter.

OPINION

I. *Timeliness of Penalty Approval*

The Commissioner bears the burden of production with respect to an individual taxpayer's liability for any penalty, requiring the Commissioner to come forward with sufficient evidence indicating that the imposition of the penalty is appropriate. *See* § 7491(c); *Higbee v. Commissioner*, 116 T.C. 438, 446–47 (2001). As part of that burden, the Commissioner must produce evidence of compliance with procedural requirements of section 6751(b)(1). *See Graev v. Commissioner*, 149 T.C. 485, 492–93 (2017), *supplementing and overruling in part* 147 T.C. 460 (2016).

Section 6751(b)(1) provides that "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination." In the statute "assessed" refers to a ministerial function, "the formal recording of a taxpayer's tax liability on the tax rolls," which is "the last of a number of steps required before the IRS can collect" a tax or penalty from a taxpayer. *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th 1066, 1071 (9th Cir. 2022) (quoting *Chai v. Commissioner*, 851 F.3d 190, 218 (2d Cir. 2017), *aff'g in part, rev'g in part* T.C. Memo. 2015-42), *rev'g and remanding* 154 T.C. 68 (2020).

The written supervisory approval described in section 6751(b) is not required to take any specific form. *See Palmolive Bldg. Invs., LLC v. Commissioner*, 152 T.C. 75, 85–86 (2019). But we have held that it generally must be obtained no later than (1) the date on which the Commissioner issues the deficiency notice, or (2) the date, if earlier, on which the Commissioner formally communicates to the taxpayer the Examination Division's determination to assert a penalty. *See Belair Woods, LLC v. Commissioner*, 154 T.C. 1, 15 (2020); *Clay v. Commissioner*, 152 T.C. 223, 249–50 (2019), *aff'd*, 990 F.3d 1296 (11th Cir. 2021).

In *Clay*, 152 T.C. at 249–50, the Commissioner issued the taxpayer a 30-day letter before the date on which the supervisory approval was obtained via a civil penalty approval form. We held that section 6751(b) was not satisfied because approval was not obtained before "a communication that advise[d] the taxpayer that penalties [would] be proposed and g[ave] the taxpayer the right to appeal them with Appeals." *Clay*, 152 T.C. at 249. Here, respondent concedes that written approval of the initial penalty determinations was not obtained until after a formal communication from the Commissioner—i.e., the 15-day letter—was sent to petitioner, which notified him of the proposed penalties and offered him the right to have them considered by Appeals. Therefore, the approval of the immediate supervisor was not timely under *Clay*.

However, an appeal in this case would ordinarily lie with the Court of Appeals for the Ninth Circuit, and therefore its precedent governs this case. *See Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). In *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th at 1071, the Ninth Circuit considered the timeliness of supervisory approval for "assessable penalties," which are not subject to deficiency procedures. The Ninth Circuit's holding concerning the timeliness of supervisory approval is articulated in broad terms: "[W]e hold that § 6751(b) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment." *Id.* at 1074. Accordingly, the question arises whether the holding should be read so as to encompass penalties subject to deficiency procedures as well.

In *Golsen*, 54 T.C. at 757, we noted that "better judicial administration . . . requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone." This prescription arose from the recognition that if we insisted on our view (as a court of national jurisdiction) and held contrary to a squarely-on-point decision of a court of appeals with jurisdiction over the appeal, the "virtual[ly] certain[]" result would be the nonprevailing party's appealing our decision and securing a reversal—a scenario that would be a futile waste

of taxpayer and judicial resources. *Lardas v. Commissioner*, 99 T.C. 490, 494 (1992). Thus, in *Lardas* we framed the test for applying the *Golsen* doctrine as whether the court of appeals decision at issue "is so clearly on point that it would be futile" to issue a decision contrary to it. *Id.* at 498. We cautioned, however, that given our obligation as a court of national jurisdiction "to apply with uniformity its interpretation" of the taxing statutes, *Lawrence v. Commissioner*, 27 T.C. 713, 719 (1957), *rev'd*, 258 F.2d 562 (9th Cir. 1958), "we should be careful to apply the *Golsen* doctrine only under circumstances where the holding of the Court of Appeals is squarely on point," *Lardas*, 99 T.C. at 495.

In *Lardas*, to determine whether the relevant court of appeals decision was "so clearly on point" that a decision contrary to it would be futile, we found it necessary to ascertain "*the scope of* [*the decision's*] *rationale*." *Id.* at 498 (emphasis added). In *Lardas* the issue was whether in the case of income source entities (such as S corporations, partnerships, or trusts) the filing of the return of the source entity or, instead, the return of the taxpayer receiving income from the source entity, commenced the running of the limitations period on assessment of tax. The Tax Court had uniformly held that the return of the taxpayer receiving income from a source entity was the relevant return. But the Ninth Circuit, where appeal would lie, had held to the contrary where the source entity was an S corporation. *See Kelley v. Commissioner*, 877 F.2d 756 (9th Cir. 1989), *rev'g and remanding* T.C. Memo. 1986-405. The source entity at issue in *Lardas* was a grantor trust.

What is important to recognize is that in *Lardas*, when deciding whether the *Golsen* doctrine should cause us to follow the Ninth Circuit, we did not merely point to the fact that the case before us involved a grantor trust whereas the Ninth Circuit decision involved an S corporation. We instead undertook an analysis to determine the scope of the Ninth Circuit's rationale in its holding concerning an S corporation so as to ascertain whether it clearly extended to grantor trusts as well. Finding that the scope of the Ninth Circuit's rationale was unclear concerning grantor trusts, we concluded that the *Golsen* doctrine was inapplicable. *Lardas*, 99 T.C. at 498.

By contrast, as explained below, the rationale of the Ninth Circuit's holding in *Laidlaw's Harley Davidson* is clear re-

garding the timing of supervisory approval. The Ninth Circuit rejected outright our position in *Clay* that the supervisory approval required by section 6751(b)(1) is timely only if it is obtained before a formal communication to the taxpayer that penalties would be proposed, finding that our interpretation "has no basis in the text of the statute." *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th at 1072. Instead, the Ninth Circuit opined that approval is timely at any time before assessment, provided the supervisor retains discretion to give or withhold approval. As an example of this qualifier, the court reasoned that, in the case of penalties subject to deficiency procedures, a deadline earlier than just before assessment might be required because a supervisor begins to lose discretion to approve once a notice of deficiency is sent.[4]

As previously noted, the Ninth Circuit summarized its holding in *Laidlaw's Harley Davidson* in broad terms: "[W]e hold that § 6751(b) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment." *Id.* at 1074. By its terms, the holding is not confined to assessable penalties, and the Ninth Circuit's discussion makes clear that it had in mind penalties subject to deficiency procedures when it added the qualifier that a supervisor must have had discretion to approve when acting to do so. Thus, nothing in the Ninth Circuit's holding or analysis suggests that it might think a timing rule different from its "retention of discretion" rule would apply in the case of penalties subject to deficiency procedures.

Given the Ninth Circuit's rejection of our section 6751(b) interpretation in *Clay* that measures timeliness on the basis of formal communications to the taxpayer, and its broadly phrased holding that approval is timely at any time before

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[4] As the Ninth Circuit explained, the supervisor loses discretion after a notice of deficiency is sent because thereafter assessment of a penalty is governed by specific statutory mandates: by section 6213(c) if the taxpayer fails to file a petition with the Tax Court within 90 days, in which case the penalty "shall" be assessed; or, if a petition is filed, by section 6213(a), prohibiting assessment "until the decision of the Tax Court has become final," and by section 6215(a), providing that when the decision of the Tax Court has become final, the deficiency (which includes associated penalties) as redetermined by the Tax Court "shall be assessed." *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th at 1071 n.4.

assessment so long as the supervisor retains discretion to approve, we conclude that its rationale is clear and extends to penalties subject to deficiency procedures. If we were to follow *Clay* and find the supervisory approval here untimely because it did not occur before the proposed penalties were formally communicated to the taxpayer, "a reversal would appear inevitable." *See Lardas*, 99 T.C. at 495. We accordingly hold that *Laidlaw's Harley Davidson* is squarely on point, and pursuant to the *Golsen* doctrine we will follow it in this case.[5]

In applying the *Laidlaw's Harley Davidson* holding here, the question becomes whether the TCO's immediate supervisor retained discretion to approve the penalties when she did so. When the supervisor approved the penalties on July 21, 2014, it was more than a month past the deadline for petitioner to respond to the 15-day letter, and the TCO had not received a written request for Appeals' consideration from him. Although petitioner had mailed such a request on July 16, 2014, it was not received by the TCO until July 24, 2014—three days after written supervisory approval had been given. The case was not received by Appeals until August 12, 2014—over three weeks after supervisory approval had been given. Thus, the TCO's immediate supervisor retained discretion to approve or to withhold approval of the penalties when she did so on July 21 because the case had not yet been transferred to Appeals (at which time the Small Business and Self-Employed Division's jurisdiction over the case, and the supervisor's discretion, may have terminated).

This timeline is well within the parameters for the supervisory approval found timely by the Ninth Circuit in *Laidlaw's Harley Davidson*. In that case, the revenue agent's immediate supervisor did not give written approval of the penalty until more than a month after the taxpayer's request for Appeals

[5] We acknowledge that we have previously suggested otherwise in a memorandum opinion. *See Castro v. Commissioner*, T.C. Memo. 2022-120, at *5 n.6. *But see Kamal v. Commissioner*, T.C. Memo. 2023-80 (applying *Laidlaw's Harley Davidson* holding with respect to a penalty subject to deficiency procedures). In both of these cases, however, the approval was timely under either the *Clay* holding or the *Laidlaw's Harley Davidson* standard. In any event, the better reading of *Golsen*, as refined by *Lardas*, is that the rationale advanced in *Laidlaw's Harley Davidson* is squarely on point with respect to the timeliness of supervisory approval of penalties subject to deficiency procedures.

consideration had been received. The case was then transferred to Appeals the day after supervisory approval was given. *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th at 1069. Accordingly, following *Laidlaw's Harley Davidson*, we hold that the approval was timely, and respondent has met his burden of production to show that the requirements of section 6751(b)(1) have been satisfied.

II. *Substantial Understatement of Income Tax*

Petitioner reported tax liabilities of $10,719 and $12,716 for 2011 and 2012, respectively. We are sustaining the determination in the notice of deficiency that he owes increases in tax of $11,464 and $11,403 for 2011 and 2012, respectively. Petitioner has not raised reasonable cause and good faith as an affirmative defense pursuant to section 6664(c)(1), and it is therefore deemed to be waived. *See Gustafson v. Commissioner*, 97 T.C. 85, 90 (1991); *see also ATL & Sons Holdings, Inc. v. Commissioner*, 152 T.C. 138, 154 (2019). Accordingly, respondent has met his burden of producing evidence that petitioner's underpayments were attributable to substantial understatements of income tax, and therefore petitioner is liable for the accuracy-related penalties as determined by respondent. *See* § 6662(d)(1)(A).

To reflect the foregoing,

Decision will be entered for respondent as to the section 6662 penalties.