

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2447

Brad S. Francis and Christine C. Francis
Appellants

v.

Commissioner of Internal Revenue
Appellee

Appeal from The United States Tax Court
(009801-16)

MANDATE

In accordance with the opinion and judgment of
05/09/2019, and pursuant to the provisions of Federal
Rule of Appellate Procedure 41(a), the formal mandate is
hereby issued in the above-styled matter.

July 15, 2019

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-2447

Brad S. Francis and Christine C. Francis

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(009801-16)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 08, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C
**United States Court of Appeals
for the Eighth Circuit**

No. 18-2447

Brad S. Francis; Christine C. Francis

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court

Submitted: May 6, 2019

Filed: May 9, 2019

[Unpublished]

Before COLLTON, BOWMAN, and SHEPHERD,
Circuit Judges.

PER CURIAM.

Brad and Christine Francis appeal from the tax court's¹ dismissal—for lack of prosecution—of

¹ The Honorable L. Paige Marvel, Chief Judge, United States Tax Court.

their challenge to the Commissioner of Internal Revenue's notice asserting an income deficiency for 2013. Following a careful review, we conclude that the tax court had jurisdiction over the case, see Walters v. United States, 474 F.3d 1137, 1139 (8th Circuit 2007) (lower court's determination of jurisdiction is reviewed *de novo*); and did not abuse its discretion by dismissing the case for lack of prosecution, see Long v. Comm'r, 742 F. 2d 1141, 1143 (8th Cir. 1984) (per curiam) (tax court's dismissal for failure to prosecute is reviewed for abuse of discretion). Accordingly, we affirm. See 8th Cir. R. 47B.

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Appellate Case: 18-2447 Page: 2 Date Filed:
05/09/2019 Entry ID: 4785786

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-2447

Brad S. Francis; Christine C. Francis

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(009801-16)

JUDGMENT

Before COLLOTON, BOWMAN, and SHEPHERD, Circuit
Judges.

This appeal from the United States Tax Court was
submitted on the record of the tax court and briefs of the
parties.

After consideration, it is hereby ordered and
adjudged that the judgment of the tax court in this cause
is affirmed in accordance with the opinion of this Court.

May 09, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans
APPENDIX E

474 F.3d 1137 (2007)

Estate of Delores WALTERS; Tanya Ward; Paddy Aungie; Melanie Traversie; Dion Hall; Brady Hall, Appellants,

v.

UNITED STATES of America, acting through the Bureau of Indian Affairs, Department of Safety, Appellee.

No. 06-2705.

United States Court of Appeals, Eighth Circuit.

**Submitted: December 13, 2006.
Filed: January 29, 2007.**

1138*1138 Lee C. McCarren, argued, Pierre, SD, for Appellant.

Mark E. Salter, argued, Asst. U.S. Attorney, Sioux Falls, SD, for Appellee.

Before BYE, COLLOTON, and BENTON, Circuit Judges.

BYE, Circuit Judge.

Several parties who suffered injuries on the Cheyenne River Sioux Indian Reservation in South Dakota challenge the district court's¹¹ determination that their claims against the Bureau of Indian Affairs (BIA) were barred by the discretionary

function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680. We affirm.

I

Three separate car accidents occurred between January 14 and May 6, 2004, on a 14.6 mile stretch of gravel road designated as BIA Route #3 within the exterior boundaries of the Cheyenne River Sioux Indian Reservation. Several people (hereinafter Walters) were injured in the accidents. They joined together to bring claims against the United States (acting through the BIA) under the FTCA alleging the washboard condition of the gravel road contributed to their accidents, and the BIA's lack of regular maintenance was the cause of the washboard condition.

The United States filed a motion to dismiss contending the discretionary function exception barred the suit because, under the circumstances of this case, maintenance of the road was a discretionary function. *See* 28 U.S.C. § 2680(a) (precluding claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"). After converting the motion to dismiss into a motion for summary judgment, the district court granted summary judgment and dismissed the suit on two grounds. First, the 1139*1139 district court agreed the discretionary function exception applied. Second, the district court *sua sponte* raised the issue whether a private party could be held liable for negligent failure to maintain a road, and concluded the FTCA's

private analogue requirement, *see* 28 U.S.C. § 1346(b)(1) (authorizing claims only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"), barred the suit under the facts and circumstances of this case. Walters filed a timely appeal challenging both of the district court's determinations.

II

We review the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party. *Tillery v. Hoffman Enclosures, Inc.*, 280 F.3d 1192, 1196 (8th Cir. 2002). If the FTCA's discretionary function exception applies, it is a jurisdictional bar to suit. *Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 795 (8th Cir. 1998). We also review de novo the district court's determination that it lacks jurisdiction. *Simes v. Huckabee*, 354 F.3d 823, 827 (8th Cir. 2004).

Walters contends the district court erred in determining the discretionary function exception barred this suit because road maintenance is generally not considered a discretionary function, but rather a ministerial act performed at the operational level. *See ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987) (concluding the discretionary function exception did not shield the Park Service from suit for its alleged failure to maintain a road in compliance with Park Service standards that required park roads to "conform to the original grades and alignments" and to be "firm,

[and] of uniform cross section"). Walters likens *ARA Leisure* to this case because the applicable regulation here defined maintenance as "the act of preserving the entire roadway, including surface, shoulders, roadsides, structures, and the necessary traffic control devices as nearly as possible in the as-built condition and to provide services for the satisfactory and safe use of such roads." 25 C.F.R. § 170.2(h) (2004). Walters reasons the "as-built condition" of BIA Route #3 did not include washboard, meaning the BIA did not maintain the road in compliance with the applicable standard, and thus this suit should be allowed for the same reason suit was allowed in *ARA Leisure*.

If § 170.2(h) were the extent of the applicable regulations, we would agree this case is the same as *ARA Leisure* and the discretionary function exception does not apply. The government, however, cites another applicable regulation which specifically requires the BIA to take into account the availability of funds when deciding the extent to which to maintain roads. *See* 25 C.F.R. § 170.6 (2004) ("Subject to the availability of funds, the Commissioner shall maintain, or cause to be maintained, those approved roads on the Federal-Aid Indian Road System.").

Where the applicable statutes, regulations, or policies allow the government to take budgetary considerations into account, the discretionary function exception applies. In *National Union Fire Insurance v. United States*, the Ninth Circuit explained this distinction:

A word also needs to be said about cost. In *ARA Leisure*, we said that the agency could not invoke the discretionary function exception based on budgetary considerations, but in *Kennewick Irrigation District v. United States*, 880 F.2d 1018 (9th Cir.1989)] we said that it could. In this case we also say that it could. These cases can be reconciled; 1140*1140 whether the government can take cost into account depends on the applicable statutes, regulations, and policies. In *ARA Leisure*, the regulation required the Park Service to maintain the road width and firmness, not to balance that goal against what it would cost. In the case at bar, the statute expressly requires the Corps to consider the "relation of the ultimate cost of such work" to the other factors in deciding whether to do the work. 33 U.S.C. § 541. Where a statute or policy requires a particular government action, it has no discretionary function immunity based on its choice to spend its money doing something else instead. But where a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function.

115 F.3d 1415, 1421-22 (9th Cir.1997).

Walters gives us no reason to create a circuit split with the Ninth Circuit on this issue, other than to urge us to consider the unfairness of shielding the BIA from suit for the serious injuries suffered by the parties in light of allegedly strong evidence the road was poorly maintained by the BIA. Unfortunately, the discretionary function exception is not about fairness:

Application of the exception is often troubling, because it may be a shield for carelessness and poor judgment.... Private actors generally must pay for the harm they do by carelessness. The government's power to tax enables it, better than any private actor, to perform its conduct with reasonable care for the safety of persons and property, and to spread the cost over all the beneficiaries if its conduct negligently causes harm. Fairness might seem to suggest that the government should be liable more broadly than private actors. But at its root, the discretionary function exception is about power, not fairness. The sovereign has, by the exercise of its authority, reserved to itself the right to act without liability for misjudgment and carelessness in the formulation of policy.

Id. at 1422.

Because the applicable regulations expressly required the BIA to consider the availability of funds in deciding whether to perform maintenance on its roads, we conclude the district court correctly held the discretionary function exception shields the government from suit in this case.^[2]

III

We affirm the district court's order of dismissal.

COLLOTON, Circuit Judge, concurring in the judgment.

I am not as confident as my colleagues that we can uphold the district court's conclusion that this action is barred by the discretionary function exception of

the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The discretionary function exception precludes liability for acts of government officials that "involve an element of judgment or choice," where the judgment or choice is "based on considerations of public policy." United States v. Gaubert, 499 U.S. 315, 322-23, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) (internal quotations omitted). Unlike National Union Fire Insurance v. United States, 115 F.3d 1415 (9th Cir.1997), where the applicable statute "expressly require[d]" the government "to consider the relation of the ultimate cost of [the] work to other factors in deciding 1141*1141 whether to do the work," *id.* at 1422 (internal quotation omitted), the regulation in this case says merely that the government "shall maintain, or cause to be maintained" the roads, "subject to the availability of funds." 25 C.F.R. § 170.6 (2004). Everything the government does is subject to the availability of funds. This case thus seems closer to ARA Leisure Services v. United States, 831 F.2d 193 (9th Cir.1987), where the government argued that road maintenance decisions required consideration of "funding constraints," *id.* at 195, and the court rejected the argument because "[b]udgetary constraints underlie virtually all governmental activity." *Id.* at 196. Cf. Aslakson v. United States, 790 F.2d 688, 693 (8th Cir.1986) ("Where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees."). I am doubtful that the people who determined not to repair the road in this case were charged with making a policy

decision about the allocation or availability of government funds.

I concur in the judgment, however, because I believe the district court correctly dismissed this action pursuant to the "private analogue requirement" of the FTCA. The FTCA extends jurisdiction to the district courts over claims against the United States for wrongful acts or omissions of government employees only in circumstances "where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1334(b)(1) (emphasis added). The Act requires the court "to look to the state-law liability of private entities, not to that of public entities, when assessing the Government's liability under the FTCA 'in the performance of activities which private persons do not perform.'" United States v. Olson, 546 U.S. 43, 126 S.Ct. 510, 512, 163 L.Ed.2d 306 (2005) (quoting Indian Towing Co. v. United States, 350 U.S. 61, 64, 76 S.Ct. 122, 100 L.Ed. 48 (1955)).

In this case, therefore, the dispositive question is whether a private entity would be liable to the plaintiffs if a private party negligently had failed to eliminate "washboard" conditions in the gravel road traveled by the plaintiffs. The Supreme Court of South Dakota provided guidance on this question in Estate of Shuck v. Perkins County, 577 N.W.2d 584 (S.D.1998). There, a driver of an automobile lost control of his vehicle due to loose gravel on a road, and the court held that the defendant county was not liable for negligence in maintaining the road by allowing loose gravel to remain on the road. The

court reasoned that "there can be no duty or negligent breach thereof concerning a condition which is inherent to that subject matter," and observed that the plaintiffs cited no authority that "loose gravel, by itself, is not an inherent part of a gravel road." *Id.* at 589. In explaining what it meant by an "inherent" condition, the court stated that "[w]hile gravel when initially placed may be compacted by machinery, the passing of time, traffic, weather and the elements *can result in that compacted gravel becoming loose.*" *Id.* (emphasis added).

The holding of *Shuck* demonstrates that negligent maintenance resulting in loose gravel cannot give rise to an action under the FTCA, because a private party (like a county) has no duty in South Dakota to prevent the development of such an "inherent" condition. For the same reason, the failure to prevent washboard conditions in a gravel road would not give rise to tort liability for a private party in South Dakota. There is no dispute that "washboard conditions" are an inherent condition of gravel roads in the same sense that *Shuck* defined loose gravel as an inherent condition — that is, while gravel roads initially may be rendered flat by machinery, the passing of time, traffic, weather, and the elements can result in the development of washboard conditions. The district court remarked that "washboard conditions on gravel roads are so obvious that any person driving on a gravel road is expected to be aware of such conditions and take precautions when driving on gravel roads." The court took judicial notice that washboard conditions "are an inherent part of almost all gravel roads in South Dakota," and appellants conceded this fact at oral

argument. Accordingly, because a private party would not be liable in South Dakota for failing to maintain a gravel road without washboard conditions, the United States has not waived sovereign immunity under the FTCA for such an act or omission by a government employee.

[1] The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

[2] Having concluded the district court lacked jurisdiction over this suit because the discretionary function exception applied, we have no reason to consider the district court's alternative holding that the suit was barred by the FTCA's private analogue requirement.

APPENDIX F

742 F.2d 1141 (1984)

Darryl S. and Arlyne M. LONG, Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Appellee.

No. 84-1347.

United States Court of Appeals, Eighth Circuit.

Submitted July 24, 1984.
Decided September 12, 1984.
Rehearing and Rehearing Denied October 15, 1984.

1142*1142 Darryl S. and Arlyne M. Long, pro se.

Glenn L. Archer, Jr. Asst. Atty. Gen., Michael L. Paup, Richard Farber, Bruce R. Ellisen, Attys. Tax Div., Dept. of Justice, Washington, D.C., for appellee.

Before HEANEY, BRIGHT, and ROSS, Circuit Judges.

Rehearing and Rehearing En Banc Denied October 15, 1984.

PER CURIAM.

Darryl S. and Arlyne M. Long (taxpayers) appeal from a decision of the United States Tax Court dismissing their petitions for redetermination of deficiencies in their income tax and upholding the

Commissioner of Internal Revenue's determination of deficiencies and tax penalties totalling over \$98,000. We affirm.

In March 1982, the Commissioner issued two notices of deficiency to taxpayers, covering the years 1978-80. Taxpayers petitioned the United States Tax Court for redetermination of the deficiencies. The Commissioner then contacted taxpayers on several occasions and attempted to work out a stipulation of facts and documents not in dispute, pursuant to Tax Court Rule 91. Taxpayers would not cooperate.

On September 19, 1983, the case was called from the calendar of the Tax Court's trial session at St. Paul, Minnesota. Taxpayers appeared pro se. No stipulation was submitted, so the court directed the parties to meet again and develop a stipulation before the trial date of September 26, 1983. Taxpayers did meet with the Commissioner's attorneys and produced numerous financial records. Nevertheless, the parties were not able to reach a stipulation.

At the trial, the Commissioner reviewed taxpayers' failure to cooperate in reaching a stipulation and moved for dismissal of the case under Tax Court Rule 123(b). Rule 123(b) provides:

Dismissal: For failure of a petitioner properly to prosecute or to comply with these Rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the petitioner. The Court may, for similar reasons, decide against

any party any issue as to which he has the burden of proof * * *.

Responding to the Commissioner's motion, taxpayers argued that they had attempted to develop a stipulation in their meetings prior to trial.

Taxpayers also argued the merits of their petitions for redetermination. They claimed that the income in question was not attributable to them but to a trust established by taxpayer Darryl Long. It appears that the sole property of the trust was Darryl Long's labor and the right to income derived from that labor.

Taxpayers refused to submit the entire trust indenture as evidence, despite the court's statement that "nothing has been stipulated from the record that you have turned over or from any of these documents, and there is nothing before the court at the moment upon which the court could make a decision other than in favor of the Respondent." 1143*1143 The court then granted the Commissioner's motion and dismissed the petitions for redetermination.

In a memorandum issued with its order of dismissal, the court stated that it was dismissing the petitions solely because of taxpayers' unreasonable refusal to cooperate in the preparation of a stipulation.

Dismissal is a harsh remedy but we think it is justified by the facts of this case. Taxpayers were persistently resistant to the Commissioner's attempts to reach a stipulation, and no stipulation was ever achieved. In addition, the court gave taxpayers a generous opportunity to state their case for redetermination of the deficiencies, yet they failed to produce any admissible evidence in support of

their claims. It appears from the taxpayers' testimony that this trust it was simply an attempt to transfer the incidence of taxation away from taxpayers by an assignment of lifetime services.

In Vnuk v. Commissioner of Internal Revenue, 621 F.2d 1318 (8th Cir.1980), a panel of this court held that such a trust does not shift the burden of taxation.

The court's decision to dismiss the petitions because of taxpayers' failure to properly prosecute was a proper exercise of its discretion. The decision of the tax court is affirmed.

APPENDIX G
UNITED STATES TAX COURT
WASHINGTON, DC 20217

BRAD S. FRANCIS &)
CHRISTINE C. FRANCIS,)
Petitioners,)
)
v.) Docket No. 9801-16
)
COMMISSIONER OF)
INTERNAL REVENUE,)
)
Respondent)

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the trial session of the Court in Kansas City, Missouri, on February 5, 2018. There was no appearance by or on the behalf of petitioners. Respondent filed a Motion to Dismiss for Lack of Prosecution, which the Court took under advisement. The Court issued an Order to Show Cause, directing petitioners to show cause in writing, on or before March 7, 2018, why respondent's Motion to Dismiss for Lack of Prosecution should not be granted. To date, petitioners have failed to file a response to the Order to Show Cause. Upon due consideration, it is ORDERED that the Order to Show Cause, dated February 5, 2018, is hereby made absolute. It is further ORDERED that respondent's Motion to Dismiss for Lack of Prosecution filed February 5, 2018, is granted, and this case is dismissed for lack

of prosecution. It is further ORDERED AND DECIDED that there is a deficiency in tax due from petitioners as follows:

<u>Year</u>	<u>Deficiency</u>	<u>Addition to Tax/Penalty</u> <u>I.R.C. §6662(a)</u>
2013	\$32,520.00	\$0.00

SERVED Apr 13 2018

Respondent concedes the accuracy-related penalty in the amount of \$1,418.20 for the taxable year 2013 as set forth in the notice of deficiency.

**(Signed) L. Paige Marvel
Chief Judge**

ENTERED: APR 13 2018

APPENDIX H

US TAX COURT
RECEIVED
DEC 11 2017

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RMM



US TAX COURT
FILED
DEC 11 2017

BRAD S. FRANCIS & CHRISTINE C. FRANCIS,
Petitioners,

PAPER FILED

v.

Docket No. 9801-16

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITIONERS' NOTICE TO THE COURT OF PETITIONERS' INTENTION TO PROTECT PERSONAL JURISDICTION BY NON- PARTICIPATION IN DISCOVERY AND SUBSEQUENT PHASES OF ACTION

CERTIFICATE OF SERVICE

Docket No. 9801-16

UNITED STATES
TAX COURT
UNITED STATES TAX COURT

2017 DEC 11 AM 10:45

BRAD STEPHEN FRANCIS
CHRISTINE CAROL FRANCIS

BY: 128
DEPUTY CLERK

Petitioner)
v.) Docket No. 9801-16
COMMISSIONER OF INTERNAL REVENUE,)
Respondent)

**NOTICE TO THE COURT
OF PETITIONERS' INTENTION TO PROTECT PERSONAL
JURISDICTION BY NON-PARTICIPATION IN DISCOVERY AND
SUBSEQUENT PHASES OF ACTION**

Petitioners' respectfully declare that they have exhausted all attempts to directly extract themselves from United States Tax Court Jurisdiction by use of United States Tax Court processes and procedures. As *pro se* litigants we have done our best to show that the United States Tax Court was utilizing a Notice of Deficiency brought by fraud and re-determining the deficiency after having usurped jurisdiction.

In order to save all those involved valuable resources of time and money we are hereby – and respectfully – declaring our intention to fight this action within the venue of the 8th Circuit Court of Appeals and to protect our personal jurisdiction by respectfully refusing to participate in formal Discovery and subsequent Tax Court procedures and processes.

TEXT OF TAX COURT DOCKET DOCUMENT 70

“Petitioners’ respectfully declare that they have exhausted all attempts to directly extract themselves from United States Tax Court Jurisdiction by use of United States Tax Court processes and procedures. As pro se litigants we have done our best to show that the United States Tax Court was utilizing a Notice of Deficiency brought by fraud and re-determining the deficiency after having usurped jurisdiction.

In order to save all those involved valuable resources of time and money we are hereby – and respectfully – declaring our intention to fight this action with the venue of the 8th Circuit Court of Appeals and to protect our personal jurisdiction by respectfully refusing to participate in formal Discovery and subsequent Tax Court procedures and processes.”

VERIFICATION

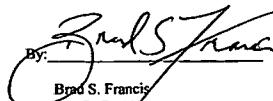
Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this motion: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the motion otherwise complies with the requirements of Tax Court Rule 50.

Furthermore, the undersigned *pro se* Petitioners know the contents of the motion; and that the information contained therein is true to the best of their knowledge and belief; and they do freely sign under the penalties of perjury.

And, Petitioners have mailed a copy of this motion to Respondent, attention Ms. Joline M. Wang, Internal Revenue Service, Suite 301, 2345 Grand Boulevard, Kansas City, MO 64108-2625, under United States Postal Service Certified Mail Article #7017 1450 0000 2512 9585.

Respectfully submitted,

Date: December 3, 2017

By: 
Brad S. Francis
Pro Se Petitioner
9704 North Holmes Street
Kansas City, MO 64155-2098
Mobile: (816) 812-3600

By: 
Christine C. Francis

Pro Se Petitioner
9704 North Holmes Street
Kansas City, MO 64155-2098
Mobile: (816) 812-3600

APPENDIX I
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-3679

Brad S. Francis; Christine C. Francis
Appellants

v.

Commissioner of Internal Revenue
Appellee

Appeal from The United States Tax Court
(009801-16)

JUDGMENT

Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

The motion for leave to file out of time for good cause is denied.

The motion of appellee for dismissal of this appeal is granted. The appeal is hereby dismissed. See Eighth Circuit Rule 47A(b).

January 29, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX J

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-3679

Brad S. Francis and Christine C. Francis

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(009801-16)

ORDER

A petition for rehearing has been filed by Appellants in the above case. The court requests a response to the jurisdictional issues in the petition.

The response is limited to 3900 words, and must contain a word count certificate. The response should be filed electronically by February 23, 2018.

February 13, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 17-3679

Brad S. Francis and Christine C. Francis

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(009801-16)

ORDER

The petition for rehearing by the panel is denied.

April 02, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX L

Deficiency Procedures 26 U.S.C. § 6211 et seq

§ 6211. Definition of a deficiency

(a) In general For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of— (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over— (2) the amount of rebates, as defined in subsection (b)(2), made.

(b) Rules for application of subsection (a) For purposes of this section— (1) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, without regard to the credit under section 33, and without regard to any credits resulting from the collection of amounts assessed under section 6851 or 6852 (relating to termination assessments). (2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitle A or B or chapter 41, 42, 43, or 44 was less than the excess of the amount specified in subsection (a)(1) over the rebates previously made. (3) The

computation by the Secretary, pursuant to section 6014, of the tax imposed by § 6211 TITLE 26—INTERNAL REVENUE CODE Page 3238 chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return. (4) For purposes of subsection (a)— (A) any excess of the sum of the credits allowable under sections 24(d), 25A by reason of subsection (i)(6) thereof, 32, 34, 35, 36, 36A, 36B, 36C, 53(e), 168(k)(4), 6428, and 6431 over the tax imposed by subtitle A (determined without regard to such credits), and (B) any excess of the sum of such credits as shown by the taxpayer on his return over the amount shown as the tax by the taxpayer on such return (determined without regard to such credits), shall be taken into account as negative amounts of tax. * * *

§ 6212. Notice of deficiency

(a) In general If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local § 6212 TITLE 26—INTERNAL REVENUE CODE Page 3240 office of the taxpayer advocate and the location and phone number of the appropriate office.

(b) Address for notice of deficiency (1) Income and gift taxes and certain excise taxes In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A,

chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. (2) Joint income tax return In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address. * * *

§ 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the

case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

(b) Exceptions to restrictions on assessment

(1) Assessments arising out of mathematical or clerical errors If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section

6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof. (2) Abatement of assessment of mathematical or clerical errors (A) Request for abatement Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter. (B) Stay of collection In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph. (3) Assessments arising out of tentative carryback or refund adjustments If the Secretary determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback or the amount described in section 1341(b)(1) with respect to which such amount was applied, credited, or refunded, he may assess without regard to the provisions of paragraph (2) the amount of the excess as a deficiency as if it were due to a mathematical or clerical error appearing on the return. (4) Assessment of amount paid Any amount paid as a

tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment. (5) Certain orders of criminal restitution If the taxpayer is notified that an assessment has been or will be made pursuant to section 6201(a)(4)— (A) such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), section 6212(c)(1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and (B) subsection (a) shall not apply with respect to the amount of such assessment.

(c) Failure to file petition.

If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

(d) Waiver of restrictions.

The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

(e) Suspension of filing period for certain excise taxes
The running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to the taxes imposed by section 4941 (relating to taxes on self-dealing), 4942 (relating to taxes on failure to distribute income), 4943 (relating to taxes on excess business holdings), 4944 (relating to investments which jeopardize charitable purpose), 4945 (relating to taxes on taxable expenditures), 4951 (relating to taxes on self-dealing), or 4952 (relating to taxes on taxable expenditures), 4955 (relating to taxes on political expenditures), 4958 (relating to private excess benefit), 4971 (relating to excise taxes on failure to meet minimum funding standard), 4975 (relating to excise taxes on prohibited transactions) shall be suspended for any period during which the Secretary has extended the time allowed for making correction under section 4963(e).

(f) Coordination with title 11

(1) Suspension of running of period for filing petition in title 11 cases In any case under title 11 of the United States Code, the running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to any deficiency shall be suspended for the period during which the debtor is prohibited by reason of such case from filing a petition in the Tax Court with respect to such deficiency, and for 60 days thereafter. (2) Certain action not taken into account For purposes of the second and third sentences of subsection (a), the filing of a proof of claim or request for payment (or the taking of any other action) in a case under title 11 of the United States Code shall not be treated as action prohibited by such second sentence.

(g) Definitions

For purposes of this section— (1) Return The term “return” includes any return, statement, schedule, or list, and any amendment or supplement thereto, filed with respect to any tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44. (2) Mathematical or clerical error The term “mathematical or clerical error” means— (A) an error in addition, subtraction, multiplication, or division shown on any return, (B) an incorrect use of any table provided by the Internal Revenue Service with respect to any return if such incorrect use is apparent from the existence of other information on the return, (C) an entry on a return of an item which is inconsistent with another entry of the same or another item on such return, (D) an omission of information which is required to be supplied on the return to substantiate an entry on the return, (E) an entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by subtitle A or B, or chapter 41, 42, 43, or 44, if such limit is expressed— (i) as a specified monetary amount, or (ii) as a percentage, ratio, or fraction, and if the items entering into the application of such limit appear on such return, (F) an omission of a correct taxpayer identification number required under section 32 (relating to the earned income credit) to be included on a return, (G) an entry on a return claiming the credit under section 32 with respect to net earnings from self-employment described in section 32(c)(2)(A) to the extent the tax imposed by section 1401 (relating to self-employment tax) on such net earnings has not been paid, (H) an omission of a correct TIN required under section 21 (relating to expenses for household and dependent care services necessary for gainful employment) or section 151 (relating to allowance of

deductions for personal exemptions), (I) an omission of a correct TIN required under section 24(e) (relating to child tax credit) to be included on a return, (J) an omission of a correct TIN required under section 25A(g)(1) (relating to higher education tuition and related expenses) to be included on a return, (K) an omission of information required by section 32(k)(2) (relating to taxpayers making improper prior claims of earned income credit), (L) the inclusion on a return of a TIN required to be included on the return under section 21, 24, 32, or 6428 if— (i) such TIN is of an individual whose age affects the amount of the credit under such section, and (ii) the computation of the credit on the return reflects the treatment of such individual as being of an age different from the individual's age based on such TIN, (M) the entry on the return claiming the credit under section 32 with respect to a child if, according to the Federal Case Registry of Child Support Orders established under section 453(h) of the Social Security Act, the taxpayer is a noncustodial parent of such child, (N) an omission of the reduction required under section 36A(c) with respect to the credit allowed under section 36A or an omission of the correct social security account number required under section 36A(d)(1)(B), (O) an omission of any increase required under section 36(f) with respect to the recapture of a credit allowed under section 36, and (P) an entry on a return claiming the credit under section 36 if— (i) the Secretary obtains information from the person issuing the TIN of the taxpayer that indicates that the taxpayer does not meet the age requirement of section 36(b)(4), (ii) information provided to the Secretary by the taxpayer on an income tax return for at least one of the 2 preceding taxable years is

inconsistent with eligibility for such credit, or (iii) the taxpayer fails to attach to the return the form described in section 36(d)(4). A taxpayer shall be treated as having omitted a correct TIN for purposes of the preceding sentence if information provided by the taxpayer on the return with respect to the individual whose TIN was provided differs from the information the Secretary obtains from the person issuing the TIN.

§ 6214. Determinations by Tax Court

(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax Except as provided by section 7463, the Tax Court shall have jurisdiction to re-determine the correct amount of the deficiency even if the amount so re-determined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.

(b) Jurisdiction over other years and quarters The Tax Court in re-determining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to re-determine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid. Notwithstanding the preceding sentence, the Tax

Court may apply the doctrine of equitable recoupment to the same extent that it is available in civil tax cases before the district courts of the United States and the United States Court of Federal Claims.

- (c) Taxes imposed by section 507 or chapter 41, 42, 43, or 44 The Tax Court, in re-determining a deficiency of any tax imposed by section 507 or chapter 41, 42, 43, or 44 for any period, act, or failure to act, shall consider such facts with relation to the taxes under chapter 41, 42, 43, or 44 for other periods, acts, or failures to act as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the taxes under chapter 41, 42, 43, or 44 for any other period, act, or failure to act have been overpaid or underpaid. The Tax Court, in redetermining a deficiency of any second tier tax (as defined in section 4963(b)), shall make a determination with respect to whether the taxable event has been corrected.
- (d) Final decisions of Tax Court For purposes of this chapter, chapter 41, 42, 43, or 44, and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.