IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALI M. TAHA, on behalf of his deceased brother and his brother's wife, *Plaintiff-Appellant*, v. **UNITED STATES**, *Defendant-Appellee*.	Case No. 2020-2061 Originating Case No. 1:17-cv-01174-CFL

PLAINTIFF-APPELLANT'S RESPONSE TO
APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

Appellant Taxpayers respectfully respond to the Appellee's Motion for Summary Affirmance (ECF 14)[1] pursuant to Federal Circuit Rule 27(b). IRS's motion should be denied for reasons set forth below, and the Court should set a briefing schedule to obtain the benefit of full briefing from the parties.

STANDARD OF REVIEW

"[S]ummary disposition is appropriate, *inter alia*, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994).

[1] Appellant uses the same acronyms as the Appellee, *viz.*, "CFC" for Court of Federal Claims, "Doc." for CFC docket entries, "IRC" for Internal Revenue Code that is codified at 26 U.S.C. *See* ECF 14 at 1–2 n.1. Additionally:

- "Taxpayers" means Ali M. Taha, Mohamad E. Taha (deceased), and Sanaa M. Yassin.
- "ECF" refers to this Court's docket.
- "IRS" means the Defendant-Appellee.

"Although findings of fact relating to jurisdictional issues are reviewed for clear error, the ultimate determination of the CFC's jurisdiction is a question of law that is reviewed *de novo*." *Blueport Co., LLC v. United States*, 533 F.3d 1374, 1378 (Fed. Cir. 2008).

STATEMENT OF THE CASE

Mohamad E. Taha (deceased) and his wife Sanaa M. Yassin, with the assistance of Ali M. Taha ("Taxpayers"), sought a refund of $14,177 for federal income taxes paid for the 2002 and 2003 tax years, plus interest and legal costs. *Taha v. United States*, 757 Fed. App'x 947, 948 (Fed. Cir. 2018). IRS disallowed the 2002 claim on December 20, 2007, but not the 2003 claim. *Id.* at 949. Taxpayers appealed the disallowance to IRS on January 21, 2008. *Id.* IRS denied that appeal on October 29, 2009. *Id.*

Taxpayers filed an amended 2004 tax return on November 1, 2009 to obtain a tax refund. *Id.* On November 28, 2012, IRS disallowed the 2004 tax-refund claim. *Id.* Taxpayers appealed the disallowance to IRS. *Id.*

On May 10, 2017, after exhausting IRS appeals, Taxpayers filed a *pro se* tax-refund suit in the federal district court for the Middle District of Florida. *Id.* That court transferred the case to CFC. *Id.* The transfer complaint was filed on September 18, 2017. *Id.*

On January 30, 2018, IRS moved to dismiss the complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) asserting that Taxpayers did not file their tax-refund claims within the three-year statute-of-limitations period. *Id.*

On April 10, 2018, CFC granted IRS's motion to dismiss, combining all three of Taxpayers' tax-refund claims in its analysis. *Id.* at 949–50. In the alternative, CFC concluded that even if Taxpayers had timely filed their tax-refund claims, CFC lacked jurisdiction because Taxpayers did not initiate their suit within two years from the date

IRS first mailed notices of disallowance for each claim under IRC § 6532(a)(1). *Id.* at 950.

On April 19, 2018, IRS filed a motion asking CFC to clarify when the two-year statute-of-limitations period began to run with respect to the 2003 tax-refund claim. *Id.* CFC determined it did not need to resolve that issue. *Id.*

The first appeal to this Court followed under 28 U.S.C. § 1295(a)(3). *Id.* This Court concluded that CFC "correctly found that it lacked jurisdiction" "[c]oncerning the 2002 and 2004 claims" because Taxpayers "did not file their tax refund suit within the statutorily-prescribed two-year period from the date the IRS first mailed notices of disallowance for those claims" as is required under IRC § 6532(a)(1). *Id.* at 951–52.

As to the 2003 tax-refund claim, this Court remanded for CFC to find three material jurisdictional facts: (1) whether Taxpayers *filed* the 2003 tax-refund claim; (2) whether the 2003 claim was *timely*; and (3) whether IRS *disallowed* the 2003 claim. *Id.* at 952.

On remand, CFC held a two-day trial in Tampa, Florida during which Mr. Ali Taha appeared *pro se* for the Taxpayers. Doc. 77, Tr. 2:4; Doc. 78, Tr. 218:4; Doc. 92 at 1. On April 1, 2020, CFC issued an opinion and order and answered this Court's three factual questions, *Taha*, 757 Fed. Appx. at 952, as follows:

Fed. Cir. Questions	CFC Answers
Whether Taxpayers filed a tax-refund claim for tax year 2003.	"It is likely that plaintiffs' 2003 amended tax return would have been received by the IRS around the same time their 2002 amended tax return was received [*viz.*] … November 29, 2007." Doc. 92 at 8. But "plaintiffs cannot show that they filed a claim for refund with the IRS as required for jurisdiction in this court." *Id.*
Whether the 2003 tax-refund claim was timely.	"Because plaintiffs … are not entitled to the extended seven-year limitations period provided by Subsection 6511(d) … plaintiffs' 2003 amended tax return, if considered filed, would be untimely." Doc. 92 at 9.
Whether IRS disallowed the 2003 claim.	"IRS never disallowed this refund claim." Doc. 92 at 4. "[T]he government does not contend that the claim was ever disallowed." Doc. 92 at 4 n.6.

Taxpayers filed a *pro se* notice of appeal, giving rise to this appeal. Doc. 103. Undersigned counsel represents Taxpayers on appeal on a *pro bono* basis.[2]

On appeal, there are three purely legal questions in dispute, and in this order: (1) whether the mailbox rule or the physical-delivery rule governs filings with IRS; (2) whether the seven-year or the three-year statute of limitations of IRC § 6511 governs Taxpayers' 2003 tax-refund claim; and (3) whether CFC erred in concluding that it lacked subject-matter jurisdiction over the 2003 tax-refund claim.

[2] Undersigned counsel represents all Taxpayers, *viz.*, estate of Mr. Mohamad E. Taha (deceased), Ms. Sanaa M. Yassin, and Mr. Ali M. Taha.

ARGUMENT

IRS's argument is not "so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua*, 17 F.3d at 380. It is incorrect—and it is neither necessary nor sufficient to summarily dispose of this case. Also, there are other reasons—"*inter alia*," *id.*—that make summary affirmance *inappropriate* in this case. The Court should deny IRS's motion because it has failed to meet the standard of review for summary disposition.

Two weeks before Appellant's opening brief was due, IRS filed a motion for summary affirmance, "based solely" on the second of the three questions in dispute—the statute-of-limitations question. ECF 14 at 12. An answer to that question is inapposite unless the first question—whether the 2003 tax-refund claim was "filed"—is answered. IRS's motion, therefore, if granted, will do nothing to summarily dispose of this case, but instead confuse the issues further and deprive this Court of a logical presentation and resolution of the issues.

This Court recognized the logical order in which the three questions need to be resolved in this case. "Starting with the first question," "[i]f the claim was filed," needs to be answered before "resolving the second question: whether Appellants' 2003 claim was *timely* filed." *Taha*, 757 Fed. App'x at 952 (emphasis added). IRS's motion presents no arguments on the logically antecedent question—what constitutes filing under IRC § 7502. Instead, IRS suggests that there is "no need for this Court to resolve whether taxpayers may rely on the common-law mailbox rule to prove they filed a tax return." ECF 14 at 13 n.6. IRS has it backwards. Resolving the IRC § 7502 question in IRS's

favor fully resolves the case; resolving the IRC § 6511 question, standing alone, does not.

Further, IRS's argument on the statute-of-limitations question—the second of the three questions—is beside the point. Answering the second question is also not necessary and not sufficient, by itself, to resolve the question of whether CFC lacked subject-matter jurisdiction.

I. TAXPAYERS TIMELY FILED THE 2003 TAX-REFUND CLAIM WITHIN THE APPLICABLE SEVEN-YEAR STATUTE OF LIMITATIONS

A. The Seven-Year Statute-of-Limitations Period Applies Here

The seven-year statute of limitations applies to claims for "credit or refund … under section 166 or section 832(c), … or … section 165(g)." IRC § 6511(d)(1). IRS discusses only IRC § 166 in its motion, neglecting IRC § 165(g).[3] The seven-year statute applies to Taxpayers' tax-refund claim because it is a claim for refund of overpaid taxes under either Section 166 or Section 165(g).

Section 166 applies to "a taxpayer other than a corporation," such as Taxpayers here, who deducts "debt which becomes worthless." IRC §§ 166(a)(1), (d)(1). Noncorporate taxpayers can deduct worthless business debt, but not worthless "nonbusiness debt." *Id.* "Nonbusiness debt" means debt other than "a debt created or acquired … in connection with a trade or business of the taxpayer; or … a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business." IRC § 166(d)(2).

[3] IRC § 832(c), relating to the "taxable income of an insurance company" is irrelevant in this case.

Section 165(g) applies to any "security" that "becomes worthless." IRC § 165(g)(1). "Security" is defined as "(A) a share of stock in a corporation; (B) a right to subscribe for, or to receive, a share of stock in a corporation; or (C) a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form." IRC § 165(g)(2)(A)–(C).

In its motion, IRS ignores (and in its opinion, CFC ignored) the undisputed fact that Mr. Mohamad Taha owned 10% of the shares of Atek Construction, Inc., a California S Corporation, engaged in contracting and construction. ECF 14 at 3 (citing Doc. 77, Tr. 14:8–12, 120:11–12, 122:23–124:23; Doc. 4 at 3–4 ¶¶ 10–11). "[A] share of stock in a corporation" is a "security" (IRC § 165(g)), which, if it becomes worthless, can be claimed as a tax refund under the seven-year statute of limitations of IRC § 6511(d)(1)(A). No on-point case from this Court was found. However, CFC has held in *Draper v. United States*, 62 Fed. Cl. 409, 413 (2004), that only shares issued by a "corporation or a government entity" qualify as a "security" within the plain meaning of IRC § 165(g). IRS does not dispute that Mr. Mohamad Taha's 10% of the shares in Atek are worthless, nor that Atek is a corporation.

Taxpayers filed their 2003 tax return on April 14, 2004. *Taha*, 757 Fed. App'x at 949. Taxpayers' uncontroverted testimony is that they mailed their 2003 tax-refund claim in November of 2007, and CFC found after trial that the 2003 tax-refund claim would have been "likely … received by the IRS around … November 29, 2007." Doc. 92 at 8. Because Taxpayers' 2003 tax-refund claim is based on a worthless security, *i.e.*, shares issued by a corporation, the seven-year statute-of-limitations period of IRC

§ 6511(d) applies. Both the mailing and likely receipt date are well within seven years of the initial tax-return filing date of April 14, 2004.

Draper also held that to qualify for a deduction under Section 165(g), "the taxpayer's worthless investment must be both a 'capital asset' and a 'security'[.]" 62 Fed. Cl. at 413. A "capital asset" is any "property held by the taxpayer (whether or not connected with his trade or business)." IRC § 1221(a). The court below concluded that Taxpayers' income on which tax was paid and refund is now sought "was capital, not debt." Doc. 92 at 8. IRS does not dispute that Mr. Mohamad Taha held 10% of Atek's shares. Those shares were not "stock in trade of the taxpayer," not property "used in his trade or business," not intellectual property, not "accounts or notes receivable acquired" by Mr. Mohamad Taha "in the ordinary course of trade or business," not a "commodities derivative financial instrument held by a commodities derivatives dealer," not a "hedging transaction," and not "supplies of a type regularly used or consumed by" Mr. Mohamad Taha. IRC § 1221(a)(1)–(8). Mr. Mohamad Taha's ownership of Atek's shares was therefore both a "capital asset" as defined in IRC § 1221 and a "security" as defined in IRC § 165(g), and it therefore qualified for the seven-year limitations period.

In other words, the business-debt deduction under IRC § 166 is materially different from the worthless-security deduction under IRC § 165(g). To be a business debt, the debt must be "created or acquired … in connection with a trade or business of the taxpayer" or the worthlessness of the debt must be "incurred in the taxpayer's trade or business." IRC § 166(d)(2). To qualify for the worthless-security deduction under IRC § 165(g), however, it does not matter that the shares of Atek's corporate stock held by

Mr. Mohamad Taha are connected or not connected with his trade or business, because Congress has expressly said so in IRC §§ 165(g) and 1221: "whether or not connected with his trade or business."

Congress determined that the statute of limitations for taxpayers wanting a refund of taxes paid on such worthless securities should be seven years, not three. *See* IRC § 6511(d)(1). As such, that seven-year statute of limitations applies to Taxpayers' 2003 tax-refund claim, and Taxpayers filed the refund claim well within that seven-year limitations period.

B. IRS's Argument Against Applying the Seven-Year Statute-of-Limitations Period Is Not "So Clearly Correct" That "No Substantial Question Regarding the Outcome of the Appeal Exists"

As discussed above, because the seven-year, as opposed to the three-year, statute-of-limitations period applies here, IRS has not met the "so clearly correct" standard this Court uses to decide motions for summary disposition. *Joshua*, 17 F.3d at 380. The motion should therefore be denied. The Court should, instead, reinstate the briefing schedule to obtain full briefing from the parties.

In this Court (and in CFC), IRS exclusively focuses on Section 166 to distract the Court from the straightforward import and application of Section 165(g) to Taxpayers' tax-refund claim. While Taxpayers' *pro se* filings in the CFC and in the first appeal to this Court were not entirely clear as to which of the three sections—166, 832(c), or 165(g)—they were invoking as grounds for claiming that the seven-year statute-of-limitations period applies to their 2003 tax-refund claim, Taxpayers have clearly—and consistently—invoked IRC § 6511(d), thus preserving their § 165(g) argument. Any lack of

clarity on the part of *pro se* Taxpayers, therefore, should not have distracted CFC from determining whether it had subject-matter jurisdiction, for both CFC and this Court are required to determine jurisdictional questions *sua sponte* if needed. *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) ("A party, or the court *sua sponte*, may address a challenge to subject matter jurisdiction at any time, even on appeal."); *Metabolite Laboratories, Inc. v. Laboratory Corp. of America Holdings*, 370 F.3d 1354, 1369 (Fed. Cir. 2004) ("Subject matter jurisdiction is an inquiry that this court must raise *sua sponte*, even where, as here, neither party has raised this issue."); *Diggs v. Dep't of Housing & Urban Dev't*, 670 F.3d 1353, 1355 (Fed. Cir. 2011) ("[S]ubject matter jurisdiction cannot be conferred by waiver, estoppel, or consent.").

Furthermore, *pro se* filings are liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed.") (cleaned up); *Simanonok v. Simanonok*, 918 F.2d 947, 953 (Fed. Cir. 1990) (concluding that because a *pro se* plaintiff did not understand the "jurisdictional issue nor its implications," the Court had no "opportunity to consider a well-briefed" jurisdictional question and, therefore, a subsequent appellate decision reaching a different conclusion than the first appellate decision does not "run afoul of … adherence to the law of the case" doctrine). This Court should also not fall for IRS's distraction. This Court should instead fully review the jurisdictional question *de novo* because a *pro se* filer's lack of awareness of or failure to flesh out all available jurisdictional arguments does not waive them.

In other words, there is a straightforward way to resolve the second question, and thereby render IRS's summary-affirmance motion nugatory: Taxpayers' tax-refund claim was filed within the seven-year limitations statute, IRC § 6511(d), as a security

that became worthless under IRC § 165(g), or as bad debt under IRC § 166. IRS fails to meet the standard of review for summary disposition. IRS's motion for summary affirmance should, therefore, be denied.

II. RULING ON THE STATUTE-OF-LIMITATIONS QUESTION WILL NOT SUFFICE TO DECIDE WHETHER CFC HAS SUBJECT-MATTER JURISDICTION

IRS has the order in which this Court should resolve the questions reversed. If, for example, this Court decides that Taxpayers have not *filed* the 2003 tax-refund claim, it would not have to decide whether they have *timely* filed that claim. Deciding what constitutes "filing" under IRC § 7502 is the logically antecedent question. A summary-disposition posture that asks this Court to decide the second question without deciding the first is therefore ill-suited to clear the Court's docket of this case. Instead, the Court will benefit from full briefing of the parties.

In February of 2020, the Supreme Court declined to resolve the split in the circuits as to whether IRC § 7502 displaces the common-law mailbox rule and whether IRS's overruling, by regulation, of federal appellate cases is permissible. *See Baldwin v. United States*, 140 S. Ct. 690 (2020).[4] The Federal Circuit has declined to take sides on the Section 7502 question on which the sister circuits are split. *See Martinez v. United States*, 101 Fed. Cl. 688, 693 (2012) ("[T]he Federal Circuit did not expressly adopt either rule.") (citing *Davis v. United States*, 230 F.3d 1383 (Fed. Cir. 2000)).

Moreover, CFC and the Tax Court—the latter hearing a disproportionately higher number of tax-refund cases than the CFC—come down on opposite sides of the

[4] Undersigned counsel was counsel of record for Petitioners Howard and Karen Baldwin in the Supreme Court.

split. *Compare Martinez*, 101 Fed. Cl. at 693 (The Federal Circuit "did not reverse the longstanding Court of Federal Claims precedent that § 7502 contains the only exceptions to the physical delivery rule.") *with Estate of Wood v. Comm'r*, 92 T.C. 793 (1989) (*en banc*), *aff'd*, 909 F.2d 1155, 1161 (8th Cir. 1990) (the common-law mailbox rule applies), *and Mitchell Offset Plate Serv., Inc. v. Comm'r*, 53 T.C. 235 (1969) (the common-law mailbox rule applies even when tax documents are not received by IRS).

This Court could decide the logically antecedent question of whether Taxpayers *filed* the 2003 tax-refund claim by declining to pick one side of the circuit split, or this Court could pick a side. That remains to be seen—and the Court would benefit immensely from full briefing on the issue. Deciding the Section 7502 question in IRS's favor would be both necessary and sufficient to dispose of this case. This Court will need to reach the Section 6511 question only if the Court decides the Section 7502 question in favor of Taxpayers. In other words, deciding the Section 6511 question that IRS poses in its motion for summary affirmance is neither necessary nor sufficient to summarily dispose of this case, but deciding the Section 7502 question is. The inevitability of having to decide the Section 7502 question shows that IRS's motion for summary affirmance based only on the Section 6511 question should be denied.

IRS "denies that the IRS ever received" Taxpayers' 2003 tax-refund claim, and therefore, IRS denies "that taxpayers ever filed a claim for refund for 2003." ECF 14 at 14. If the common-law mailbox rule is not applied, IRS (and CFC, which declined to apply the common-law mailbox rule) would prevail—and if this Court were likewise to conclude that the mailbox rule does not apply, that decision would fully resolve this case. But if this Court were to conclude that the common-law mailbox rule applies, then

Taxpayers' document would be deemed filed on or about "November 29, 2007." Doc. 92 at 8. Thus, if the common-law mailbox rule were applied, only then would this Court even need to decide whether the 2003 tax-refund claim was *timely* filed—*i.e.*, decide which statute-of-limitations period applies (the three-year period of IRC § 6511(a) or the seven-year period of IRC § 6511(d)), and whether Taxpayers filed within the applicable limitations period. It would, therefore, make little sense to jump to the Section 6511 question based on IRS's urging in its motion for summary affirmance.

CONCLUSION

The Court should deny IRS's motion for summary affirmance and set a schedule to obtain full briefing from the parties.

Respectfully submitted, this 23rd day of October, 2020.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this response to motion complies with the Court's type-volume limitation rules. According to the word-count calculated by the word processing system with which this document was prepared, it contains a total of **3,395** words (less than 5,200 words).

/s/ Aditya Dynar
Aditya Dynar

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 23rd day of October, 2020, the foregoing document was filed electronically. This filing was served electronically on all parties by operation of the Court's electronic filing system.

/s/ Aditya Dynar
Aditya Dynar