

No.

IN THE

Supreme Court of the United States

Brad Stephen Francis and
Christine Carol Francis,
Petitioners,

v.

Commissioner of Internal Revenue,
Respondent.

On Petition For Writ of Certiorari
To The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Brad S. Francis, *pro se*
9704 North Holmes Street
Kansas City, MO 64155-2098
(816) 812-3600

Questions Presented For Review

This is a call for the Court to exercise its supervisory power over the lower courts:

Specifically, this case seeks review of the Eighth Circuit Court of Appeals' tacit sanctioning of the United States Tax Court's refusal to address the Francis' Family's challenges to subject matter jurisdiction and to personal jurisdiction on the merits before proceeding with adjudication of a redetermination of deficiency.

The central issue before the Court is the proper exercise of jurisdiction.

1. Did the Eighth Circuit have jurisdiction to adjudicate Case No. 17-3679?
2. Did the Eighth Circuit's dismissal for lack of jurisdiction deny the Francis' Family with due process of law by abusing Eighth Circuit Rule 47A(b)?

Parties to the Proceeding

Brad Stephen Francis

Christine Carol Francis

Appellants / Petitioners / Plaintiffs – *pro se*

9704 North Holmes Street

Kansas City, Missouri 64155-2098

Phone: (816) 812-3600

The United States of America

The Department of the Treasury

– Internal Revenue Service

The Department of Justice

TABLE OF CONTENTS

Questions before the Court.....	ii
Parties Below.....	iii
Table of Authorities.....	vi
Opinions Below.....	1
Jurisdiction.....	1
Statutory Provisions Involved.....	1
Statement	2
Cause of Action: Notice of Deficiency	2
Action in the Tax Court	8
Action in the 8 th Circuit	12
Reasons for Granting the Petition.....	18
ONE: The 8 th Circuit abdicated their Congressional mandate to determine if the United States Tax Court had subject matter jurisdiction over the Francis' Family's redetermination of deficiency.....	18
TWO: The 8 th Circuit abused their discretion in dismissing the Francis' Family's action under Eighth Circuit Rule 47A(b).....	21

Conclusion.....	23
Appendix A:	
8 th Circuit Judgment; January 29, 2018.....	1a
Appendix B:	
8 th Circuit Order; February 13, 2018.....	2a
Appendix C:	
8 th Circuit Order; April 2, 2018.....	3a
Appendix D:	
Tax Court Order; November 8, 2017.....	4a
Appendix E:	
Tax Court Order; April 26, 2016.....	7a
Appendix F:	
Stamm International v. Commissioner.....	8a
Appendix G:	
Internal Revenue Code in relevant part.....	19a
Appendix H:	
Eighth Circuit Rule 47A(b).....	39a
Appendix I:	
Federal Rules of Civil Procedure	40a
Appendix J:	
United States Tax Court Rule 13.....	45a

TABLE OF AUTHORITIES

Constitution

Article III, § 1.....	18
-----------------------	----

Cases

Arbaugh v. Y.H. Corp., 546 U.S. 500, 514 (2006).....	14, 19
---	--------

Broadway v. Commissioner, 111 F. 3d 593, 595 (8 th Cir.1997).....	14
---	----

Capron v. Van Noorden, 2 Cranch 126, 127 (1804).....	20
---	----

Francis v. United States - Supreme Court Docket 17-1596.....	7
---	---

Francis v. Commissioner - Tax Court Docket 9801-16.....	8, 11
--	-------

Francis v. Commissioner - Eighth Circuit Case No. 17-3679.....	12, 21
---	--------

Frieling v. Commissioner, 81 T.C. 42, 46 (1983).....	3
--	---

Kontrick v. Ryan, 540 U.S. 443, 455 (2004).....	19
---	----

Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (1884).....	19
Midland Mortgage Co., v. Commissioner, 73 T.C. 902 (1980).....	20
Normac, Inc., & Normac International v. Commissioner, 90 T.C. 142, 146-147 (1988).....	14,15
Sukhov v. Gonzales, 403 F. 3d 568, 570 (8 th Cir. 2005)	16
Stamm International Corp., v. Commissioner, 84 T.C. 248, 252 (1985).....	11
Wheeler's Peachtree Pharmacy, Inc., v. Commissioner, 35 T.C. 177, 180 (1980).....	14
Williams v. Commissioner, 999 F.2d 760, 763 (4 th Cir. 1993).....	15
FOIA Cases	
F16033-0142.....	4, 5, 6, 7
F16068-0179.....	5

Statutes

5 U.S.C. § 702.....	7
26 U.S.C. § 6211.....	2, 7
26 U.S.C. § 6213.....	3, 8
26 U.S.C. § 6702.....	3, 4
26 U.S.C. § 6703	4
26 U.S.C. § 7433	2, 3, 7
26 U.S.C. § 7482.....	12, 14, 18
28 U.S.C. § 1291.....	13, 14
28 U.S.C. § 1746.....	23, 24
44 U.S.C. § 1507.....	4

Rules

Fed. R. App. P.40	15, 16
Fed. R. Civ. P. 1.....	16
Fed. R. Civ. P. 12(b)(1).....	19
Fed. R. Civ. P. 12(h)(1).....	16
Fed. R. Civ. P. 12(h)(3).....	20
United States Tax Court Rule 13.....	3
Eighth Circuit Rule 47A(b).....	14, 15, 21
Supreme Court Rule 14.1(g)(ii).....	8, 12

Regulations

26 C.F.R. § 301.6203-1.....	4
26 C.F.R. § 301.7433-1(e)	2, 4

Other Sources

Section 7433's Statute of Limitations: How
Courts Have Wrongly Turned a Taxpayer's
Exclusive Sword into the IRS's Shield
Against Damages, 61 Clev. St. L. Rev.
195 (2013); Diana Leyden.....2, 7

OPINIONS BELOW

The opinion of the court of appeals, submitted January 29, 2018, is unpublished; Case No. 17-3679.

The United States Tax Court order denying *Motion to Dismiss on Grounds of Mootness* was dated November 8, 2017, and served on November 9, 2017.

JURISDICTION

The judgment by the Eighth Circuit was filed on January 29, 2018. A petition for *rehearing by panel* was denied on April 02, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, section 1;
relevant provisions of the Internal Revenue Code,
Federal Rules of Appellate Procedure, and the
Federal Rules of Civil Procedure are produce in the
text or are reproduced in the appendix to the petition.
(App. *infra*, 58a-33a).

STATEMENT

Cause of Action:

Deficiency Procedures in the Case of Income, Estate, Gift, and Certain Excise Taxes; 26 U.S.C. § 6211 et seq.

Summary of this Sub-Section:

The following statement gives detailed dates and information regarding the statute of limitations under 26 U.S.C. § 7433 *Unauthorized Collection Activities* and corresponding dates relating to *Deficiency Procedures* 26 U.S.C. § 6211 et seq.

The reason for the inclusion of this detailed information is, in the lower courts, the Francis' Family have alleged the *Notice of Deficiency* for tax period 2013 was issued for the improper purpose of interfering¹ with an action the IRS knew² the Francis' Family intended to bring under 26 U.S.C. § 7433.

Furthermore, the Francis' Family has alleged the *Notice of Deficiency* for 2013 was issued without observing Deficiency Procedures (i.e. due process) because the IRS needed to rush its issuance to

¹ Most actions brought under 26 U.S.C. § 7433 are barred due to miscalculating the statute of limitations. Reference: Diana Leyden, *Section 7433's Statute of Limitations: How Courts have Wrongly Turned a Taxpayer's Exclusive Sword into the IRS's Shield against Damages*, 61 Clev. St. L. Rev. 195 (2013).

² The IRS knew due to the Francis' Family's Notice of Exhaustion of Administrative Remedies issued to the IRS on June 1, 2015, pursuant to 26 C.F.R. 301.7433-1(e).

coincide with the statute of limitations under 26 U.S.C. § 7433.

The validity of the *Notice of Deficiency* is a central issue in the lower courts. The United States Tax Court is a court of limited jurisdiction and that jurisdiction – in the case of a redetermination of deficiency – is dependent upon the issuance of a valid *Notice of Deficiency* pursuant to 26 U.S.C. § 6213(a); *See* Rule 13(a)³, Tax Court Rules of Practice and Procedure; and *Frieling v. Commissioner*, 81 T.C. 42, 46 (1983).

1. The Francis' Family filed a timely non-frivolous return on Form 1040 for tax period ending December 31, 2013, on March 18, 2014.

2. On May 18, 2015, the Francis' Family submitted a *true duplicate*⁴ tax return on form 1040 issuing notice to the IRS⁵, *inter alia*, that we had not heard from them regarding our 2013 return.

3. After 533 days of silence, on September 2, 2015, the IRS issued form LTR 3176C declaring the Francis' Family's 2013 return frivolous.

4. The IRS determination, issued on form LTR 3176C cited 26 U.S.C. § 6702 but did not specify the basis for the determination nor provide a reasoned opinion.

³ Appendix I, page 34a

⁴ We copied our copy of original return & placed it in the mail.

⁵ Internal Revenue Service, IRS hereafter.

5. The IRS determination, paragraph 4, utilized an unpublished⁶ informal rule in the guise of a formal rule required of 26 U.S.C. 6702(c) to circumvent their duty at 26 U.S.C. § 6703.

6. On September 3, 2015, the Francis' Family issued the IRS a letter that raised *issues of law* and *issues of fact* with form LTR 3176C; the IRS did not reply.

7. The IRS followed the determination, paragraph 4, with an assessment of frivolous penalties under Notice CP15 dated November 16, 2015.

8. The Francis' Family requested the IRS issue them a copy of the signed assessment pursuant to 26 C.F.R. § 301.6203-1, under FOIA⁷ Case #F16033-0142.

9. On February 8, 2016, the IRS issued the Francis' Family an **unsigned** *Certificate of Assessment* on Form 4340 in response to FOIA Case #F16033-0142.

10. On January 11, 2016, the IRS issued two CP504 Notices of Intent to Levy⁸ with 3 possible locations⁹ for the Francis' Family to send a reply.

⁶ 44 U.S.C. § 1507 Filing document as constructive notice; publication in Federal Register as presumption of validity; judicial notice; citation.

⁷ Freedom of Information Act, hereinafter FOIA

⁸ The Francis' Family had previously issued *Exhaustion of Administrative Remedies* pursuant to 26 C.F.R. § 301.7433-1(e) on June 1, 2015, regarding tax periods 2011, 2012, and 2014; and the statute of limitations under 26 U.S.C. § 7433 was June 23, 2016.

⁹ Atlanta, GA; Memphis, TN; and Cincinnati, OH

11. The Francis' Family made a timely CDP¹⁰ Hearing Request for tax period 2013 but the IRS reversed¹¹ the timely request and refused the hearing.
12. The IRS issued Letter 525 (Notice of Examination) dated February 5, 2016, for tax period 2013 and requested the Francis' Family's response by March 6, 2016.
13. The Francis' Family issued a response dated February 26, 2016, to the IRS audit of tax period 2013.
14. The IRS received¹² the Francis' Family's response (paragraph 13) on February 25, 2016.
15. The Francis' Family's response to the IRS audit, *supra*, was witnessed and mailed by Jo Shernaman of Reneau & Shernaman, Attorneys-At-Law.
16. The IRS, without waiting until the March 6, 2016, deadline expired¹³, did hide the results of the audit in FOIA Case# F16033-0142¹⁴ being mailed in an envelope postmarked March 02, 2016.
17. The IRS's audit results did not address the *issues of law* and *issues of fact* raised by the Francis'

¹⁰ Collection Due Process Hearing

¹¹ FOIA Case# F16068-0179.

¹² The audit response was dated February 26, 2016, but mailed on February 23, 2016 under Certified Mail Article #7015 1520 0001 4493 7115.

¹³ See paragraph 11 – March 6, 2016, was the deadline for response set by the IRS for the examination of the Francis' Family's 2013 return.

¹⁴ See paragraph 9; the same mailing delivered unsigned assessments on form 4340.

Family in their response (see paragraph 12) to the examination.

18. The IRS' audit results include an **Examination Closing Input Document** that shows a disposal code of 10 which indicates a '*defaulted statutory notice*' –

19. A '*defaulted statutory notice*' indicates that the IRS record shows the Francis' Family did not reply¹⁵ to IRS audit Letter 525 dated February 5, 2016; *see* paragraph 12.

20. The **Examination Closing Input Document** (paragraph 18) was not dated or signed.

21. The audit results were hidden among RACS¹⁶ Reports, Forms 4340, and Account Transcripts sent in response to a FOIA¹⁷ request.

22. The RACS Reports were old and predated¹⁸ September 2, 2015: the date of the first IRS communication sent to the Francis' Family regarding tax period 2013.

¹⁵ This allowed the IRS to avoid giving the Francis' Family Notice by listing the points of disagreement between the parties and the law the IRS counted upon – this is especially important considering the disagreement surrounding IRC § 6702(c) where an unpublished informal rule was used in the guise of a formal rule for the determination.

¹⁶ The acronym stands for **R**evenue **A**ccounting **C**ontrol **S**ystem: RACS.

¹⁷ FOIA Case# F16033-0142 mailed from zip code 90012 (Los Angeles, CA).

¹⁸ Dates include August 16, 2012; August 27, 2012; April 25, 2013; May 6, 2013; and June 20, 2014 – reference ¶ 3.

23. The IRS did not send the Francis' Family a 30 day letter containing instructions on how to appeal¹⁹ the IRS proposed deficiency following the audit.

24. Twenty-eight days after²⁰ sending the audit results in a FOIA disclosure the IRS issued²¹ the 90 day letter (Letter 3219 – *Notice of Deficiency*) on March 30, 2016, with an expiration of June 28, 2016.

25. June 28, 2016, is 5 days after the statute of limitations for bringing suit under 26 U.S.C. § 7433 expired²² on June 23, 2016.

26. The determination on the face of the *Notice of Deficiency* changed the amount of gross income

¹⁹ The Francis' Family requested an *Appeals Office Conference* on April 18, 2016. We received a response from the IRS to our request on May 26, 2016. The response said they are reviewing our information and would contact us again if they could not issue a response by June 13, 2016; we did not receive a follow up response.

²⁰ FOIA Case #F16033-0142; The results of the examination were placed in an envelope postmarked March 2, 2016.

²¹ The envelopes containing the two Notices of Deficiency for tax period 2013 (one addressed to Brad S. Francis and the other to Christine C. Francis) have postmarks of March 31, 2016, which only provided the Francis' Family with 89 days before the June 28, 2016, deadline.

²² The statute of limitations is often miscalculated for 26 U.S.C. § 7433: See Diana Leyden, *Section 7433's Statute of Limitations: How Courts have Wrongly Turned a Taxpayer's Exclusive Sword into the IRS's Shield against Damages*, 61 Clev. St. L. Rev. 195 (2013). The statute of limitations for the Francis' Family to bring action under 26 U.S.C. § 7433 for tax periods 2011 and 2012 was June 23, 2016. The Francis' Family brought action under 26 U.S.C. § 7433, and 5 U.S.C. § 702, which is currently docketed in the United States Supreme Court under Case No. 17-1596.

verified by the Francis' Family on line 7 of form 1040 for tax period 2013.

27. The statutory definition of a deficiency codified at 26 U.S.C. § 6211 does not include statutory authorization to change a tax payer's gross income.

28. Section 6211 of the IRC²³ provides that a deficiency is the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the sum of the amount shown on the return plus amounts previously assessed (or collected without assessment as a deficiency) minus the amount of rebates (defined in subsection (b)(2) which have been made.

29. A deficiency is, therefore, the difference between the amount shown as tax due, and what that amount should be if deductions, adjustments, credits, and exemptions were properly applied resulting in an adjusted gross income.

-UNITED STATES TAX COURT-
Case No. 9801-16

Basis of Jurisdiction – Rule 14.1(g)(ii)
26 U.S.C. § 6213(a)

Summary of this Sub-Section:

The Francis' Family's position in the lower court was that the United States Tax Court lacked subject matter jurisdiction because they lack a valid *Notice of Deficiency*, and that the United States Tax

²³ Internal Revenue Code, Title 26 of the United States Code.

Court never fairly obtained personal jurisdiction over the Francis' Family.

The United States Tax Court avoided exercising their jurisdiction to determine if the *Notice of Deficiency* was valid or if the Tax Court had obtained personal jurisdiction over the Francis' Family in a fair manner.

30. The IRS' ninety-day Letter 3219 to the Francis' Family stated:

"The Tax Court has a simplified procedure for small tax cases when the amount in dispute is \$50,000 or less for any one tax year. You can also get information about this procedure, as well as a petition form you can use, by writing to the Clerk of the United States Tax Court at 400 Second Street NW, Washington, D.C. 20217. You should write promptly if you intend to file a petition with the Tax Court."

(emphasis added)

31. Therefore, the Francis' Family sent the Clerk of the Tax Court a two sentence request for information on April 18, 2016, (Appendix E) asking for information on the simplified procedure.

32. The Francis' Family included the first two pages of Letter 3219 with the paragraph bracketed in

Letter 3219 that discussed writing promptly for information.²⁴

33. The letter was signed “Brad” (omitting the surname “Francis” and Christine Francis’ name) and it did not contain the entire notice of deficiency; only the cover letter.

34. Chief Judge Michael B. Thornton filed the two sentence request for information as a petition on April 26, 2018.

35. The Francis’ Family issued protests declaring that they had not filed a petition and asking to be removed from the docket in letters²⁵ dated May 2 and May 3, 2016.

36. At that time the Francis’ Family had not submitted a filing fee to the United States Tax Court.

37. In an ORDER dated May 10, 2016, Chief Judge Michael B. Thornton stated,

“*** Among other things, in those Letters petitioners indicate that they have not decided whether to continue to prosecute their Tax Court case. Upon due consideration and for cause, it is ORDERED that the time within which petitioners shall file an amended petition and pay the filing fee, is extended to June 28, 2016. If, by June 28, 2016, no amended petition and/or filing fee is received, the Court **may** dismiss this case for lack of jurisdiction.” (**Emphasis** added).

²⁴ Tax Court Docket Document 001 – See Appendix E, page 7a

²⁵ Tax Court Docket Documents 003 and 004.

38. Chief Judge Michael Thornton turned over the position of Chief Judge to L. Paige Marvel on June 1, 2016; Chief Judge Marvel took over the Francis' Family's case at that time.

39. There are 83 docket entries (including 13 motions²⁶ by the Francis' Family) for Case No. 9801-16. About 28 entries are related to challenges to the Tax Court's subject matter jurisdiction and personal jurisdiction or ask the Court to determine if it has subject matter jurisdiction and personal jurisdiction:

Docket No.	Date	Filings & Proceedings
0001	04/26/16	Two-Sentence Request for Information filed as Petition
0009	07/06/16	"Second" Amended ²⁷ Petition filed
0014	09/20/16	Motion to Investigate Respondent's Exhibits A & B
0017	09/26/16	Motion to Remand
0022	10/04/16	Motion to Determine Jurisdiction
0031	10/06/16	Motion for Interlocutory Appeal
0042	12/27/16	Motion to Dismiss for Lack of Jurisdiction
0055	09/06/17	Motion to Dismiss on Grounds of Mootness.
0067	12/04/17	Notice of Appeal to the 8 th Cir.

²⁶ Docket Documents 14, 17, 19, 20, 22, 23, 24, 30, 31, 36, 42, 47, 51

²⁷ To the extent the Commissioner issues an invalid notice, the taxpayer may file suit in the Tax Court and then seek to dismiss the suit on the grounds the court lacks jurisdiction; see *Stamm International Corp., v. Commissioner*, 84 T.C. 248, 252 (1985). See Appendix F, page 8a

40. The *Motion to Dismiss for Lack of Subject Matter Jurisdiction*²⁸ specifically raises the issues that the Notice of Deficiency is invalid.

41. Chief Judge Marvel denied the *Motion to Dismiss for Lack of Subject Matter Jurisdiction* without explanation.

42. On September 6, 2017, the Francis' Family issued a *Motion to Dismiss on Grounds of Mootness* based on the Court not having personal jurisdiction over the Francis' Family.

43. The Tax Court denied the *Motion to Dismiss on Grounds of Mootness* on November 8, 2017.

44. The Francis' Family appealed²⁹ to the Eighth Circuit to address subject matter jurisdiction and personal jurisdiction on December 1, 2017.

45. The Francis' Family gave the IRS and the Tax Court notice on December 11, 2017, of their intention to not participate in discovery or further Tax Court proceedings.

-United States Court of Appeals-
-for the Eighth Circuit-
Case No. 17-3679

Basis of Jurisdiction – Rule 14.1(g)(ii):
26 U.S.C. § 7482(a)

²⁸ Tax Court Docket Document 0042.

²⁹ Received by the Tax Court on December 4, 2017, and entered on the Tax Court Docket as Document 0067.

Summary of this Subsection:

The Francis' Family argued that the Eighth Circuit had jurisdiction over the lower court that, they alleged, had usurped personal jurisdiction; and that did not have subject matter jurisdiction over the redetermination of deficiency due to an invalid notice of deficiency.

The DOJ argued that the Eighth Circuit did not have jurisdiction yet due to the provisions of the *finality rule* codified at 28 U.S.C. § 1291.

The Eighth Circuit dismissed the action without explanation and subsequently denied a petition for rehearing by panel without explanation.

Both determinations were signed by the Court Clerk.

APPEAL

The Francis' Family appealed to the Eighth Circuit on December 1, 2017³⁰, challenging the United States Tax Court's jurisdiction. The appeal was filed by the United States Tax Court on December 4, 2017.

On January 11, 2018, the Department of Justice filed a motion to: (1) file out of time; and (2) to dismiss the case for lack of jurisdiction.

The DOJ³¹ argued³² that courts of appeals have jurisdiction to review Tax Court decisions

³⁰ The case was docketed on December 8, 2017, and entered December 10, 2017; see docket report.

³¹ Department of Justice, DOJ hereinafter

pursuant to 26 U.S.C. § 7482(a) but that that jurisdiction is subject to the *finality rule* established by 28 U.S.C. § 1291; see, *Broadway v. Commissioner*, 111 F. 3d 593, 595 (8th Cir. 1997).

The DOJ also argued, inter alia, that *good cause* existed for filing the motion outside of the 14-day period under 8th Cir. R. 47A(b).

The Francis' Family argued³³ that the finality of the Tax Court's decision was immaterial because the Tax Court lacked jurisdiction.

Namely, the Francis' Family argued the Tax Court had usurped personal jurisdiction.

The Francis' Family also argued that the Tax Court lacked a valid *Notice of Deficiency*;

And that the Tax Court had refused to exercise their jurisdiction to determine their jurisdiction when that jurisdiction had been duly challenged.

Reference *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); and *Wheeler's Peachtree Pharmacy, Inc., v. Commissioner*, 35 T.C. 177, 180 (1980).

Finally, the Francis' Family argued, inter alia, that the Eighth Circuit had jurisdiction to determine if the United States Tax Court had jurisdiction because jurisdiction can be challenged at any time as

³² Page 4, MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR LEAVE TO FILE OUT OF TIME, January 11, 2018.

³³ APPELLANTS' OPPOSITION TO APPELLEE'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR LEAVE TO FILE OUT OF TIME DATED JANUARY 11, 2018

a dispositive issue; *Normac, Inc. & Normac International v. Commissioner*, 90 T.C. 142, 146-147 (1988).

The DOJ replied that the Francis' Family subsequently filed an amended petition requesting a determination of deficiency giving the Tax Court personal jurisdiction.

The DOJ also replied that the Francis' Family elected to proceed in Tax Court by filing the *amended petition*.

The DOJ further replied that the *Notice of Deficiency* is presumed valid and that courts generally will not look behind the statutory notice of deficiency; See *Williams v. Commissioner*, 999 F.2d 760, 763 (4th Cir. 1993).

JUDGMENT: PROCESS SIGNED BY THE COURT CLERK

The Eighth Circuit, in a JUDGMENT dated January 29, 2018, denied the DOJ's motion to file out of time but they granted the DOJ's motion for dismissal under Eighth Circuit Rule 47A(b).

The judgment did not provide a reasoned opinion – no explanation was given and the judgment was signed by the Court Clerk. See Appendix A, page 1a.

PETITION FOR REHEARING BY PANEL

The Francis Family submitted a timely Petition for Rehearing by Panel pursuant to Fed. R. App. P. 40 on February 2, 2018.

The Francis' Family questioned the Eighth Circuit's denial of the DOJ's motion to file out of time and the contradicting grant of the DOJ's motion to dismiss that was filed out of time.

Judicial economy, the Francis Family argued, dictates that disputed jurisdiction be settled prior to adjudication; guidance is to be found, as was pointed out, at Fed. R. Civ. P. 1 and Fed. R. Civ. P. 12(h)(1).

Furthermore, the Francis' Family argued that personal jurisdiction is hotly disputed and the Francis' Family's challenge to subject matter jurisdiction has been ignored by the Tax Court.

On February 13, 2018, the Eighth Circuit ordered the DOJ to reply to the jurisdictional issues³⁴ raised in the *Petition for Rehearing by Panel*.

The relevant arguments made by the DOJ in their response to the *Petition for Panel Rehearing* included that a petition for panel rehearing

*** "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." See, Fed. R. App. P. 40(a)(2).

³⁴ The inference is the issue of a contradictory court order was not to be addressed in the response.

The DOJ alleged that the Francis' Family failed³⁵ to comply with Fed. R. App. P. 40(a)(2) and referenced *Sukhov v. Gonzales*, 403 F.3d 568, 570 (8th Cir. 2005).

The DOJ's reply to the petition for *Rehearing by Panel* also argued³⁶ that the final judgment rule was an overriding factor compared to the Francis' Family's argument *invoking judicial* economy in order to avoid piecemeal appeals.

The other arguments made by the DOJ in its response³⁷ were:

- A. The Court correctly granted the motion to dismiss.
- B. The remaining arguments by the Francis' Family are meritless:
 - 1. Correctness³⁸ of the Tax Court Order is not pertinent to the *finality* of the Tax Court order.
 - 2. The Tax Court correctly ruled that it had jurisdiction and that the case was not moot.
 - a. The Notice of Deficiency & filing of amended petition conferred jurisdiction on the Tax Court.

³⁵ The JUDGMENT did not offer any explanation.

³⁶ Page 7, APPELLEE'S RESPONSE TO APPELLANT'S PETITION FOR PANEL REHEARING, dated March 1, 2018.

³⁷ The response was limited to 3900 words by the court order.

³⁸ That is, the correctness as that correctness relates to the Tax Court's jurisdiction to make such an order.

- b. The Francis' Family's payment of the deficiency did not deprive the Tax Court of its jurisdiction.

PROCESS SIGNED BY THE COURT CLERK

On April 02, 2018, the Court Clerk signed an order, at the direction of the Court, denying the rehearing by panel without explanation.

**REASONS WHY
THE PETITION SHOULD BE GRANTED**

This is a call for the Court to exercise its supervisory power over the lower courts: the Court of Appeals for the Eighth Circuit abdicated its duty

O N E

The Eighth Circuit abdicated their Congressional mandate to determine if the United States Tax Court had subject matter jurisdiction over the Francis' Family's redetermination of deficiency.

- A. "Only³⁹ Congress may determine a lower federal court's subject-matter jurisdiction. U.S. Const., Art. III, § 1".

³⁹ Konrick v. Ryan, 540 U.S. 443, 453 (2004)

- B. Congress has granted courts of appeals jurisdiction over United States Tax Court decisions as provided by 26 U.S.C. § 7482(a).
- C. Subject matter jurisdiction may be challenged at any time; *Arbaugh v. Y & H Corp.*, 546, U.S. 500 (2006):

"The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. Rule 12(h)(3) instructs: 'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.' See *Kontrick v. Ryan*, 540 U. S. 443, 455 (2004)."

Kontrick v. Ryan, 540 U.S. 443, 455 (2004) "A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884) (challenge to a federal court's subject-matter jurisdiction may be

made at any stage of the proceedings, and the court should raise the question *sua sponte*); *Capron v. Van Noorden*, 2 Cranch 126, 127 (1804) (judgment loser successfully raised lack of diversity jurisdiction for the first time before the Supreme Court); Fed. Rule Civ. Proc. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

- D. The Francis' Family raised the question⁴⁰ of *subject matter jurisdiction* with the Eighth Circuit.
1. The Francis' Family attacked the Tax Court's subject matter jurisdiction in the Eighth Circuit on the grounds that the Tax Court lacked a valid *Notice of Deficiency*.
 2. "However, a valid petition may not be filed in the Tax Court without the issuance of a valid statutory notice of deficiency." *Midland Mortgage Co., v. Commissioner*, 73 T.C. 902 (1980).

⁴⁰ APPELLANTS' OPPOSITION TO APPELLEE'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR LEAVE TO FILE OUT OF TIME DATED JANUARY 11, 2018. The brief in opposition is dated January 15, 2018.

- E. The Eighth Circuit issued a JUDGMENT granting the DOJ's motion to dismiss, signed by a clerk, without ever providing a reasoned opinion regarding the issue of subject matter jurisdiction.
- F. The Eighth Circuit is in plain error and, respectfully, this Court should remand.

T W O

The Eighth Circuit abused their discretion in dismissing the Francis' Family's action for lack of jurisdiction under Eighth Circuit Rule 47A(b).

- A. Eighth Circuit Rule 47A(b) provides in relevant part:
 - “The appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court's jurisdiction. Except for good cause or on the motion of the court, a motion to dismiss based on jurisdiction must be filed within 14 days after the court has docketed the appeal.” ***
- B. The appeal was docketed on December 08, 2017; Case No. 17-3679 docket report.
- C. The DOJ's *motion to dismiss case for lack of jurisdiction and to file motion out of time* was filed on January 11, 2018.
- D. The last day to file a *motion to dismiss case for*

- lack of jurisdiction* under Eighth Circuit Rule 47A(b) was December 22, 2017.
- E. The DOJ filed the *motion to dismiss case for lack of jurisdiction* 34 days after the appeal was docketed on January 11, 2018.
 - F. The Eighth Circuit denied the DOJ's motion to file a motion to dismiss case for lack of jurisdiction out of time in the JUDGMENT, signed by the Court Clerk, dated January 29, 2018.
 - G. The Eighth Circuit granted the DOJ's *motion to dismiss case for lack of jurisdiction* (that they denied could be filed out of time) in the JUDGMENT, signed by the Court Clerk, dated January 29, 2018.
 - H. This is a prima facie contradiction and an invalid – nonsensical – JUDGMENT.
 - I. The Francis' Family raised the issue that the Eighth Circuit's JUDGMENT was, on its face, a contradiction in the *Petition for Rehearing by Panel* filed February 02, 2018.
 - J. The Eighth Circuit, without explaining the contradiction, denied the *Petition for Rehearing by Panel* in an ORDER, signed by the Court Clerk, filed on April 02, 2018.
 - K. The Eighth Circuit abused their discretion in allowing a JUDGMENT to stand, after receiving NOTICE that it was, on its face, a contradiction without explanation or correction.

- L. The Eighth Circuit is in plain error and, respectfully, this Court should remand.

CONCLUSION

The petition for writ of certiorari to the Eighth Circuit should be granted because the lower courts have departed from the principles of justice by abusing their powers related to jurisdiction.

The lower courts have denied jurisdiction when it should have been embraced – and exercised jurisdiction without authority. Therefore, this petition for a writ of certiorari to the Eighth Circuit should be granted.

July 1, 2018

Respectfully,

► /s/ Brad S. Francis
Brad S. Francis, *pro se*
9704 North Holmes Street
Kansas City, MO 64155

► /s/ Christine C. Francis
Christine C. Francis, *pro se*
9704 North Holmes Street
Kansas City, MO 64155

DECLARATION

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the statements in this petition for a writ of certiorari are true and correct.

Executed this 1st day of July, 2018, in Kansas City, Missouri.

► /s/ Brad S. Francis
Brad S. Francis, pro se
9704 North Holmes Street
Kansas City, MO 64155-2098
Mobile: (816) 812-3600
E-Mail: all4_laissez.faire@yahoo.com

► /s/ Christine C. Francis
Christine C. Francis, pro se
9704 North Holmes Street
Kansas City, MO 64155-2098
Mobile: (816) 812-3600
E-Mail: all4_laissez.faire@yahoo.com