No. 2020-2061

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.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 1:17-CV-01174-CFL (HON. CHARLES F. LETTOW)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2020-2061

Short Case Caption Taha v. US

Filing Party/Entity Plaintiff-Appellant

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Form 9 (p. 2)
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GLOSSARY

AOB	Appellant's Opening Brief
CFC	Court of Federal Claims
CIR	Commissioner of Internal Revenue
FCR	Federal Circuit Rules
FRAP	Federal Rules of Appellate Procedure
FRCP	Federal Rules of Civil Procedure
FRE	Federal Rules of Evidence
IRC	Internal Revenue Code, codified at 26 U.S.C.
IRS	Internal Revenue Service
NPRM	Notice of Proposed Rulemaking
RB	Response Brief
Taxpayers	Ali M. Taha, Mohamad E. Taha (deceased), and Sanaa M. Yassin

ARGUMENT IN REPLY

IRS asks this Court to conclude that Congress did, and IRS can, "hide elephants in mouseholes" on as important a question as subject-matter jurisdiction of federal courts. *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001). The Court should conclude otherwise. It should reverse CFC's decision and conclude that CFC has subject-matter jurisdiction over Taxpayers' refund suit because, under IRC § 7502 and the common-law mailbox rule, they filed their refund claim a few days before November 29, 2007, which was within the limitations period of IRC § 6511(d). The Court should then remand for further proceedings consistent with that conclusion.

I. THE COMMON-LAW MAILBOX RULE GOVERNS

The common-law mailbox rule is a generally applicable and widely accepted rule that predates the IRS and the U.S. Postal Service, and it survived the 1954 enactment of—and nine subsequent amendments to—IRC § 7502. *See Rosenthal v. Walker*, 111 U.S. 185, 193 (1884) (calling the rule "well settled" in 1884). If Congress wished to discard that rule, it had many an opportunity to do so—and it would have done so expressly. Through *nine* amendments to IRC § 7502, Congress has refused to do what IRS asks this Court to do: supplant the common-law mailbox rule.

Nor does Congress lack the know-how to supplant the common-law mailbox rule expressly. It has done so on multiple occasions in statutes not related to IRS. *See* AOB19 (string-citing statutes). Dispositive here, Congress has *not* used the type of express language in IRC § 7502 that would be necessary and sufficient to supplant the common-law mailbox rule. *Compare* IRC § 7502 *with* AOB19 (statutes cited therein).

IRS agrees that the "overarching question in this case is whether Taxpayers have timely filed a claim for refund for 2003," but claims that "the use of testimonial evidence is foreclosed by IRC § 7502 and [26 C.F.R.] § 301.7502-1(e)(2)(i)." RB16. IRS starts, not with the text of the statute, but with indeterminate legislative history. RB17. But federal courts "resort to legislative history" only "[w]hen the plain language and canons of statutory interpretation fail to resolve statutory ambiguity." *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000). IRS repeats an oft-rejected version of legislative history. Circuit courts concluding that § 7502 does not supplant the common-law mailbox rule have repeatedly repudiated it. RB17. If legislative history shows anything, it's that Congress enacted Section 7502 with the common-law mailbox rule in mind. *See* RB34–35.

IRS suggests that the default rule before Section 7502 came into existence was the physical-delivery rule, not the common-law mailbox rule. RB17. Two cases show that the pre-Section 7502 default rule was the common-law mailbox rule: *Detroit Auto. Prods. Corp. v. CIR*, 203 F.2d 785, 785–86 (6th Cir. 1953) (stating and applying the common-law mailbox rule: "a rebuttable presumption of fact that [the letter] was received by the addressee in the ordinary course of mail"), *Arkansas Motor Coaches, Ltd. v. CIR*, 198 F.2d 189, 191–92 (8th Cir. 1952) (same). Congress's enactment of Section 7502 in 1954 only conformed the section to *Rosenthal* (1884).

The appropriate place to start the analysis is with the text of the statute. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("We start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning") (cleaned up); *Indian*

Harbor Ins. Co. v. United States, 704 F.3d 949, 954 (Fed. Cir. 2013) ("When interpreting a statute, we start with the language of the statute itself. We search for Congress's intent using both text and structure of the statute. In reviewing the statute's text, we give words their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.") (cleaned up). Appellant's principal brief did just that, AOB15–21, and this Court should follow the text-first approach.

IRS instead maintains that "Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." RB26. The text of Section 7502 shows otherwise. The text starts with a "general rule": for "United States mail," the "postmark" date "shall be deemed to be the date of delivery." IRC § 7502(a). It then states that for two types of United States mail—registered and certified—the date on the mailing receipt "shall be deemed the postmark date" (and, therefore, the delivery date). IRC § 7502(c)(1)(B).

Section 7502(d) then states that Section 7502 "shall not apply to" three things: filings in "any court other than the Tax Court," "currency or other medium of payment unless received and accounted for," or filings "required … to be delivered by any method other than by mailing." Section 7502(d) does not list any other "exceptions," *i.e.*, Congress listed no other situations or scenarios to which Section 7502 "shall not apply." The negative-implication canon, therefore, points to the conclusion that in situations, as here, where the tax-refund document is mailed via regular U.S. mail but not received by IRS, the default rule given in Section 7502(a) applies: the "postmark" date is "deemed to be the date of delivery."

IRS would have the Section 7502(c) or (d) exceptions swallow the default rule given in Section 7502(a) respecting *all* categories of "United States mail." That is a misapplication of the negative-implication canon, and it renders superfluous Section 7502's repeated textual commitment to making the tendering of tax documents to the U.S. Postal Service or to a third-party mail carrier more relevant than actual delivery to or receipt by IRS. IRC § 7502(a)(1) ("postmark"), § 7502(a)(2)(B) ("deposited in the mail in the United States"), § 7502(c)(1)(B) ("date of registration"), § 7502(e)(1) ("date the deposit was mailed"), § 7502(f)(1) ("date recorded or marked as described in paragraph(2)(C) [date on which such item was given to such trade or business for delivery] by any designated delivery service"). *See also infra* (discussion regarding the negative-implication canon).

A. No Deference Is Due in Statutory-Silence Cases, Unlike Statutory-Ambiguity Cases

1. IRS Concedes That This Is a Statutory-Silence Case

IRS distinguishes between a late-delivery and a never-received scenario. RB18. Because this case falls in the latter category, the Court does not have to tackle the late-delivery scenario.

IRS's strongest text-based argument seems to be that "timely mailing is treated as timely filing as of the postmark date, *provided* the document is ultimately delivered. IRC § 7502(a)." RB18 (emphasis added). There is statutory basis for this argument: "If any … document … *is* … *delivered* by United States mail to the agency, … the date of the United States postmark stamped on the cover … shall be deemed to be the date of delivery[.]" IRC § 7502(a) (emphasis added). But that language also means the statute

applies only to a late-delivery situation, not to the never-received scenario. IRS argues, therefore, that if the document is never received by IRS, Section 7502 simply does not apply, or rather, only Section 7502(c) can potentially apply. RB18. That is because, IRS argues that while IRC § 7502(a) speaks of delivery ("is … delivered"), IRC § 7502(c) dealing with registered and certified mail does not ("is sent"). RB18.

In light of such statutory silence regarding the never-received scenario, IRS correctly notes that at least the Third, Eighth, and Ninth Circuits have held that "Section 7502 did not displace the common-law mailbox rule as a method to prove timely filing." RB19. IRS then argues—an argument that Taxpayers contest—that IRS has "superseded" precedents in those circuits "by regulation, [26 C.F.R.] § 301.7502-1(e)(2)." RB20.

IRS concedes that this is a statutory-silence, as opposed to a statutory-ambiguity case. *See* RB23 ("Section 7502 is silent on the question presented here."). That concession helps Taxpayers. The textual analysis, and deference analysis, if any, follows a different path in statutory-silence cases than in statutory-ambiguity cases.

2. Canons of Construction Resolve This Case

Regarding interpreting statutory silence, IRS says that the negative-implication canon competes with the common-law-presumption canon and then misapplies the negative-implication canon. RB30.[1] No such tension exists. Concluding that Section 7502 addresses only the late-delivery scenario, not the never-received one, requires

[1] *But see Arangure v. Whitaker*, 911 F.3d 333, 348 n.4 (6th Cir. 2018) ("The Supreme Court has not expressly addressed the hierarchy *between* canons in the *Chevron* analysis (or outside it), *i.e.*, which canons lower courts should consider before others.") (emphasis in original) (discussing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)).

application of the negative-implication canon, as explained above ("the expression of one thing implies the exclusion of others"). *Arangure*, 911 F.3d at 340. In other words, we end up having to deal with a statutory-silence case only after applying the negative-implication canon and concluding that the statute is silent as to the applicable rule when a tax document is mailed but never received.

The conclusion taken from the negative-implication canon makes the common-law-presumption canon especially salient here: in the absence of statutory language expressly displacing the common law, the common law rule governs. *Id.* at 342–43 ("The common-law presumption canon … presumes that the existing common law still applies unless the statute clearly indicates otherwise.") (citing *United States v. Texas*, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.") (cleaned up)); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 623 (1812) ("The common law, therefore, ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose."). The common law rule here is the mailbox rule articulated by the Supreme Court in *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884).

3. The Court Should Reject IRS's Request to Jump to Reasonableness Review

To avoid tackling the common-law-presumption canon, IRS maintains that when faced with "dueling" canons (an illusory duel, as explained above), courts should only evaluate whether "the agency's interpretation is unreasonable." RB30 (quoting *Baldwin*). That suggestion is a transparent attempt at collapsing the *Chevron* inquiry into a cursory

Step Two reasonableness review without engaging in rigorous Step Zero and Step One analyses. The Supreme Court has cautioned lower courts in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) that they must not skip those steps. IRS gets no deference to its litigating position regarding how the common-law presumption canon applies here.

On this point, IRS relies on *Baldwin*. RB30. But the Ninth Circuit had decided *Baldwin v. United States*, 921 F.3d 836 (9th Cir. 2019) (decided April 16, 2019) before the Supreme Court decided *Kisor* (decided June 26, 2019). So, IRS's reliance on *Baldwin* is doubly misplaced: *Kisor* requires this Court to "empty" the "legal toolkit" at Step One before so much as thinking of deferring to the agency's interpretation at Step Two, plus *Baldwin* only has persuasive, not precedential, value in this Circuit. Further, the common-law-presumption is to be applied *before* going down the deference road to reasonableness review. *Arangure*, 911 F.3d at 343. "Where, as here, the canons supply an answer, *Chevron* leaves the stage." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (cleaned up).

Sensing it is on thin ice, IRS attempts in vain to distinguish this Court's *Rios v. Nicholas* decision, which adopted the common-law mailbox rule for the never-received scenario where the statute was silent. RB30; *Rios v. Nicholas*, 490 F.3d 928 (Fed. Cir. 2007). *Rios* applied the common-law-presumption canon to conclude that the common-law mailbox rule applies where a document is mailed but not received by the government entity. 490 F.3d at 932. The *Rios* Court did not defer to the government litigant's position on the question. The Court should decline to do so here too.

IRS admits that the deference question is outcome-determinative: without deference, the mailbox rule would govern, and Taxpayers would prevail; with deference,

they would not. RB31. So, instead of a text-and-canons-first approach, IRS urges the Court to adopt a deference-first approach and fill the statutory silence, not with the common-law-presumption canon, but with IRS's regulation, 26 C.F.R. § 301.7502-1. RB31. That way of proceeding flips the order. This Court is required to apply the common-law-presumption canon at Step One in interpreting the statute *before* deciding whether to proceed to *Chevron* Step Two. Because the common law rule eliminates any ambiguity at Step One, there is no reason to reach Step Two here, which is the only circumstance where deference to the agency could come into play, as *Epic* and *Kisor* instruct. Federal agencies do not get to fill statutory silences; they only get to resolve statutory ambiguities.

4. There Is No Gap to Fill Because Canons of Construction Eliminate Ambiguity

IRS also proposes that there is no gap for this Court to fill because the IRS's 2011 regulation has already filled the gap. RB32. That approach is yet another way IRS is slyly asking this Court to jump straight to deference or reasonableness review without first employing and emptying the interpretive legal toolkit. And it ignores IRS's original sin: IRS is trying to fill a 'gap' whose existence is denied by several well-reasoned federal appellate courts concluding that the common-law mailbox rule articulated by the Supreme Court in *Rosenthal* survives after enactment of Section 7502 and amendments thereto. IRS must not be permitted to overrule federal-court precedent, then say there is a gap, and then fill that gap with a self-serving and sparsely reasoned regulatory amendment. *See* AOB37. Also, IRS's concession that this is a statutory silence case

shows there is no gap left open for the agency to fill—nor is there reason to jump to *Chevron* Step Two.

This case can be fully resolved at *Chevron* Step One. But IRS conflates *Chevron* Step One and Step Two in its "gap filling" argument. Gap-filling is Step Two language that IRS uses at Step One. Taxpayers argue that Section 7502 is *not* ambiguous at Step One because applying canons of construction resolve any perceived ambiguity from the statute. The Court does not even have to tackle Step Two. Step Two is where, if there were an ambiguity left after emptying the legal toolkit at Step One, then and only then would the agency be able to fill the gap with a reasonable construction of the statute. Thus, the idea that the common-law presumption canon fills a gap in Section 7502 with the common-law mailbox rule (or the physical-delivery rule) is wrong and should be rejected outright. The canons fully resolve this case at Step One. That should be the end of the matter. But because IRS conflates the Step One canons with Step Two gap-filling, Taxpayers rebut that misdirection below.

IRS posits that if there is a gap to fill, IRS's regulation has already filled it. RB31. The traditional approach is the opposite. The Supreme Court "has looked to the common law as the source of what might be termed *gap-filling* or *default rules* for filling in the details of the statute," the prominent legal scholar William Eskridge notes. William N. Eskridge, Jr. *et al.*, *Legislation and Statutory Interpretation* 299 (2d ed. 2006) (emphasis in original). That is because common law "consists of a comprehensive set of well-developed, time-tested rules." *Id.* at 300. When IRS's interpretation of the Internal Revenue Code departs from the common law, the Supreme Court has broken the tie in favor of retaining and applying the common law. *Id.* at 300 (discussing *Bob*

Jones University v. United States, 461 U.S. 574 (1983), rejecting IRS's interpretation of 26 U.S.C. § 501(c)(3)). The Court should do the same here: it should recognize that there is no gap to fill because the common-law mailbox rule read alongside the statute eliminates any ambiguity. IRS's regulation did not fill a gap; it tried to create one—and it now seeks deference for trying to do so.

There is no gap left here because canons of construction resolve the interpretive question at *Chevron* Step One. Gap-filling arises in situations where a court concludes that the statute is ambiguous. This case is different. All parties agree that the statute at issue here is silent. Silence is not ambiguity. Nor can silence be viewed as delegating gap-filling authority to the agency. Otherwise, each instance of statutory silence would turn into an open-ended delegation with no limiting principle. Statutory "silence" cannot be an "invitation to regulate," as ten federal appellate judges have said. *Oregon Restaurant & Lodging Ass'n v. Perez*, 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing *en banc*, joined by nine other Judges of the Ninth Circuit). Section 7502 was written against the background of the common-law mailbox rule. What might appear to be a gap is actually not a gap because Congress has not expressly or impliedly supplanted the common law. Congress's silence does not render the statute ambiguous or otherwise delegate open-ended gap-filling authority to IRS.

5. Neither *Brand X* Nor *Chevron* Deference Is Warranted

IRS next disavows reliance on *Brand X* deference under the notion that it applies in a circuit when "*that*" circuit has already interpreted the statute. RB35 (emphasis added); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). There is no dispute here that IRS sought to overturn multiple federal appellate

cases it found inconvenient by promulgating the 2011 amendment to 26 C.F.R. § 301.7502-1. And there is no dispute that the Taxpayers, California residents, relied on Ninth Circuit's pre-*Baldwin* (2019) *Anderson* (1992) precedent. *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992). *Anderson* was the law of the circuit in which Taxpayers resided at the time they mailed the relevant tax refund documents (2007)—precedent that the Ninth Circuit later discarded due to *Brand X* based on IRS's regulation that was not promulgated until 2011. *See* AOB27. IRS fails to address this crucial point as to why this Court may end up having to confront *Brand X*'s many failings in deciding whether the common-law mailbox rule governs for tax documents that IRS claims it never received.

A combination of *Kisor* and *Home Concrete* have cut back on *Brand X* deference quite a bit. *Kisor* prohibits lower courts from skipping the first important step in any decision involving statutory interpretation: empty the legal toolkit by exhausting all available tools and canons of construction. *Home Concrete* categorically bars administrative interpretations from trumping Supreme Court decisions. *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012). *Home Concrete* is fatal to IRS's argument to the extent it is suggesting that its 2011 regulations trump the Supreme Court's *Rosenthal* decision.

Further, IRS's 2011 regulation did not exist at the time Taxpayers mailed the tax-refund document in 2007. IRS suggests there is no bar to giving the 2011 regulation retroactive effect. RB29; 26 U.S.C. § 7805. Section 7805 does not authorize this type of self-serving regulation that harms honest taxpayers. Retroactivity prevents loopholing whereby taxpayers could rearrange their affairs such as to obtain a tax advantage in the

time interval after IRS issues a notice of proposed rulemaking and before it issues a notice of final rulemaking. Retroactivity in the context of many IRS rules perhaps punishes behavior that should be illegal but was not precisely captured by a prior regulation. That rationale *does not* apply to the regulation at issue here. At issue here is a rule relating to filing documents with IRS. Section 7502 stands on the notion that the taxpayer should not be punished for the errors of the U.S. Postal Service, third-party mail carriers, or IRS's document collection centers. In the face of a clear statute and well-settled common law, IRS's 2011 regulation should be neither upheld nor applied here.

If nothing else, IRS's disavowal should be taken seriously. If IRS is not asking for *Brand X* deference, the Court should honor IRS's wishes and decline to acquiesce in IRS's interpretation under *Brand X*.

In the end, this Court should afford neither *Brand X* nor *Chevron* deference to an attempted regulatory annulment of Article III decisions by an Article II agency for the reasons Taxpayers posit in their principal brief. *See* AOB22–42. Instead, this case can be resolved by applying the ordinary tools of construction such as the common-law-presumption canon—obviating the need to defer to IRS's resolution of the interpretive question that is presented to this Court.

6. This Court Should Decide Federal Courts' Subject-Matter Jurisdiction for Itself, Without Deference to IRS's Views on the Question

IRS next maintains that Taxpayers' arguments regarding *Brand X* and *Chevron* "have been waived and not properly preserved for appeal." RB38. That is a false, if not

a desperate, argument. *IRS* brought the *Baldwin* denial of certiorari to the CFC's attention, thus asserting that the CFC should both apply the Ninth Circuit's *Baldwin* decision and defer to IRS's 2011 regulation. Appx22 (Docket No. 86). The CFC did just that. Appx6–7 (discussing the Ninth Circuit and Supreme Court's *Baldwin* opinions, and *Chevron* and *Brand X*), Appx7 ("Given these precedents, the court is left with little room for digression."). Taxpayers thereafter point in this Court to all the ways in which the CFC erred in deferring to IRS's interpretation due to *Baldwin*, *Brand X*, and *Chevron*. That improper-deference question is properly before this Court.

Also, that question is a matter of statutory construction and relates to subject-matter jurisdiction, both of which are nonwaivable and subject to this Court's *de novo* review. *Ferreiro v. United States*, 350 F.3d 1318, 1324 (Fed. Cir. 2003); *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1335 (Fed. Cir. 2008).

B. CFC Found that Taxpayers Proved the Mailing Date at Trial

IRS argues that Taxpayers "cannot prevail due to the vague, uncorroborated testimony in this case." RB39. On the contrary, there is *uncontroverted* testimony that the mailing date for the 2003 refund claim was a few days before November 29, 2007—and the CFC entered that finding of fact into the record. Appx8. IRS does not suggest that the CFC's factual finding was "clear error," *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999), which is the applicable standard of review for that question.

IRS points to this Court's unpublished and nonprecedential opinion in *Davis v. United States*, No. 99-5073, 2000 WL 194111 (Fed. Cir. Feb. 16, 2000) for the proposition that corroboration of the taxpayer's testimony is necessary when IRS does not receive the mailing at issue. Lack of *corroboration* without pointing to any *controverting*

facts would be an odd evidentiary rule. Mr. Ali Taha's in-court testimony was under oath and subject to full cross-examination under the applicable federal rules of evidence and civil procedure. IRS points to nothing suggesting it impeached any portion of Mr. Ali Taha's testimony, does not point to any fact other than that it never received the document that Mr. Ali Taha mailed, does not suggest there were insufficient guarantees of trustworthiness or truthfulness that would make Mr. Ali Taha's testimony suspect.[2]

Nor could there be corroboration in situations like this one. When a letter is mailed via regular U.S. mail and never received by the intended recipient, no one has the envelope, which is the only physical evidence of the postmark date. The only available—and best—evidence in such situations is testimony, under oath, subject to full cross-examination, and probed for guarantees of trustworthiness. Corroboration, therefore, cannot be the deciding factor.

Relying on *Davis*, IRS seems to suggest that at least a second person needed to testify to sufficiently corroborate Mr. Ali Taha's testimony. RB39. Presumably, that person would be Mr. Mohamad Taha, deceased at the time of trial, whose tax-refund claim gave rise to this case. Drawing an adverse inference from such supposed lack of corroboration quickly runs into problems with the witness unavailability provisions of the federal rules of evidence. *See* FRE 804(a)(4).

IRS points to *Wood* and *Anderson* for the types of corroboration that would satisfy the common-law mailbox rule to argue that Mr. Ali Taha's testimony here falls short.

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[2] Mr. Ali Taha testified, "I know for sure 2002 [tax-refund claim] and 2003 [tax-refund claim] were filed simultaneously" in "separat[e]" "envelopes." Appx264. IRS received the 2002 tax-refund claim on November 29, 2007 and never received the 2003 tax-refund claim. Appx4.

RB40 (discussing *Estate of Wood v. CIR*, 909 F.2d 1155, 1156–57 (8th Cir. 1990); *Anderson*, 966 F.2d 487). *Wood* involved an unusual situation where the president of a bank prepared the tax document for someone else, walked the letter to the one-room local post office, and saw the postmaster postmark the envelope. 909 F.2d at 1156–57. And *Anderson* involved a plaintiff who saw the postmaster stamp her envelope. 966 F.2d at 491. Just because that was the testimony in those cases does not mean Mr. Ali Taha's truthful testimony here is insufficient as a matter of law. Nor is "corroboration by a disinterested witness," RB41, going to work in the vast majority of cases concerning individuals as opposed to business-entity taxpayers where individuals prepare and file their own tax paperwork. Even assuming disinterestedness were a factor, Mr. Ali Taha (like the bank president in *Wood*) did not testify as to his own tax document here. The tax-refund claim is his deceased brother Mr. Mohamad Taha's and his sister-in-law Ms. Sanaa Yassin's.

Taxpayers have the burden of establishing jurisdiction by a preponderance of the evidence. *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014). Taxpayers met that burden. Appx8 (finding that IRS would have "likely" received Taxpayers' 2003 refund claim by "November 29, 2007"). IRS's protest about sufficiency of evidence is without merit.

II. THE SEVEN-YEAR STATUTE OF LIMITATIONS APPLIES

A. All Arguments Are Squarely Presented in This Court

Respecting the statute-of-limitations question, IRS presents two preliminary arguments: variance (RB44) and waiver (RB46). Neither argument has merit.

IRS asserts that Taxpayers have brought forward "two new legal theories in their opening brief as to why their claim for refund for 2003 is timely." RB43. Based on this assumption, IRS then explains why the variance and waiver doctrines "preclude Taxpayers from raising these new arguments for the first time on appeal." RB43.

Taxpayers only explain why the seven-year statute of limitations applies; they do not present new theories. Whether the seven-year or the three-year statute of limitations applies has been a point of contention throughout this suit. IRS does not, and cannot, dispute that. RB43 ("In the CFC Taxpayers urged that the extended time to file a claim for refund under Section 6511(d) applied.").

1. The Substantial-Variance Doctrine Is Inapposite

IRS's principal argument stems from *Lockheed Martin Corp. v. United States*, 210 F.3d 1366 (Fed. Cir. 2000). RB44. IRS's secondary argument is based on *Ottawa Silica Co. v. United States*, 699 F.2d 1124 (Fed. Cir. 1983). RB45.

The substantial variance doctrine "bars a taxpayer from presenting claims in a tax refund suit that substantially vary the legal theories *and* factual bases set forth in a tax refund claim presented to the IRS." *Lockheed*, 210 F.3d at 1371 (cleaned up; emphasis added). Variance in both legal theories *and* factual bases is necessary under the substantial-variance doctrine. There has been no variance in either here. CFC has found facts sufficient to support Taxpayers' argument that the seven-year statute of limitations

applies. The amount of refund Taxpayers are entitled to is a separate determination from whether, for purposes of subject-matter jurisdiction, the refund claim was timely filed within the applicable statute of limitations.

Also important, the substantial-variance doctrine limits litigation "to those grounds the IRS has already had an opportunity to consider and is willing to defend." *Ottawa Silica*, 699 F.2d at 1139. Because IRS never received the 2003 refund claim, IRS has not had the opportunity to consider it. Indeed, CFC found, and IRS concedes, IRS "never disallowed" the 2003 tax-refund claim. Appx4. How could the claim have been simultaneously considered and not considered?

IRS would look to the "two-page" 2003 refund claim to determine "the legal theories" under the substantial-variance doctrine. RB45; Appx1183–1184. The statute of limitations is not a "legal theory" that can be raised in the tax form; the IRS-drafted form has no line item—and IRS points to nothing in the Taxpayers' two-page 2003 refund claim, Appx1183–1184—where a taxpayer could enter the precise statute or regulatory section for the statute of limitations the taxpayer claims as a basis for timely filing. Nor would there be a reason to have such a line item on the relevant tax forms: the argument that a certain statute of limitations applies and that it has run is an argument that *IRS first raises* when it denies a refund claim. IRS has not even denied the 2003 claim yet (IRS "never disallowed" the 2003 refund claim, Appx4), and has not informed Taxpayers of any basis for denial.

Even assuming there is any way to glean a "legal theory" *and* the "factual bases" for a refund claim by simply looking at the 2003 refund document itself, IRS ignores that CFC has already found facts sufficient for this Court to now conclude as a matter

of law that the seven-year statute of limitations applies. If this Court thinks additional fact development is needed to make that determination, it could, as it did in 2018, remand to CFC with specific instructions on what factual development would be necessary to decide whether CFC has subject-matter jurisdiction. *See* Appx107 (asking CFC to find three material jurisdictional facts).

Also, because CFC found facts suggesting that the debt could fall under either Sections 166 or 165(g) (Mr. Mohamad Taha's stake in Atek is "nonbusiness" debt, Appx9, or alternatively, is "capital, not debt," Appx8), it is ordinary for an appellant to then point out on appeal all the ways in which the lower court erred as a matter of law when it concluded that the three-year, not the seven-year, statute of limitations applies; otherwise, every tax-refund appeal would be rendered nugatory and there could be no hope for "meaningful judicial review" ever. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020).

Taxpayers do just that in their Opening Brief. AOB9–10, AOB12–14, AOB43–50. Taxpayers have consistently argued throughout the course of this litigation, and even prior to that if the date of mailing the 2003 refund claim is any indication, that the seven-year statute of limitations of Section 6511(d) applies. That legal theory and reliance on Section 6511(d) has been clear and variance-free since the very beginning. CFC also passed judgment on the issue. *Hollmer v. Harari*, 681 F.3d 1351, 1356 (Fed. Cir. 2012). It is, therefore, properly presented in this Court.

The substantial-variance doctrine is simply inapplicable here.

2. Taxpayers Have Not Waived Any Theory of Recovery

Pointing to the 2003 refund form, IRS argues substantial variance; pointing to subsequent court filings (or lack thereof), IRS next argues waiver. RB46. IRS's waiver argument is meritless.

IRS's brief presents a confused picture. IRS suggests the Court should look at Taxpayers' filings in CFC to determine waiver. RB46. On the next page, it suggests, the appropriate waiver inquiry focuses on "the pleading[s]." RB47; *see also* FRCP 7(a) (defining "pleadings," relevant here, as "a complaint"). Next, IRS suggests that jurisdictional arguments must be made "in an administrative claim for refund prior to filing their suit," RB48, ignoring IRS's own concession and CFC's finding that IRS never disallowed the 2003 refund claim, meaning that there has never been an administrative determination of that claim.

IRS's subterfuge is astounding. It does not tell the Court when waiver occurs—when jurisdictional facts are omitted from a tax form that makes no provision for listing them, and one that IRS never disallowed? When IRS raises as a defense in front of the trial court that the three-year, not the seven-year, statute of limitations applies? When the trial court finds jurisdictional facts that would form the predicate for concluding as a matter of law that the seven-year statute of limitations applies?

IRS does not dispute that it would be error to predetermine the refund claim without determining whether CFC has subject-matter jurisdiction to decide what amount of refund is due. Yet, IRS somehow thinks "Taxpayers have waived any claim based on nonbusiness bad debt or worthless securities." RB49. CFC thus far has not

determined the *claim*. Taxpayers do not ask this Court to determine the *claim*. The question presented is whether CFC had *subject-matter jurisdiction* to determine the claim.

"[T]he law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). IRS tells us today that Taxpayers have waived arguments as to why the seven-year statute of limitations governs because IRS claims and CFC agreed that the three-year statute of limitations applies. That is not waiver; that is so much hand-waving on IRS's part. No waiver has occurred here.

B. The Section 6511(d) Seven-Year Statute of Limitations Applies

1. The Basis for the Refund Can Be Characterized as Business Bad Debt

IRS essentially argues that CFC erred by not applying the *Cenex* 11-factor test to the facts found by CFC after trial. RB50–51; *Cenex, Inc. v. United States*, 156 F.3d 1377, 1381–82 (Fed. Cir. 1998). CFC's entire *Cenex* analysis amounts to six sentences, Appx8, even if there was testimony establishing many of the facts necessary to evaluate the *Cenex* factors—and evaluate them in Taxpayers' favor as a matter of law. Appx3–4 (facts regarding the "promissory note" "from Atek" to Mr. Mohamad Taha). The *Cenex* factors and corresponding facts found by CFC are as follows:

(1) Names given to the instruments: "promissory note," Appx3;

(2) Presence or absence of a fixed maturity date and schedule of payments: CFC seems not to have entered a finding of fact on the record for this *Cenex* factor;

(3) The presence or absence of a fixed rate of interest and interest payments: 10% interest rate, Appx3;

(4) The source of repayment: "profit distributions retained by Atek," Appx3–4;

(5) The adequacy or inadequacy of capitalization: CFC seems not to have entered a finding of fact on the record for this *Cenex* factor;

(6) The identity of interest between the creditor and the stockholder: Mr. Mohamad Taha is both creditor and stockholder, Appx3–4;

(7) The security, if any, for the advances: CFC seems not to have entered a finding of fact on the record for this *Cenex* factor;

(8) The corporation's ability to obtain financing from outside lending institutions: "Mr. Mohamad Taha … sought to recover his undistributed amounts via a bankruptcy action" but "was unsuccessful in his claim for payment because the bankruptcy court found that there were insufficient funds to distribute to creditors." Appx4;

(9) The extent to which the advances were subordinated to the claims of outside creditors: CFC seems not to have entered a finding of fact on the record for this *Cenex* factor even if the relevant bankruptcy-related court orders are part of the record, Appx1180, Appx1196–1197;

(10) The extent to which the advances were used to acquire capital assets: "Atek retained most of this money to sustain the company's operations," Appx3; and

(11) The presence or absence of a sinking fund to provide repayments: CFC seems not to have entered a finding of fact on the record for this *Cenex* factor.

Although CFC found facts relevant to addressing the *Cenex* factors, because CFC found that Mr. Mohamad Taha's "*pro rata* share of Atek's income is capital, not debt," Appx8, CFC concluded as a matter of law that a "contribution to capital shall not be considered a debt for purposes of section 166." Appx8. In other words, per IRS's argument, CFC did not apply the 11-factor *Cenex* test that IRS now claims applies. RB50–52. Taxpayers agree that if factfinding is needed, the remedy is reversal and remand with instructions to enter missing findings into the record and then analyze them under the *Cenex* test. But there are sufficient facts in the record, thereby enabling this Court to decide *de novo* whether CFC erred in deciding a question of law: whether these facts make the debt "business debt" for purposes of Section 166 such that the seven-year statute of limitations applies.

CFC found facts relevant to six of the eleven *Cenex* factors. And there are facts developed in the record on one of the factors even if CFC did not expressly state facts going to that factor in its decision. Seven factors, therefore, go in Taxpayers' favor. Seeing how seven of the eleven factors favor Taxpayers, the Court has enough factual material to conclude as a matter of law that the seven-year statute of limitations applies pursuant to *Cenex*. Alternatively, the Court does not have to decide the *Cenex* question

because the same seven-year statute of limitations applies to refund claims based on either a nonbusiness debt or on capital.

2. CFC Found that the Refund Claim Is Based on Either Nonbusiness Debt or on Capital

CFC's finding that the 2003 refund claim is based on nonbusiness debt "for purposes of Section 166," Appx8–9, is sufficient for this Court to conclude as a matter of law that the refund claim was filed within the applicable statute of limitations. AOB45–50.

Alternatively, CFC found that the 2003 refund claim is based on capital, not debt. That finding of fact is sufficient for this Court to conclude as a matter of law that the seven-year statute of limitations therefore applies. *See* IRC §§ 6511(d), 165(g); AOB43–45.

IRS's argument on these two points, RB56–59, falters due to its problematic premise that Taxpayers must prove they are entitled to a certain amount of refund, as opposed to proving, under the preponderance-of-the-evidence standard, that CFC possesses subject-matter jurisdiction because the seven-year statute of limitations likely applies. IRS's presentation of argument that quibbles over the amount of refund owed is largely academic at this juncture. This Court's task is plain: it must decide whether the refund claim was filed within the applicable statute of limitations. It was because Taxpayers claimed a refund "under section 166 or … section 165(g)." IRC § 6511(d)(1).

CONCLUSION

The Court should reverse CFC's decision and conclude that CFC had subject-matter jurisdiction over Taxpayers' tax-refund suit. Under the common-law mailbox rule, the Court should deem their refund claim filed on or a few days before November 29, 2007, which makes it timely filed within the applicable limitations period of IRC § 6511(d). The Court should then remand for further proceedings consistent with that conclusion.

Respectfully submitted, on June 1, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and FCR 32(b)(1) because this brief contains **6,465** words, excluding the parts of the brief exempted by FRAP 32(f), which is within the applicable 7,000-word limit. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit by using the Court's Case Management / Electronic Case Filing (CM/ECF) system. All participants have consented to service by electronic mail:

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