

No. 05-1090

In the Supreme Court of the United States

SYNERGY STAFFING, INC., FKA
PERSONNEL CONNECTION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Petitioner contends (Pet. 2, 4-5) that payroll tax deposits that it made during certain taxable quarters prior to, and including, the first taxable quarter of 1998 were misapplied by the Internal Revenue Service (IRS) because they were not applied to the specific payroll periods that petitioner designated on its deposit checks. The court of appeals held that petitioner's claim lacked merit because, during all times relevant to this case, "employers did not have the power to designate employee payroll tax deposits to [specific payroll] periods within a tax quarter." *Synergy Staffing, Inc. v. United States*, 134 Fed. Appx. 158, 158 (9th Cir. 2005) (citing 26 U.S.C. 6656(e)). That holding is correct and does not warrant further review by this Court.

1. During the pertinent period, petitioner, a corporation that provides temporary employee placement services, was required to deposit payroll taxes into an account at an approved bank each time that it paid its employees. *Synergy Staffing, Inc. v. United States IRS*, 323 F.3d 1157, 1158 (9th Cir. 2003); *Synergy Staffing, Inc. v. United States*, No. 00-321, Statement of Uncontroverted Facts and Conclusions of Law (Facts and Conclusions of Law) at 8 (C.D. Cal. Oct. 10, 2003) (citing 26 C.F.R. 31.6302-1(b) and (c)); Pet. 2. On a quarterly basis, petitioner was required to make a payment to the IRS of the withheld taxes. 26 C.F.R. 31.6011(a)-4(a)(1); 26 C.F.R. 31.6071(a)-1(a).

Beginning in 1988, on several occasions, petitioner failed to make the payroll tax deposits each pay period as required. *Synergy Staffing*, 323 F.3d at 1158; Pet. 2. Each time that petitioner was late with a deposit, it incurred a failure-to-deposit penalty pursuant to 26 U.S.C. 6656. *Synergy Staffing, Inc. v. United States*, No. 00-321, Minute Entry at 2 (C.D. Cal. Oct. 9, 2003); Facts and Conclusions of Law at 8 (citing 26 U.S.C. 6656(b)(2)(1988)).

During the third taxable quarter of 1997 and the first taxable quarter of 1998,* petitioner made several payroll tax deposits. Because they were not sufficient to cover all deposits due, petitioner “sought to prevent the imposition of additional penalties and interest” under Section 6656 by placing “an instruction on [it]s check to apply

* See Facts and Conclusions of Law at 5 (“Of the relevant payroll tax deposit checks exhibited by [petitioner] in this action, only the two checks for the third quarter of 1997 and the seven checks for the first quarter of 1998 include a reference on the face of each check to a particular payroll period within the quarterly tax return period to which the payroll tax deposit relates.”).

the payment to current taxes.” *Synergy Staffing*, 323 F.3d at 1158; see Pet. 2-3. If so applied, petitioner would still have owed the past-due amounts and the interest accruing on those amounts, but would have avoided new failure-to-deposit penalties by ensuring that currently due amounts were paid in full. See Pet. 3.

Then-existing law, however, did not allow employers to designate that payroll tax *deposits* be applied to a particular payroll period within a taxable quarter. *Synergy Staffing*, 134 Fed. Appx. at 158. The rule was different than that applicable to voluntary tax *payments*, which then-existing IRS policy allowed to be designated to a particular quarter. *United States v. Energy Res. Co.*, 495 U.S. 545, 548 (1990) (citing Rev. Rul. 79-284, 1979-2 C.B. 83. At that time, the IRS applied payroll deposits to the earliest payroll period in the taxable quarter for which amounts were due: “[D]eposits will be applied * * * against deposit liabilities in due-date order. Thus, a deposit will first be applied to satisfy any past due underdeposits within the same return period, with the oldest underdeposit being satisfied first.” Rev. Proc. 90-58, 1990-2 C.B. 642. Accordingly, the IRS applied the deposits at issue here to the earliest-due payroll periods in the taxable quarter designated by petitioner, rather than to the currently due payroll period in that quarter. As a result, petitioner incurred new failure-to-deposit penalties with respect to each new payroll period.

2. In 1998, Congress decided to “[m]itigat[e] [the] failure to deposit penalty” by amending Section 6656 to “allow[] the taxpayer to designate the period to which each deposit is applied.” H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 259. That new approach would alleviate the “[c]ascading penalties” which resulted from then-

existing law when “payments that would otherwise be sufficient to satisfy current liabilities are applied to satisfy earlier shortfalls.” *Ibid.*

The amendment to Section 6656 was enacted on July 22, 1998, and became effective 180 days thereafter. Taxpayer Bill of Rights 3, Pub. L. No. 105-206, Tit. III, § 3304, 112 Stat 742. The amended statute, as applied to deposits due after the effective date until December 31, 2001, 112 Stat. 743, authorized their designation to a particular payroll period within a tax quarter, and, as applied to deposits due after December 31, 2001, required that they be applied to the most recent payroll period within a tax quarter, unless designated otherwise. 112 Stat. 742; see 26 U.S.C. 6656(e)(1) (Supp. V 1999). Petitioner concedes that “[a]t the times material to this petition, Congress had not yet enacted 26 U.S.C. § 6656(e).” Pet. 1.

3. Petitioner nonetheless contends (Pet. 4) that, prior to the enactment of Section 6656(e), the IRS was required to apply payroll deposits as designated. Petitioner relies on *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), but that decision is inapposite. In *Energy Resources*, this Court considered “IRS policy [that] permits taxpayers who ‘voluntarily’ submit *payments to the IRS* to designate the tax liability to which the payment will apply.” *Id.* at 548 (citations omitted) (emphasis added). This case, by contrast, does not involve petitioner’s quarterly tax *payments*, as each such payment was applied to the tax quarter that petitioner designated. See Facts and Conclusions of Law at 3 (finding that each check “which designated the payment to a particular taxable quarter was credited to the specified quarter”). The case instead involves petitioner’s tax *deposits* into the approved bank account during that tax

quarter, each of which was applied to the earliest pay period during that quarter in accordance with then-existing law. Petitioner has cited no authority to support its position that, prior to the enactment of Section 6656(e), the IRS was required to apply tax deposits in the manner requested by the taxpayer. As the statute did not then specify the process to be used in applying payroll deposits, the agency had broad authority to “fashion [its] own rules of procedure.” See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)); *Cameron v. United States*, 252 U.S. 450, 460-463 (1920).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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