

No. 18A1313

Supreme Court, U.S.  
FILED

JUN 11 2019

OFFICE OF THE CLERK

**In the  
Supreme Court of the United States**

Steven T. Waltner and Sarah V. Waltner,

*Petitioners,*

v.

United States,

*Respondent.*

On Application for Extension of Time to File Petition for A Writ of Certiorari  
to the United States Court of Appeals for the Ninth Circuit

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**PETITIONERS' APPLICATION FOR EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the  
United States and as Circuit Justice for the United States Court of Appeals for the  
Ninth Circuit:

Petitioners respectfully request that the time for filing a petition for a writ of  
certiorari in this matter be extended for 60 days to and including August 26, 2019.  
The Judgment for review was entered on January 17, 2019 by a panel of the Court  
of Appeals for the Ninth Circuit (see App. A, *infra*). A petition for rehearing was  
filed on March 4, 2019 and was denied on March 28, 2019 (see App. B, *infra*).

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SUPREME COURT, U.S.

Therefore, absent an extension, the Petition for a Writ of Certiorari would be due on June 26, 2019. This application is presented at least ten days before that date. The parties for whom the undersigned seeks an extension are the Petitioners Steven T. Waltner and Sarah V. Waltner, along with her counsel in the case below, Donald W. Wallis, Esq. The Court has jurisdiction over the Judgment under 28 U.S.C. §1254(1).

### BACKGROUND

This case concerns a demonstrably processible tax return that the IRS had examined, calculated the tax, and processed a reduced overpayment. In a later refund action, the U.S. Court of Federal Claims declared that the return was not *valid* as a claim for refund under the specificity requirements of two Treasury regulations, and dismissed the refund action for lack of subject matter jurisdiction. Subsequently, the IRS issued a notice of deficiency several months after the statute of limitations on assessment had expired. The Waltners challenged the proposed deficiency in the U.S. Tax Court, asserting that the notice of deficiency was invalid, that there was no deficiency as a matter of law, and that the Tax Court lacked the power to do anything but render judgment in favor of petitioners and dismiss.

In the deficiency case, the government stipulated that the Waltners had timely filed their 2008 return and confirmed that the IRS had processed the return, but argued contrary to its Stipulations of Fact that the return nevertheless was not *valid*, and that the Waltners were precluded from defending the return as a *valid* return for purposes of triggering the statute of limitations because the Claims Court had called it an invalid claim for refund. The government did not introduce into

evidence a single page of the record of the prior case to prove that the issues were identical in both cases under the same burdens of proof and legal standards. The government argued that, since the return was earlier determined to be insufficient as a claim for refund, the exception to the statute of limitations for when a return is not filed at all (IRC §6501(c)(3)) allowed the IRS to assess a deficiency of tax on this return at any time. The Tax Court accepted the government's position that it took in contravention of its own Stipulations of Fact and its own treatment of the return, took judicial notice of the fact that there was a final judgment in the Claims Court refund action, and, without any evidence supporting issue preclusion, ruled that the Waltners were barred from arguing that their return was *valid* to start the limitations period. In this way, the Tax Court treated the already-processed return as a nullity for purposes of the exception to the statute of limitations, IRC § 6501(c)(3) (which does not mention or define the word "valid" in its context), and found that the Waltners were therefore liable for a *failure to file* penalty. It also imposed sanctions under § 6673 without allowing the Waltners to read, let alone to brief in opposition, the government's sanctions motion. And the court *sua sponte* imposed sanctions against the Waltners' counsel without a showing of bad faith, multiplication of proceedings or excess costs.

On appeal, without any record evidence of the prior case, the Court of Appeals for the Ninth Circuit affirmed that collateral estoppel precluded the Waltners from defending against the government's argument that the timely-filed and already-processed return was nevertheless *invalid* to start the limitations period. The Court of Appeals found the notice of deficiency to be timely and

summarily affirmed the deficiency, the failure to file penalty, and the sanctions under IRC §6673 against the Waltners. Disregarding Mr. Wallis's Status Report in which he indicated his intention to appeal the *sua sponte* sanctions against him, the Court of Appeals dismissed that portion of the appeal for lack of jurisdiction.

Petitioners intend to seek a writ of certiorari. The Ninth Circuit's affirmance of the application of collateral estoppel without *any part* of the record of the prior case in evidence directly contradicts its own decisions in *Guam Investment Company v. Central Building, Inc.*, 288 F.2d 19, 23 (CA9 1961), *U.S. v. Lasky*, 600 F.2d 765, 769 (CA9 1979), *Hernandez v. City of Los Angeles*, 624 F.2d 935, 937 (CA9 1980); and *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1321 (CA9 1992). The decision also conflicts with decisions of the Second, Third, Sixth and Eighth Circuit Courts of Appeals, and flies in the face of the principle that this Court articulated in *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980):

one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case.

The Court of Appeals could not have considered whether the issue sought to be precluded was fully and fairly litigated, or whether the burdens of proof and legal standards were the same in the prior case and the case below. It decided the case by applying the doctrine without requiring the government to meet its burden to prove with evidence any element of its defense.

The Waltners' petition will present the question of whether a timely-filed tax return that was examined and processed by the IRS and relied upon to issue a

deficiency notice can later, and without evidence, be declared by a court to be a nullity for purposes of the assessment statute of limitations by a court decree of issue preclusion based on a subjective and revisionist interpretation of IRC § 6501(c)(3).

The Ninth Circuit's interpretation of this exception to the statute of limitations conflicts with this Court's decisions in *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), and *Badaracco v. Commissioner*, 464 U.S. 386, 396-397 (1984), but, to the Waltners' knowledge, this Court has not yet passed on the precise question presented in the Waltners' Petition.

The Petition also will present the question of whether an informal notice of intent to appeal that Mr. Wallis filed in his Status Report is adequate to preserve the right of a party's counsel to appeal a *sua sponte* sanctions order against him that appears in the Judgment. Essentially holding that it was not, the Ninth Circuit split from a contrary decision of the Fifth Circuit in *Cobb v. Lewis*, 488 F.2d 41 (5th Cir.1974) ("the notice of appeal requirement may be satisfied by any statement, made either to the district court or to the Court of Appeals, that clearly evinces the party's intent to appeal"). The Waltners wish to seek remand to the Court of Appeals to hear and decide this important issue.

#### **REASONS FOR GRANTING AN EXTENSION OF TIME**

Petitioners understand that applications for extension of time to file petitions for certiorari are not favored, but believe that a 60-day extension is justified on the following grounds:

1. Petitioners have not yet been able to retain their former counsel, Mr. Donald Wallis, to represent them in their appeal to this Court. Mr. Wallis represented the Waltners in their appeal to the Ninth Circuit. In late March, when the petition for rehearing was denied, and in early April, Sarah Waltner and Donald Wallis made several attempts to confer but were unable to connect, due either to his work schedule or to her own. In the first two weeks of April, they were unable to confer due to Mr. Wallis's illness (flu exacerbated by his heart condition and debilitating fatigue). As of May 6, 2019, Mr. Wallis was recovering but expressed overwhelming professional and personal commitments and stated that he was not yet in a position to determine if he could work on or file the Petition for Certiorari on the Waltners' behalf *pro bono*, as the Waltners requested. Mr. Wallis is currently out of the country until June 14, 2019. Sarah Waltner and Mr. Wallis are currently scheduled to confer on June 15, 2019.

2. Around Easter, Petitioners' own work on the Petition was interrupted by family crisis involving the Waltners' son. Petitioner Sarah Waltner had to move him from his father's home in Eugene, Oregon to her home in Phoenix, Arizona on very short notice and with borrowed money.

3. Petitioners are suffering increasing financial hardship and will need more time to raise or to borrow the funds needed to prepare and file the Petition, or to obtain an agreement with their counsel that will reduce their financial burden.

4. Although Sarah Waltner has been working diligently with the thought that petitioners might have to file the Petition *pro se*, she has had difficulty completing the work alone without the assistance of counsel.

5. Further, there is one matter that petitioners cannot handle on their own in any event. The Court of Appeals held that Petitioners have no standing to appeal Mr. Wallis's sanctions issue on their counsel's behalf, even though they noticed their appeal of the Judgment that included that sanction. Therefore, without assurance of the continued representation of their former counsel, petitioners may have to abandon the issue and delete it from the Petition. An extension of time will help petitioners to determine whether Mr. Wallis will press the attorney sanction issue on his own behalf, and, if he does not, how to proceed in the preparation and completion of the Petition.

4. Without the extension of time, petitioners will have to write, format, and file the Petition *pro se* and possibly *in forma pauperis*, or be forced to give up the appeal.

5. An extension will not prejudice Respondent. The Mandate from the Court of Appeals has issued (see App. C, *infra*).

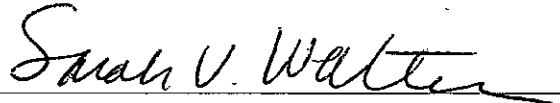
6. Under Rule 13.5 of the Rules of the United States Supreme Court, for good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. Petitioners believe that good cause exists.

WHEREFORE, petitioners pray that this Court will find good cause to grant them and Mr. Wallis an extension of no more than 60 days, to and including August 26, 2019, to file the Petition for a Writ of Certiorari in this case.

Respectfully submitted this 11<sup>th</sup> day of June, 2019.



Steven T. Waltner, Petitioner  
101 E. 48<sup>th</sup> Avenue  
Eugene, OR 97405  
(541) 525-0622  
steve.waltner@gmail.com



Sarah V. Waltner, Petitioner  
P.O. Box 1791  
Scottsdale, AZ 85252  
(623) 252-6492  
sevanhoey@gmail.com



# APPENDIX A

**FILED**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

JAN 17 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

STEVEN T. WALTNER and SARAH V.  
WALTNER,

No. 17-72261

Petitioners-Appellants,

Tax Ct. No. 1729-13

v.

MEMORANDUM\*

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent-Appellee.

Appeal from a Decision of the  
United States Tax Court

Submitted January 8, 2019\*\*  
Pasadena, California

Before: GRABER and WATFORD, Circuit Judges, and ZOUHARY,\*\*\* District  
Judge.

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes that this case is suitable for decision  
without oral argument. Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Jack Zouhary, United States District Judge for the Northern  
District of Ohio, sitting by designation.

Appellants Steven and Sarah Waltner appeal an order from the United States Tax Court sustaining a tax deficiency and imposing sanctions against them and their attorney, Donald Wallis. We affirm in part and dismiss in part.

1. The Waltners first challenge the \$8,801 tax deficiency and \$978.75 penalty for failure to file a valid tax return. They claim that the three-year statute of limitations under 26 U.S.C. § 6501(a) for assessing their 2008 tax liability expired by the time the IRS sent them a deficiency notice in 2012. The Tax Court determined that the statute of limitations had not begun to run because the Waltners never filed a valid tax return for 2008. We review *de novo* whether the assessment was time-barred. *Wolf v. Comm’r*, 4 F.3d 709, 713 (9th Cir. 1993).

For § 6501(a)’s limitations period to begin running, the filed tax return must be valid. *See Beard v. Comm’r*, 82 T.C. 766, 777 (1984), *aff’d*, 793 F.2d 139 (6th Cir. 1986) (*per curiam*). The Waltners already litigated the validity of their 2008 tax return in a separate action in the Court of Federal Claims. That court held that the 2008 tax return was not valid because it did not provide the IRS with sufficient information to calculate the Waltners’ tax liability. *Waltner v. United States*, 98 Fed. Cl. 737, 761 (2011), *aff’d*, 679 F.3d 1329 (Fed. Cir. 2012). Because the validity of the purported 2008 tax return was both fully litigated and necessary to that court’s decision, the Tax Court correctly held that collateral estoppel prevents the Waltners from relitigating the validity of their return.

The Waltners argue that the Commissioner validated their 2008 tax return by processing it and mailing a CP16 notice to them in September 2009. But that notice merely informed the Waltners that they would not be paid the refund they claimed on their tax return. Under *Beard*, 82 T.C. at 777, nothing about that notice converted the Waltners' 2008 tax return into a valid tax return. Because the Waltners' 2008 tax return was invalid, the statute of limitations never started to run and the Commissioner's 2012 notice of deficiency was timely.

Under 26 U.S.C. § 6651(a)(1), a taxpayer who fails to file a valid tax return is subject to penalty, unless the failure to file is due to reasonable cause and not due to willful neglect. The Tax Court held that the Waltners' failure to file a valid return was due to willful neglect. The record supports that finding, so we affirm the \$8,801 income tax liability and the \$978.75 failure-to-file penalty.

2. The Tax Court did not abuse its discretion in sanctioning the Waltners for maintaining frivolous arguments. Under 26 U.S.C. § 6673(a)(1)(B), a taxpayer may be sanctioned up to \$25,000 if it appears to the Tax Court that "the taxpayer's position . . . is frivolous or groundless." The Waltners have litigated their zero-wages theory numerous times in federal court and have received repeated warnings that this zero-wages position is frivolous. In one previous case, the Tax Court explained to the Waltners that their zero-wages arguments were frivolous and imposed a \$2,500 sanction. We affirmed that sanction two years ago. *Waltner v.*

*Comm'r*, 659 F. App'x 440, 441 (9th Cir. 2016) (unpublished). Despite those warnings and sanctions, the Waltners continue to assert their frivolous position. We affirm the \$10,000 sanction under § 6673(a)(1)(B).

3. We lack jurisdiction to review the \$15,500 sanction against Wallis, the Waltners' attorney.

Appellate review of a Tax Court decision is obtained by filing a notice of appeal within 90 days after entry of the decision. 26 U.S.C. § 7483. This deadline is jurisdictional. *Bowles v. Russell*, 551 U.S. 205, 206–07 (2007). The Waltners' notice of appeal states that they are appealing the order that imposed the sanction against their "former counsel." But Wallis did not sign the notice of appeal, did not appear on the notice, and did not file a notice of his own.

A court's authority extends only to claims based on the litigant's own legal rights and interests and does not extend to claims based on the legal rights or interests of third parties. *Hollingsworth v. Perry*, 570 U.S. 693, 707–08 (2013). The Waltners lack standing to challenge a sanction that did not cause them any legally cognizable injury. *Id.* Accordingly, we dismiss the Wallis portion of the appeal for lack of jurisdiction.

**AFFIRMED in part and DISMISSED in part.**

# APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

MAR 28 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

STEVEN T. WALTNER; SARAH V.  
WALTNER,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent-Appellee.

No. 17-72261

Tax Ct. No. 1729-13

ORDER

Before: GRABER and WATFORD, Circuit Judges, and ZOUHARY,\* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judges Graber and Watford vote to deny the petition for rehearing en banc, and Judge Zouhary so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed March 4, 2019, is DENIED.

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\* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

# APPENDIX C



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

APR 05 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

STEVEN T. WALTNER and SARAH  
V. WALTNER,

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent - Appellee.

No. 17-72261

Tax Ct. No. 1729-13  
United States Tax Court

**MANDATE**

The judgment of this Court, entered January 17, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule  
41(a) of the Federal Rules of Appellate Procedure.

Costs are taxed against the appellant in the amount of \$85.61.

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT


By: Quy Le  
Deputy Clerk  
Ninth Circuit Rule 27-7

**CERTIFICATE OF SERVICE**

I certify that on this date I served the above PETITIONERS' APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT by depositing the document with the United States Postal Service with first-class postage prepaid and by electronic mail to respondent's counsel of record as follows:

Karen G. Gregory  
Attorney, Tax Division  
Department of Justice  
Post Office Box 502  
Washington, D.C. 20044  
Appellate.TaxCivil@usdoj.gov  
Karen.G.Gregory@usdoj.gov

Dated: June 11, 2019.

  
\_\_\_\_\_  
Sarah V. Waltner