

Whirlpool Update: New Filings and Distribution for Supreme Court Conference

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On November 2, 2022, the Supreme Court of the United States announced that the case of [*Whirlpool Financial Corp., et al., Petitioners v. Commissioner of Internal Revenue, No. 22-9*](#), has been distributed for consideration at its upcoming conference on November 18, 2022. Meaning, we should have an answer in the next few weeks as to whether the Supreme Court will hear the case.

The Supreme Court's distribution for the conference follows the government's [brief](#), submitted on October 19, 2022, in opposition to Whirlpool's [petition](#) for a writ of certiorari.

In its brief, the government summarizes its position as follows:

Petitioners contend (Pet. 17) that 26 U.S.C. 954(d)(2) is “conditioned on the promulgation of regulations” by the Treasury Department and thus may not “be enforced without regard to such regulations.” But as the court of appeals correctly held, Section 954(d)(2)’s text itself establishes clear “conditions” and “consequences,” Pet. App. 12a, and when applied to this case, that text “mandate[s]” that the income at issue is FBCSI, id. at 18a. The phrase “under regulations prescribed by the Secretary” delegates to the Treasury Department authority to “implement the statute’s commands,” but not to “vary from them,” ibid., so the court permissibly declined to articulate a separate rationale in this case based on the implementing regulations. Petitioners concede (Pet. 33) that the decision below does not conflict with that of any other court of appeals. Nor does it conflict with this Court’s precedent because petitioners’ cited cases involved meaningfully distinct statutory schemes. And resolving the question presented lacks practical importance because the Treasury Department’s former regulations would dictate the same result as the statutory text, and the revisions that were made to the regulations in 2008 removed any potential doubt about that result. This Court’s review is unwarranted.

The government's position is an interesting one. It seems to accept that a court is free to ignore regulations relied on by the public if the court determines that the government's position is supported by the statutory language and the statute is not entirely conditioned on the operation of a regulation. Additionally, the government believes here that US Congress did not entirely condition operation of Internal Revenue Code (Code) Section 954(d)(2) on regulations.

Perhaps sensing the difficulty in prevailing on this argument, the government (similar to what it did in the rehearing proceedings in the US Court of Appeals for the Sixth Circuit) seeks to limit *Whirlpool* to the specific statute at issue. However, this ignores the fact that the same or substantially the same language is used in other Code provisions, making it difficult to limit the government's argument to Code Section 954(d)(2).

In another attempt to discourage review, the government essentially argues that the substantive issue is an issue of first-and-last impression because the regulations at issue were amended for tax years subsequent to Whirlpool's. Again, this ignores the fact that *Whirlpool* involves important administrative law issues that will remain regardless of the amendment.

Finally, the government makes the valid point that no circuit split exists with respect to the lower court's decision. While this may be true with respect to Code Section 954(d)(2) and regulations promulgated thereunder, the Sixth Circuit's approach conflicts with approaches by other Courts of Appeals (and the Supreme Court) when it comes to the ability of the public and the courts to ignore or disregard validly promulgated regulations.

Whirlpool has submitted its [reply](#) in support of its petition for certiorari, addressing the government's position. Whirlpool's reply goes into more detail on our observations above, characterizing the government's response as resting "on a patently revisionist history of this case," misreading the statute and downplaying the importance of the case from an administrative law perspective.

Practice Point: As noted above, we will know soon whether the Supreme Court will decide to address the issues raised by Whirlpool. We will provide another update as soon as a determination is made.

Prior coverage of this case can be found below:

- [SCOTUS Requests Government Response to Whirlpool's Petition](#)
- [SCOTUS to Consider Whirlpool's Petition for Certiorari in Subpart F Case](#)
- [Amici Support Whirlpool's Request for Supreme Court Review](#)
- [Will the Supreme Court Rule on Whirlpool's Subpart F Income Case?](#)

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