NO. 16-6371

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MART D. GREEN, TRUSTEE OF THE DAVID AND BARBARA GREEN 1993 DYNASTY TRUST,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant,

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
CASE NO. 5:13-CV-01237
JUDGE TIMOTHY D. DEGIUSTI

APPELLEE'S [PROPOSED] SURREPLY

Charles E. Geister III, OBA # 3311
J. Leslie LaReau, OBA # 16257
Len Cason, OBA # 1553
Michael A. Furlong, OBA # 31063
HARTZOG CONGER CASON & NEVILLE, LLP
201 Robert S. Kerr Avenue
1600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000
Facsimile: (405) 996-3403
ATTORNEYS FOR APPELLEE

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APPELLEE'S [PROPOSED] SURREPLY

Plaintiff-Appellee Mart D. Green, Trustee of The David and Barbara Green 1993 Dynasty Trust ("Trust") respectfully submits the following Surreply to the Reply Brief of Defendant-Appellant United States of America ("Government"). The Trust has concurrently filed a Motion for Leave to File Surreply.

ARGUMENT

The Government appeals the District Court's order granting summary judgment to the Trust on the issue of whether I.R.C. § 642(c) allows a taxpayer to deduct noncash contributions sourced in gross income at fair market value. *Green v. United States*, 144 F.Supp.2d 1254 (W.D. Okla. 2015). In its principal brief, the Trust explained that this Court should uphold the District Court for two reasons. First, the Trust argued that fair market value is the correct valuation standard to apply to a deduction under I.R.C. § 642(c). (Appellee's Br. at 22-26, 33-50.) Second, the Trust pointed out that the parties agree that the Trust sourced its noncash charitable contributions in unrelated business income and, accordingly, fair market value is also the correct valuation standard to apply under I.R.C. § 681, 512(b)(11), and 170(b)(1). (Appellee's Br. at 26-32.)

In its Reply Brief, the Government argued, for the first time in this litigation, that the "doctrine of variance" bars this Court from exercising jurisdiction over the Trust's §§ 681, 512(b)(11) and 170(b)(1) argument. (Reply Br. at 26-28.) The

"doctrine of variance" is a judicial interpretation of I.R.C. § 7422(a), which provides that a taxpayer may not sue for a refund until first seeking a refund from the IRS, and Treas. Reg. § 301.6402-2(b)(1), which provides that a claim for refund "must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof."

This Court has held that these provisions bar this Court from considering an issue raised by a taxpayer that has not first presented the issue in a claim for refund to the IRS. For example, in *True v. United States*, this Court held a taxpayer could not assert a collateral estoppel issue against the IRS because it had not first raised that issue in its claim for refund. 190 F.3d 1165, 1173 (10th Cir. 1999). In *Angle v. United States*, this Court held a taxpayer's untimely third claim for refund was not "reasonably encompassed" by its previous claims for refund and, accordingly, this Court could not consider the issues raised therein. 996 F.2d 252, 254 (10th Cir. 1993) (citing *Herrington v. United States*, 416 F.2d 1029, 1032 (10th Cir. 1969)).

The Government incorrectly asserts that the Trust did not raise the issue of whether it was allowed a deduction under §§ 681, 512(b)(11) and 170(b)(1) in its claim for refund submitted to the Internal Revenue Service. (*Id.* at 28.) In fact, the Trust's 2004 amended income tax return (which constituted its claim for refund) explains in meticulous detail the Trust's deduction computation under §§ 681, 512(b)(11), and 170(b)(1). (App. at 76-77.) These were the appropriate statutes

under which to calculate the Trust's charitable deduction with respect to unrelated business income, which constituted most of the Trust's gross income.

Indeed, the primary reason the Trust filed an amended return was to recalculate its deduction under § 170(b)(1)(A) instead of § 170(b)(1)(B) as it had done in its original 2004 income tax return. (App. at 75.) The only way the Trust would have reached the percentage limitations in § 170(b)(1) in the first place was if it claimed a deduction under § 512(b)(11), which incorporates the percentage limitations by reference. Thus, §§ 681, 512(b)(11), and 170(b)(1) undeniably formed the basis of the Trust's claim for refund.

In its disallowance letter, the IRS recognized that the Trust had claimed a deduction with respect to unrelated business income to which the percentage limitations of § 170(b)(1) apply. (App. at 161-62.) The IRS nonetheless concluded that the Trust was limited to deducting its adjusted basis in its noncash contributions rather than fair market value. It was the IRS and not the Trust that first injected the valuation question into this tax dispute.

The Trust's principal brief explains in detail why the District Court proceeding ultimately focused on the valuation standard applicable to a § 642(c) deduction. (Appellee's Br. at 11-12.) Once the District Court determined, under § 642(c), that a fair market value standard applied to the Trust's deduction, it was no longer necessary for the Trust to press its §§ 681, 512(b)(11), and 170(b)(1)

argument below. But the direction that the District Court proceedings took is irrelevant to the question of whether the Trust claimed a refund under §§ 681, 512(b)(11), and 170(b)(1), as in fact it did. Indeed, the final judgment rendered by the District Court was calculated according to the unrelated business income charitable deduction paradigm set forth in §§ 681, 512(b)(11), and 170(b)(1), to which the Government made no objection. (App. at 389-90.)

In contrast to the taxpayers in *True* and *Angle*, the Trust did not omit §§ 681, 512(b)(11), and 170(b)(1) from its claim for refund. At a minimum, these statutes were "reasonably encompassed" by the Trust's claim. The Court of Federal Claims has held that it has jurisdiction to consider a taxpayer's position as long as it was "comprised within the general language of the claim." *Mandich v. United States*, 124 Fed. Cl. 209, 225 (2015) (emphasis added) (citing *Ottawa Silica Co. v. United States*, 699 F.2d 1124, 1138 (Fed. Cir. 1983)). The Court of Claims previously held that a court has jurisdiction to consider a ground for refund that is "expressly or impliedly contained in the application for refund." *Burlington Northern, Inc. v. United States*, 684 F.2d 866, 868 (Ct. Cl. 1982) (emphasis added).

Similarly, in *True*, this Court recognized:

> [A]n issue raised in litigation, but not specifically referred to in the refund claim, *might be permitted*, if the newly raised issue was subsidiary to, or an integral part of, the grounds presented in the refund claim such that the omitted issue must have necessarily been considered by the [IRS] in its review of the refund claim.

190 F.3d at 1172 (citing *Lockheed Martin Corp. v. United States*, 39 Fed. Cl. 197, 201 (1997) and *Parke, Davis & Co. v. United States*, 1975 WL 787 (E.D. Mich. Nov. 5, 1975)). The Government cannot reasonably deny that the IRS considered §§ 681, 512(b)(11) and 170(b)(1) in reviewing the Trust's refund claim. As noted above, the IRS highlighted the percentage limitations of § 170(b)(1) in its disallowance letter. Thus, the Government is incorrect to assert that this Court lacks jurisdiction to consider §§ 681, 512(b)(11), and 170(b)(1) in deciding this appeal.

CONCLUSION

WHEREFORE, the Trust respectfully requests that this Court determine it has jurisdiction to consider the Trust's argument under §§ 681, 512(b)(11), and 170(b)(1) and affirm the judgment of the District Court.

Respectfully Submitted,

/s/ Charles E. Geister

Charles E. Geister III, OBA # 3311
J. Leslie LaReau, OBA # 16257
Len Cason, OBA # 1553
Michael A. Furlong, OBA # 31063
HARTZOG CONGER CASON & NEVILLE, LLP
201 Robert S. Kerr Avenue
1600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000
Facsimile: (405) 996-3403
ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I hereby certify that on September 13, 2017, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Geoffrey J. Klimas
geoffrey.j.klimas@usdoj.gov

Hilarie Snyder
hilarie.e.snyder@usdoj.gov

Olivia Hussey Scott
olivia.hussey.scott@usdoj.gov

I hereby certify that with respect to the foregoing:

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Date: September 13, 2017 /s/ Charles E. Geister, III

Charles E. Geister III, OBA # 3311
HARTZOG CONGER CASON & NEVILLE, LLP
201 Robert S. Kerr Avenue
1600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000
Facsimile: (405) 996-3403
ATTORNEY FOR APPELLEE

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/s/ Charles E. Geister, III

Charles E. Geister III, OBA # 3311
HARTZOG CONGER CASON & NEVILLE, LLP
201 Robert S. Kerr Avenue
1600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000
Facsimile: (405) 996-3403
ATTORNEY FOR APPELLEE