No. 12-1408

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

QUALITY STORES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF RESPONDENTS

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I. INTEREST OF *AMICUS CURIAE*

The American Benefits Council (ABC) is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans under ERISA.[1] ABC's more than 360 members include large employer sponsors of employee benefit plans, as well as organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, ABC's members either directly sponsor or provide services to ERISA plans covering more than 100 million Americans. ABC regularly participates as amicus curiae in this Court and in other courts on issues that affect employee benefit plan design or administration.

ABC and its members have a substantial interest in this case, which presents the issue of how to determine which supplemental unemployment compensation benefits are excluded from taxable wages for purposes of the Federal Insurance Contributions Act. ABC submits that the Sixth Circuit provided the proper answer to this question by using the statutory definition in 26 U.S.C. § 3402(o).

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Both parties have consented to the filing of this brief.

II. SUMMARY OF ARGUMENT

The government and Quality Stores agree that some supplemental unemployment compensation benefits are excluded from taxable wages for purposes of the Federal Insurance Contribution Act, even though such benefits are included in the recipient's taxable income and are subject to income tax withholding. The parties disagree, however, on which such benefits are excluded from taxable wages for FICA purposes.

The government contends the supplemental unemployment compensation benefits that are excluded from taxable wages for FICA purposes are only those benefits that satisfy the requirements imposed by a series of revenue rulings issued by the IRS starting in 1956 and continuing through 1990. Quality Stores contends the benefits excluded from taxable wages for FICA purposes are any benefits that come within the statutory definition of supplemental unemployment compensation benefits in section 3402(o)(2)(A) that applies for income tax withholding purposes.

The benefits at issue in this case are severance payments that were made to employees in connection with the termination of the taxpayer's business operations. These benefit payments do not satisfy the requirements imposed by the IRS revenue rulings because the benefits were not in any way tied to state unemployment compensation benefits, whereas the most recent revenue ruling requires such coordination in order for benefits to be excluded from taxable wages for FICA purposes. In contrast, however, the benefits at issue in this case come

within the statutory definition of supplemental unemployment compensation benefits in section 3402(o)(2)(A). Unlike the most recent revenue ruling, this statutory definition does not contain any requirement that the benefits must be tied to state unemployment compensation benefits.

The Sixth Circuit agreed with Quality Stores that the statutory definition controls, even though the definition by its terms applies only for income tax withholding purposes and not for FICA purposes. However, in an earlier case involving a different taxpayer that presented the same issue, *CSX Corp. v. United States*, 518 F.3d 1328 (Fed. Cir. 2008), the Federal Circuit agreed with the government that the revenue rulings, rather than the statutory definition, are controlling for FICA purposes.

Most of the emphasis in the briefs and the opinions in both the Sixth Circuit and the Federal Circuit focused on whether the taxpayer in each case was correct that the definition of supplemental unemployment compensation benefits in section 3402(o)(2)(A) that is applicable for income tax withholding purposes determines which benefits are excluded from taxable wages for FICA purposes, and not on whether the government is correct that only benefits that satisfy the requirements of the revenue rulings are excluded from taxable wages for FICA purposes. However, an evaluation of the merits of the taxpayer's position is only part of the picture, and should not be the sole basis for deciding the case.

The resolution of the case must also take into account an evaluation of the merits of the government's position. In that regard, the government is mistaken in its position that a series

of IRS revenue rulings can properly establish a controlling answer to the legal issue of which supplemental unemployment compensation benefits are excluded from taxable wages for FICA purposes.

It is notable that the government itself is equivocal in its position regarding the legal status of these revenue rulings. While the government contends the IRS revenue rulings determine what benefits are excluded from taxable FICA wages, the government does not provide an explanation for why the positions taken in these revenue rulings should be controlling in determining which benefits are excluded from taxable FICA wages. Moreover, the government does not even contend that the positions taken in these rulings are correct, much less provide an explanation for why the IRS believes these positions are correct.

The government simply contends that because the benefits at issue in the case do not meet the requirements in the rulings, these benefits cannot be excluded from FICA wages. The government asserts that it is not claiming the revenue rulings are entitled to judicial deference, while failing to explain how it might be that IRS documents such as revenue rulings that the government acknowledges are not entitled to deference could nevertheless be determinative on the issue of which supplemental unemployment compensation benefits are excluded from taxable wages for FICA purposes.

When the issue in the case is evaluated not merely from the perspective of the merits of the taxpayer's position on which supplemental unemployment compensation benefits are excluded from taxable wages for FICA purposes, but also from

the perspective of the merits of the government's position that relies on the revenue rulings, there can be no doubt that the taxpayer's position is preferable, since the taxpayer's position provides a coherent and sensible answer to the issue, whereas the government does not offer an alternative to the taxpayer's position that is coherent or supportable.[2]

III. ARGUMENT

The fundamental problem with the government's position as to which supplemental unemployment compensation benefits are excluded from taxable wages for FICA purposes is that the government offers no real alternative to the taxpayer's position on this issue. Instead, the government offers a completely unsatisfactory combination of partial positions that do not come together into a coherent whole.

The government contends that the particular benefits that are at issue in this case do not come within the category of supplemental unemployment compensation benefits that are excluded from taxable wages for FICA purposes because these benefits do not come within the terms of a series of revenue rulings the IRS has issued on this subject. However, the government has made no effort to defend the conclusions reached in these revenue rulings and contends instead that the correctness of

[2] The arguments presented in this brief are derived from an article written by counsel of record for *amicus*. *See* Patrick J. Smith, Quality Stores *and the Status of Revenue Rulings*, 140 Tax Notes 1089 (2013).

the conclusions in these revenue rulings is not at issue in the case.

Nevertheless, the government repeatedly asserts that the reason the benefits at issue in this case cannot be excluded from taxable wages for FICA purposes is because the benefits do not satisfy the requirements of the revenue rulings. In order to evaluate the government's position that these revenue rulings are controlling on this issue, it is necessary to review the principles that apply in determining the legal status of agency documents such as IRS revenue rulings.

A. Framework for analysis

The framework for determining the status of agency guidance documents such as IRS revenue rulings was clarified by *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011). *Mayo* did not deal directly with IRS guidance documents such as revenue rulings. The specific issue in *Mayo* instead concerned the standards to be used in evaluating the validity of IRS regulations. In that regard, *Mayo* clarified that the validity of IRS regulations must be evaluated under the same standard that applies for all other agencies, namely, the two-part test set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that test, a regulation will be upheld (1) if, using traditional tools of statutory construction, a court determines that Congress did not address the question at issue, and (2) if the position adopted by the regulation is reasonable. *Id.* at 842-43, 843 n.9.

However, in reaching the conclusion that IRS regulations are evaluated under the *Chevron* test, *Mayo* also made clear that, more generally, judicial review of IRS action is subject to the same rules and principles that apply in the case of judicial review of action by any other federal agency: "[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" 131 S. Ct. at 713.

With respect to the application of the "uniform approach to judicial review of administrative action" referred to in this passage from *Mayo* in the case of agency guidance documents that are not evaluated under the *Chevron* two-part test, significant clarification of the *Chevron* framework had previously been provided in *United States v. Mead Corporation*, 533 U.S. 218 (2001). *Mayo*'s reference to "the importance of maintaining a uniform approach to judicial review of administrative action" leaves no doubt that *Mead*'s clarification of the *Chevron* framework is fully applicable in tax cases. *Mead* clarified not only how to determine which agency guidance documents are evaluated under the *Chevron* two-part test but also what weight a court should give to agency guidance documents that do not satisfy the standards for being evaluated under the *Chevron* two-part test.

Chevron itself did not make clear whether all agency guidance documents are evaluated under the *Chevron* two-part test and are thus potentially eligible for judicial deference under that test. *Mead* clarified that not all agency guidance documents are

eligible for deference under *Chevron*. *Mead* clarified that the agency guidance documents that are eligible to be evaluated under the *Chevron* two-part test, and therefore eligible to receive judicial deference, are only those where "Congress delegated authority to the agency generally to make rules carrying the force of law, and ... the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-27.

Thus, the only agency guidance documents that are eligible for *Chevron* deference are guidance documents the agency intended to have "the force of law." As a result, generally only relatively formal agency guidance documents, such as regulations, are eligible for *Chevron* deference. The agency's use of notice-and-comment procedures to issue guidance usually shows the agency intended the guidance to have the force of law, and guidance issued under those procedures will ordinarily receive *Chevron* deference. *Id.* at 230.

Mead also clarified that agency guidance documents that are not eligible for *Chevron* deference, because, for example, the agency did not intend the documents to have the force of law, are not as a consequence automatically given no weight by a reviewing court. Instead, such agency guidance documents are given the weight determined under the standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under that standard, agency guidance receives weight based on the document's "power to persuade," which "will depend on the thoroughness evident in its consideration; the validity of its reasoning; its consistency with earlier and later pronouncements; and all those factors

which give it power to persuade, if lacking power to control." *Id.* at 140.

When the *Mead* test for determining which agency guidance documents are eligible for deference under the *Chevron* test is applied to IRS revenue rulings, it is clear that such rulings are not eligible for *Chevron* deference. Revenue rulings are not issued using notice-and-comment procedures, and the IRS does not claim that revenue rulings have the force of law that IRS regulations have. Instead, IRS revenue rulings represent the IRS's application of the law to particular factual situations. *See*, *e.g.*, 26 C.F.R. § 601.601(d)(2)(v)(d) ("Revenue rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose"); 26 C.F.R. § 601.601(d)(2)(i)(a) ("A Revenue Ruling is an official interpretation by the Service that has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned"); 26 C.F.R. § 601.601(d)(2)(v)(a) ("The conclusions expressed in Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated in the revenue ruling"); 26 C.F.R. § 601.601(d)(2)(v)(e) ("[S]ince each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same

conclusion in other cases unless the facts and circumstances are substantially the same").

Moreover, while *Mead* suggested that agency interpretations that were not issued using notice-and-comment rulemaking procedures might under some circumstances be eligible to be evaluated using the *Chevron* two-part test, *see*, *e.g.*, 533 U.S. at 227 ("As significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."), that position seems to have been abandoned in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). *See*, *e.g.*, *id.* at 1874 ("*Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking."; "It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.") For a more extended discussion of this point, see Patrick J. Smith, Chevron *Step Zero After* City of Arlington, 140 Tax Notes 713 (2013). In any event, in litigating this case, the government has explicitly disavowed any claim that the revenue rulings that are relevant to the case should be evaluated under *Chevron*.

Thus, it is clear that the IRS revenue rulings dealing with supplemental unemployment compensation benefits are evaluated under the *Skidmore* "power to persuade" standard and not

under *Chevron*'s two-part test. While agency guidance documents that are evaluated under *Chevron*'s two-part test can establish law, provided they satisfy both parts of the test, agency guidance documents that are evaluated under the *Skidmore* standard cannot establish law. For agency guidance documents that are evaluated under *Skidmore*, even in cases where the reviewing court adopts the position expressed in the guidance document by the agency, the reviewing court's reason for adopting the agency position is not because that position establishes the law but only because the reviewing court finds the agency position persuasive.

B. Application of *Skidmore* standard

Under *Skidmore*, the revenue rulings on which the government relies in this case would be given little if any weight because of their lack of reasoning and the inconsistency among the positions expressed in these revenue rulings.

The most obvious inconsistency among the revenue rulings relates to the issue of whether the benefits must be tied to state unemployment compensation benefits in order for the benefits to be excluded from taxable wages for FICA purposes. On this issue, the IRS has reversed its position not just once but twice.

In Rev. Rul. 56-249, 1956-1 CB 488, the benefits that were held to be excluded from taxable FICA wages were tied to the amount of state unemployment compensation benefits. However, in Rev. Rul. 77-347, 1977-2 C.B. 362, the IRS relied on the enactment of section 3402(o) to conclude that

"the fact that benefits under the plan are not tied to the State's unemployment benefits is not a material or controlling factor." Thus, in Rev. Rul. 77-347, the IRS reversed the position it had taken in Rev. Rul. 56-249 that benefits must be tied to state unemployment compensation benefits in order to be excluded from taxable wages for FICA purposes. The government's petition for certiorari completely ignores Rev. Rul. 77-347 and thus neither acknowledges nor attempts to explain this reversal of position. The government's brief in this Court acknowledges the reversal of position in Rev. Rul. 77-347, but only in a footnote and without any attempt to explain the reversal. *See* Brief for the Petitioner at 34 n.5. This brief simply notes that "the scope of the IRS's administrative exception has changed over time." *Id.* at 34.

The IRS reversed its position on this issue for a second time in Rev. Rul. 90-72, 1990-2 C.B. 211, concluding that Rev. Rul. 77-347 was incorrect on this issue:

> The portion of Rev. Rul. 77-347 concluding that benefits do not have to be linked to state unemployment compensation in order to be excluded from the definition of wages for FICA and FUTA tax purposes is inconsistent with the underlying premises for the exclusion and is therefore hereby revoked. This action restores the distinction between SUB pay and dismissal pay by re-establishing the link between SUB pay and state unemployment compensation set forth in Rev. Rul. 56-249.

Id. at 212.

Rev. Rul. 90-72 based this conclusion on the conclusion that Rev. Rul. 77-347 was incorrect in relying on section 3402(o). "[S]ection 3402(o) is not applicable for FICA or FUTA purposes." *Id.* Since the government's petition for certiorari ignores Rev. Rul. 77-347, the petition likewise fails to acknowledge this second reversal of position by the IRS on this issue. The government's brief in this Court acknowledges the second reversal of position, but only in the same footnote that acknowledges the first reversal of position in Rev. Rul. 77-347, and likewise without any attempt to justify or explain the two reversals. *See* Brief for the Petitioner at 34 n.5. Thus, under the *Skidmore* standard, the fact that the IRS has not just once but twice reversed its position on the issue of whether benefits must be tied to state unemployment compensation benefits in order to be excluded from taxable wages for FICA purposes means that the current IRS position on this issue is entitled to very little if any weight.

Moreover, this is not the only issue on which the IRS has reversed its position on the requirements that must be satisfied in order for benefits to be excluded from taxable wages for FICA purposes. The IRS has also reversed its position, again not just once but twice, on the issue of whether benefits paid in a lump-sum can be excluded from taxable wages for FICA purposes. The benefits that were held to be excluded from taxable wages for FICA purposes in Rev. Rul. 56-249 were not paid in a lump-sum but were instead paid over time.

However, as the government acknowledges in its petition for certiorari, in Rev. Rul. 59-227, 1959-2 C.B. 13, the IRS reversed its position on whether

lump-sum payments can be excluded from taxable wages for FICA purposes by "explaining that the principles of the 1956 Revenue Ruling would apply with equal force to plans … that made lump sum rather than periodic payments to employees." Petition at 12-13. In Rev. Rul. 90-72, the IRS took the opposite position on this issue, concluding that benefits paid in a lump sum do not satisfy the requirement that Rev. Rul. 90-72 imposed that benefits must be tied to state unemployment compensation benefits in order to be excluded from taxable wages for FICA purposes. 1990-2 C.B at 212. While the government's petition for certiorari acknowledges the initial reversal of position by the IRS on whether lump-sum payments can be excluded from taxable wages for FICA purposes (without acknowledging that it was a reversal), Petition at 12-13, the petition neither acknowledges nor attempts to explain the second IRS reversal of position on this issue. The government's brief in this Court ignores both reversals of position on this issue.

Thus, the IRS has reversed its position not just once but twice on not just one but two different issues concerning which benefits are excluded from taxable wages for FICA purposes. Under the *Skidmore* standard, this double reversal of position by the IRS on two different issues relating to which benefits can be excluded from taxable wages for FICA purposes makes it very difficult for the current IRS positions to receive any weight at all.

The other feature of the series of revenue rulings that seriously reduces the weight that is given to the positions expressed in these rulings is the lack of reasoning in the rulings to support the positions

expressed in the rulings. Rev. Rul. 56-249, the ruling that first held that certain supplemental unemployment compensation benefits could be excluded from taxable wages for FICA purposes, contained no reasoning at all. Instead, this ruling contained only an extensive description of the terms of the benefit plan that was at issue.

While Rev. Rul. 90-72, the latest ruling in this series, contained a small amount of reasoning, this reasoning was extremely superficial and conclusory. While this ruling expressed the position that benefits must be tied to state unemployment compensation benefits in order to be excluded from taxable wages for FICA purposes, the ruling did not explain the basis for this position, or for the position that benefits that are not tied to state unemployment compensation benefits cannot be excluded from taxable wages for FICA purposes. Moreover, neither the IRS nor the Justice Department has ever provided such an explanation.

Because of the substantial internal inconsistencies among the revenue rulings and because of the lack of any satisfactory explanation in these rulings for the positions they adopt, under *Skidmore*, these positions should be given very little weight in determining what supplemental unemployment compensation benefits are excluded from taxable wages for FICA purposes.

Moreover, not only are the revenue rulings inconsistent among themselves, the arguments the government makes in support of its position that the benefits at issue in this case are taxable wages for FICA purposes are also inconsistent with the terms of the rulings. The government contends that in

addition to the fact that wages are defined broadly for FICA purposes, additional factors supporting its position that the benefits at issue in this case are taxable wages for FICA purposes are the fact that the benefits at issue are based on the length of the employee's service with the company and the level of the employee's regular compensation: "[W]hen, as here, the amount of a payment to a departing employee is based on factors like the employee's salary and years of service to the company, those factors indicate that the payment is compensation for past services rendered by the employee." Petition at 23.

However, this argument by the government is in direct conflict with the terms of the revenue rulings that the government relies on as establishing the controlling tests for determining whether benefits are excluded from taxable wages for FICA purposes. Rev. Rul. 56-249 clearly states that the benefits that were at issue in that ruling were based in part on the duration of an employee's service with the employer and the level of the employee's regular compensation:

> The benefits payable from the fund are to be in varying amounts and for varying periods, depending on the size of the fund, duration of layoff of an employee, *time worked prior to layoff*, amount of State unemployment benefits available, *and the base hourly-rate of the individual employee*, less taxes withheld.

1956-1 C.B. at 490 (emphasis added).

Moreover, Rev. Rul. 90-72, which is the most recent in the series of rulings on this subject, in describing the relevant factors from Rev. Rul. 56-249,

explicitly included these same factors, noting that "the amount of weekly benefits payable is based [in part] upon … the amount of straight-time weekly pay," and that "the duration of the benefits is affected by … the employee's seniority." 1990-2 C.B. at 212. The government does not acknowledge or attempt to explain this serious inconsistency between its position in this case and the terms of the rulings it relies on as controlling on the issue of what benefits are excluded from taxable FICA wages as supplemental unemployment compensation benefits.

In light of this inconsistency, either the government's position in this case on the relevance of these factors is wrong or the revenue rulings are incorrect to conclude that benefits displaying these characteristics are excluded from taxable FICA wages. Either of these alternatives is obviously seriously damaging to the government's position in this case.

C. Other flaws in government position

The government's briefs in the Sixth Circuit in this case seem to display a recognition of the weakness of the government's position that the revenue rulings on which the government relies establish the law regarding what supplemental unemployment benefits are excluded from taxable wages for FICA purposes. The government's briefs explicitly disavow any attempt to defend the correctness of the tests in the revenue rulings and instead devote all their attention to attacking the taxpayer's position that the statutory definition controls.

For example, the government asserts that "[t]he merits of the linkage requirement of Rev. Rul. 90-72 are not at issue here." Reply Brief for the Appellant at 32, *United States v. Quality Stores, Inc.*, 693 F.3d 605 (6th Cir. 2012) (No. 10-1563). Nevertheless, the government relies on the linkage requirement stated in Rev. Rul. 90-72 as part of the reason why the benefits at issue in this case supposedly do not qualify as supplemental unemployment compensation benefits that are not taxable wages for FICA purposes. Brief for the Appellant at 31-32, *Quality Stores*, (6th Cir. 2012) (No. 10-1563).

The government claims it is not asserting *Chevron* deference for the revenue rulings: "Debtors (and amici) argue at length that Rev. Rul. 90-72 and the other Revenue Rulings addressing SUB pay are not entitled to judicial deference … but the Government has made no such argument before this Court." Reply Brief for the Appellant at 28, *Quality Stores*, (6th Cir. 2012) (No. 10-1563). *See also* Petition for Rehearing *En Banc* at 7, *Quality Stores,* (6th Cir. 2012) (No. 10-1563) ("[T]he Government has not argued for deference to the Revenue Rulings"). However, that claim is inconsistent with the government's arguments that the revenue rulings represented the "present law" that is described in the committee report relating to the enactment of the statutory definition: "[T]he Committee Report was merely reciting 'present law,' and the source of that 'present law' was the very Revenue Rulings that Debtors disavow." Reply Brief for the Appellant at 11, *Quality Stores*, (6th Cir. 2012) (No. 10-1563). *See also* Brief for the Appellant at 39, *Quality Stores*, (6th Cir. 2012) (No. 10-1563) ("[T]he statement [in

the committee report] was a recitation of 'present law,' which necessarily refers to the IRS's Revenue Rulings regarding SUB pay").

The government does not explain how it reconciles its claim that the revenue rulings represented the "present law" that the committee report described with the government's claim that it is not asserting *Chevron* deference for the revenue rulings. If the revenue rulings do not receive *Chevron* deference, as the government acknowledges they do not, it is not possible for the revenue rulings to represent law, since *Chevron* deference applies only to agency pronouncements that have the force of law and does not apply to agency pronouncements that do not have the force of law. *See Mead*, 533 U.S. at 226-27.

Thus, agency documents that do not receive *Chevron* deference necessarily do not have the force of law and could not possibly be the "present law" referred to in the committee report. The fact that the committee report preceded *Chevron* does not affect this analysis, since, as *Mead* makes clear, prior to *Chevron*, agency documents such as IRS revenue rulings were evaluated under *Skidmore*, which clearly does not accord the force of law to such documents.

The government's claim that it is not asserting *Chevron* deference for the revenue rulings is also inconsistent with the government's position that because the benefit plans at issue in this case do not satisfy the requirements reflected in the revenue rulings, the benefits paid under those plans do not qualify as supplemental unemployment compensation benefits that are excluded from

taxable FICA wages. Failure to satisfy the requirements reflected in the revenue rulings could have this consequence only if the revenue rulings established the law on this issue.

The section of the government's opening brief in the Sixth Circuit headed "Statement of the Issue" makes this tension clear:

> Whether the courts below erred in holding that the severance payments at issue, which admittedly did not qualify for exclusion from Federal Insurance Contributions Act tax under Rev. Rul. 90-72, 1990-2 C.B. 211 (excluding certain supplemental unemployment compensation benefits from FICA tax) nevertheless did not constitute "wages" for FICA tax purposes.

Brief for the Appellant at 3, *Quality Stores*, (6th Cir. 2012) (No. 10-1563). *See also id.* at 10 ("The Government noted that although certain types of SUB pay are excluded from FICA tax as a result of a series of IRS Revenue Rulings beginning with Rev. Rul. 56-249, 1956-1 C.B. 488, and culminating with Rev. Rul. 90-72, 1990-2 C.B. 211, the severance payments at issue did not qualify under Rev. Rul. 90-72 because, among other things, they were not dependent upon the receipt of state unemployment compensation") (describing argument made in the bankruptcy court).

It is clearly an essential part of the government's position that the benefits at issue in this case are taxable wages for FICA purposes to claim that the benefits do not qualify for exclusion from taxable wages for FICA purposes under the revenue rulings,

and consequently the status of the revenue rulings is clearly at issue in the case:

> Although the IRS has ruled, in Rev. Rul. 90-72, that dismissal payments that meet the requirements delineated therein are not subject to FICA tax, there is no dispute that the severance payments at issue do not qualify for such exclusion because they were not dependent upon eligibility for, or receipt of, state unemployment compensation.

Id. at 22. And yet the government has not presented any arguments as to why the position in the revenue rulings is controlling or correct but instead, as noted above, explicitly asserts that the correctness of the linkage requirement expressed in Rev. Rul. 90-72 is not at issue in this case.

The government's position that the revenue rulings establish the law is inconsistent with the terms of the revenue rulings themselves. The revenue rulings by their own terms do not purport to establish law. Thus, for example, the revenue rulings do not purport to establish a comprehensive set of rules to determine which benefit plans provide supplemental unemployment compensation benefits that will be excluded from taxable wages for FICA purposes and which benefit plans do not provide such benefits. The revenue rulings for the most part do not purport to say which of the factors is necessary for the result. Even with respect to the most contested factor, the link to state unemployment benefits, while Rev. Rul. 90-72 states that this link is necessary for the benefits to be excluded from taxable wages for FICA purposes, it does not explain what the nature of the link must be.

The government states that the revenue rulings have "carved out a limited exception for certain types of dismissal pay," *id.* at 22, 31, but does not attempt to justify the existence of this carve-out. Most provocatively, the government acknowledges that the existence of authority for the IRS to create this carve-out could be questioned, but dismisses this issue by noting that taxpayers have not complained about the IRS's creation of such a carve-out, only about the scope of the carve-out: "While one could argue … that the IRS lacked authority to carve out an exclusion for SUB pay meeting the requirements of the Revenue Rulings in light of Congress's treatment of dismissal pay, taxpayers obviously have not clamored to do so inasmuch as the exclusion lowers their tax burden." Reply Brief for the Appellant at 10, *Quality Stores*, (6th Cir. 2012) (No. 10-1563).

The government may mean to suggest here that in defining such a carve-out from treatment as taxable FICA wages for certain supplemental unemployment compensation benefits, the IRS has simply allowed taxpayers a benefit to which they would not otherwise be entitled, and that taxpayers accordingly cannot complain about the terms of the benefit. But if the government were to take that position, the government has not explained what is the source of the IRS's authority to allow such benefits to certain taxpayers but not others, or what determines the propriety of the particular place at which the IRS has drawn the line between the benefits that are eligible for this IRS allowance to certain taxpayers and the benefits in the case of other taxpayers that are not eligible for this IRS

allowance. The failure of the IRS to provide such explanations would subject the positions taken in the revenue rulings to challenge under the Administrative Procedure Act's arbitrary and capricious standard by taxpayers whose benefit plans do not satisfy the requirements reflected in the revenue rulings. See 5 U.S.C. § 706(2)(A).

The government's equivocation on the status of the revenue rulings continues in its petition for certiorari. For example, the petition never asserts that Rev. Rul. 90-72 is *correct* in its position that benefits must be tied to state unemployment compensation benefits in order to be excluded from taxable wages for FICA purposes. Instead, the petition merely states that in Rev. Rul. 90-72, "the IRS *set forth* in detail *its position* on … the criteria that govern the determination whether particular payments to terminated employees are FICA 'wages.'" Petition at 14 (emphasis added). Likewise, with respect to the IRS position stated in Rev. Rul. 90-72, the petition merely states that "*[u]nder that approach*, the severance payments at issue here clearly are not exempt from FICA taxation because they are wholly unconnected to state unemployment compensation." *Id.* (emphasis added).

However, in describing why the government believes section 3402(o) is not relevant, the petition for certiorari clearly relies on the revenue rulings as the reason why the government believes the benefits at issue in the case are not excluded from taxable wages for FICA purposes:

> The provision does not explicitly address, and has no logical bearing on, the determination whether particular payments

> to terminated employees are subject to FICA taxation. *Rather, that determination is governed by other provisions of law*. And, once Section 3402(o) is understood to be irrelevant to questions of FICA taxation, the severance payments at issue here clearly constitute FICA "wages." See pp. 8-14, *supra*.

Id. at 20 (emphasis added).

The pages in the petition that are cited here as support for the position that "the severance payments at issue here clearly constitute FICA 'wages'" conclude with the discussion of Rev. Rul. 90-72 that includes the statements quoted above. Thus, as in its briefs in the Sixth Circuit, the government's petition for certiorari adopts inconsistent positions on the status of the revenue rulings. The petition refrains from endorsing the positions in the revenue rulings as correct, while nevertheless relying on them as the basis for the position that the benefits at issue in the case are not excluded from taxable wages for FICA purposes, and even seems to refer to them as being in the category of "other provisions of law."

Thus, the government's position on the status of the revenue rulings remains as incoherent and unsupported in this Court as it was in the Sixth Circuit.

IV. CONCLUSION

In the absence of any explanation of why the government believes a series of revenue rulings issued by the IRS are controlling on the issue of which supplemental unemployment compensation benefits are excluded from taxable wages for FICA purposes, or why the most recent of these revenue rulings concluded that, in order to be excluded, benefits must be tied to state unemployment compensation benefits, the government's position that the benefits at issue in the case cannot be excluded is incoherent and unsupported.

In contrast, the taxpayer has presented a very coherent, sensible, and easily understood explanation of the basis for its position, namely, that the statutory definition of supplemental unemployment compensation benefits should apply for FICA purposes as well as income tax withholding purposes because of the principle that there should be parallelism between what is considered wages for both sets of provisions. Given the choice between the taxpayer's coherent position and the government's incoherent position, it is clear that the taxpayer's position must be preferred.

Accordingly, the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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