No. ____________

In the Supreme Court of the United States

Steven T. Waltner and Sarah V. Waltner,

Petitioners,

v.

United States,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals in the case below held that the return Petitioners filed for tax year 2008 was not a "valid return" for purposes of the exception to the statute of limitations on tax assessments, § 6501(a), that applies when a return *is not filed at all*, and then held that the IRS therefore may assess the tax at any time. However, the phrase "valid return" appears nowhere in the statutory exception at § 6501(c)(3) or in any other provision of the United States Code.

The first question presented for review is:

1. Whether the court below, in conflict with its own precedents as well as those of this Court and five other Circuit Courts of Appeal, erred in holding that Petitioners' timely-filed tax return (which the IRS examined, processed, and later relied upon to issue a late-mailed notice of deficiency) did not start the running of the 3-year statute of limitations on assessment.

Before the Tax Court's decision ("Decision") was entered, Petitioners filed a Status Report in which their counsel clearly stated his intention to appeal the Tax Court's sanctions order. Splitting from a contrary decision of the Fifth Circuit, the Ninth Circuit gave no effect to counsel's informal notice and declared that it lacked jurisdiction over the portion of the Decision that imposed costs against counsel.

The second question presented for review is:

2. Whether, in conflict with the Fifth Circuit, the court below erred in finding an informal notice of intent to appeal ineffective to preserve the right of a party's counsel to appeal a *sua sponte* sanction against him that appears in the Decision.

RELATED CASES

- *Waltner v. Commissioner*, No. 1729-13, United States Tax Court. Judgment entered May 9, 2017.
- *Waltner v. Commissioner*, No. 17-72261, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 17, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Steven T. Waltner and Sarah V. Waltner petition this Court for a Writ of *Certiorari* to review the final judgment of the United States Court of Appeals for the Ninth Circuit that Petitioners are liable for a late-noticed tax deficiency and penalties after timely filing their return, and that the Court of Appeals lacked jurisdiction over Petitioners' counsel's appeal.

OPINIONS BELOW

The Memorandum opinion of the United States Court of Appeals for the Ninth Circuit in *Waltner v. Commissioner of Internal Revenue,* No. 17-72261 (January 17, 2019) ("Judgment") can be found at 748 Fed.Appx. 162 (Mem) and is reproduced in Petitioners' Appendix at A-44.[1] The following orders are also included in the Appendix:

- Ninth Circuit Order denying Petitioners' petition for rehearing (March 28, 2019), A-43;
- Tax Court Memorandum Opinion in *Waltner v. Commissioner,* Docket No. 1729-13, reported at T.C. Memo. 2014-133 (July 3, 2014)), A-1;
- Tax Court Order on Petitioner's motion for reconsideration (September 19, 2014), A-20.
- Tax Court Order imposing costs under § 6673(a)(2) against Petitioners' counsel (December 15, 2014), A-25;
- Tax Court Order and Decision (May 9, 2017), A-38.

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[1] References to the Appendix included with this Petition are designated as "A-__."

STATEMENT OF JURISDICTION

Under Article III, Section 2 of the United States Constitution, this Court has appellate jurisdiction over this controversy to which the United States is a party. The Judgment for review was entered on January 17, 2019 by a panel of the Court of Appeals for the Ninth Circuit. A petition for rehearing was filed on March 4, 2019 and was denied on March 28, 2019. On June 14, 2019, the Honorable Justice Kagan of this Court issued an order granting Petitioners an extension of time until August 25, 2019 to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 26 U.S.C. § 7482(a)(1)[2] and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 6501:

(a) General Rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed)…

(c) Exceptions. ….

(3) No return.

In the case of failure to file a return, the tax may be assessed, … at any time.

[2] Hereinafter, unless otherwise indicated, all section references are to the United States Code, Title 26.

Reproduced in the Appendix are relevant portions of the U.S. Constitution and the statutes cited in the Table of Authorities.

STATEMENT OF THE CASE

This case concerns a demonstrably processible tax return for tax year 2008 that the IRS, in fact, examined and processed (the "Return"). In processing the Return, the Commissioner calculated the tax to be the same as the amount shown on the Return, but found an error that caused it to reduce the amount of the overpayment shown on the Return, and credited the amount of the reduced overpayment to Petitioners' account for a different tax year. In Petitioners' subsequent refund action, the U.S. Court of Federal Claims ("Claims Court"), without considering the fact that the Return already had been processed without difficulty, declared that the Return was not valid as a claim for refund under that court's interpretation of the specificity requirements within two Treasury Regulations. On this and on alternative grounds, the Claims Court dismissed Petitioners' refund action for lack of subject matter jurisdiction.

Subsequently, and several months after the statute of limitations on assessment had expired, the IRS issued Petitioners a notice of deficiency for tax year 2008. Petitioners challenged the proposed deficiency in the Tax Court, asserting that the notice of deficiency was of no force and effect, that, as a matter of law, there was no deficiency, and that the Tax Court lacked authority to take any action other than to render judgment in favor of the Petitioners and to dismiss the case. §§ 6211 *et seq.* (A-53); 6501(a)

(A-56); *Trefry v. Commissioner*, 10 BTA 134, 137-138 (1928). The Tax Court denied Petitioners' motion to dismiss. Petitioners then amended their Tax Court Petition to add the statute of limitations as a defense, and they also moved to strike portions of the Answer to that amended Tax Court Petition.

In the Tax Court case below, the Commissioner *stipulated* that the Waltners had timely filed their Return. After the court admitted evidence of the same, the Commissioner confirmed that the IRS had processed the Return. Nevertheless, in contravention of his own Stipulations of Fact, the Commissioner asserted that, because the court in the refund case had called the already-processed Return an "invalid" return, Petitioners were collaterally estopped from contending in the Tax Court case that the Return was a "return" for purposes of starting the statute of limitations on assessment.

But the Commissioner did not introduce into evidence a single page of the record of the Claims Court refund case to prove that the two issues (i) were identical in both cases (ii) under identical legal standards, (iii) were fully and fairly litigated in the prior action, and (iv) were a critical and necessary part of the prior court's judgment. The Commissioner argued that the exception to the statute of limitations when a return is not filed *at all* (IRC § 6501(c)(3)) allowed the IRS to assess a deficiency of tax on the Return at any time. In effect, the Commissioner urged the Tax Court to nullify the Return because, long after he had processed it, he determined that the amount of income reported therein was inaccurate.

The Tax Court—in contravention of Tax Court Rule 91(e), Ninth Circuit precedent in *Congoleum*

Industries, Inc., v. Consumer Product Safety Commission, 602 F.2d 220, 223 (CA9 1979), and this Court's decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2983 (2010), —gave no effect to Stipulations of Fact Nos. 2-6. Instead, it accepted the Commissioner's position, even though that position was completely rebutted by (i) his own Stipulations of Fact, (ii) his prior judicial admission that the Return was a valid return [Fact 8, below], and (iii) his own processing and treatment of the Return. The Tax Court also (i) took judicial notice of legal characterizations in the Claims Court's final judgment (which courts consider improper when considering the application of the doctrine of collateral estoppel), and (ii) without any evidence to support the Commissioner's assertion of the doctrine of collateral estoppel, ruled that Petitioners were barred by the doctrine from taking the position that the filing of the Return started the limitations period.

In this way, the Tax Court, recognizing that the already-processed Return was the basis of the notice of deficiency, nevertheless treated the Return as a nullity under the exception to the statute of limitations, § 6501(c)(3). Furthermore, without holding the Commissioner to his burden of production under § 7491(c), the Tax Court also ruled that Petitioners therefore were liable under § 6651 for a failure-to-file penalty!

Lastly, the Tax Court imposed sanctions under § 6673 for Petitioners' supposed "original reporting position" on the Return, without allowing Petitioners to read, let alone to brief in opposition, the

Commissioner's sanctions motion. ER293-296.[3] The Tax Court also imposed *sua sponte* sanctions against Petitioners' counsel under § 6673(a)(2), finding bad faith on counsel's part (against his own clients, not against opposing counsel, A-33) by looking to conduct in *other* cases but without any showing of multiplication of the proceedings actually before the court, or of excess costs.

Petitioners filed a Notice of Appeal of the Decision and of all orders underlying the Decision, including the imposition of costs against their counsel. And on January 14, 2015—after the Tax Court's issuance of the order imposing costs and before the entry of the Decision—Petitioners and their counsel filed Petitioners' Status Report, in which their counsel notified the Tax Court and the Commissioner of his intention to appeal the Opinion and Order and the Decision which imposed sanctions against him under § 6673. (FER1; A-48)

On appeal, without any record evidence of the prior case, the Court of Appeals for the Ninth Circuit nevertheless affirmed that the doctrine of collateral estoppel precluded Petitioners from rebutting the Commissioner's assertion in the Tax Court that the timely-filed and already-processed Return failed to start the limitations period. The Court of Appeals therefore affirmed that the notice of deficiency was timely, and then summarily affirmed the deficiency, the failure to file penalty, and the § 6673 sanctions against Petitioners and their counsel. As to these sanctions, Petitioners, on appeal by and through their

[3] References to the Excerpts of Record and Further Excerpts of Record filed with the Ninth Circuit are designated as "ER __" and "FER__."

counsel, pointed out that the Tax Court (i) did not identify a frivolous position, (ii) received no evidence of any *excess* costs, vexatious conduct, or multiplication of the proceedings attributable to Petitioners' counsel,[4] and (iii) took an action *sua sponte* that did not comport with due process. But, giving no effect to the Status Report in which their counsel indicated his intention to appeal the *sua sponte* sanctions against him, the Court of Appeals dismissed that portion of the appeal for lack of subject matter jurisdiction.

Petitioners seek a writ of *certiorari*. The Ninth Circuit's affirmance of the application by the Tax Court of the doctrine of collateral estoppel, without any part of the record of the prior case being 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). And the Ninth Circuit's reliance on judicial notice to support its application of collateral estoppel conflicts with decisions of the Second, Third, Sixth and Eighth Circuit Courts of Appeal and deprives Petitioners of the principle of fairness articulated by this Court in *Allen v. McCurry*, 449 U.S. 90 (1980).

The interpretation by the Tax Court, as affirmed by the Ninth Circuit, of the exception at § 6501(c)(3) to the statute of limitations on tax assessment (and, although not a statutory term, the interpretation of

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[4] The *docket sheet* in the trial court eloquently demonstrates that Mr. Wallis did not multiply the proceedings in any respect. ER574.

"valid return") conflicts with this Court's decisions in *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), *Germantown Trust Co. v. Commissioner,* 309 U.S. 304 (1940), and *Badaracco v. Commissioner*, 464 U.S. 386, 396-397 (1984). However, to Petitioners' knowledge, this Court has not yet passed on the precise questions presented in this Petition.

The Court of Appeals' failure to give effect to Petitioners' counsel's informal notice of his intent to appeal conflicts with a decision of the Fifth Circuit in *Cobb v. Lewis*, 488 F.2d 41 (CA5.1974) which held that "the notice of appeal requirement may be satisfied by any statement, made either to the [trial] court or to the Court of Appeals, that clearly evinces the party's intent to appeal."

A. The basis for federal jurisdiction in the trial and appellate courts.

Under § 6214(a), the Tax Court generally has subject matter jurisdiction over the case or controversy that is raised by petition for redetermination of the Commissioner's determination of a tax deficiency that is set forth in a timely-issued, statutory notice thereof—but only if that notice is mailed in accordance with § 6212. However, in this case, the notice of deficiency was not timely; therefore, Petitioners challenged the Tax Court's subject matter jurisdiction, which the Tax Court itself has held is limited to its power to declare the notice to have no force and effect and to declare that no deficiency exists.

> If a notice of deficiency—even one that is valid in all other respects—is sent after the statute of limitations has run against the assessment and

> collection of the tax, it has no force or effect, and "there is no deficiency."

Trefry v. Commissioner, 10 BTA 134, 137-138, (1928) (emphasis added); *Reddock v. Commissioner,* 72 TC 21, 27-28 (1979) (granting summary judgment because "there is no deficiency due from petitioners" from late-mailed notice). In the case below, the Tax Court held the issue to be merely an affirmative defense, and did not even consider its subject matter jurisdiction.

Under Federal Rules of Appellate Procedure ("FRAP"), Rule 13(a)(1)(A), Petitioners timely mailed their Notice of Appeal on August 5, 2017 (ER569). Under § 7482(a)(1), the Court of Appeals had exclusive jurisdiction to review the final Order and Decision of the Tax Court, entered on May 9, 2017 (ER1) ("Decision"). Alternatively, the Court of Appeals had jurisdiction to vacate the Tax Court's Decision if it determined that the lower court lacked subject matter jurisdiction. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94-96 (1998).

2. The undisputed facts relevant to jurisdiction and material to the questions presented.

The following facts were stipulated, judicially admitted, and/or proved by evidence, and thus were firmly established in the case below:

(1) After receiving an automatic extension (ER135-136), Petitioners filed their 2008 individual income tax return, IRS Form 1040 ("Return") on August 11, 2009 via U.S. Certified Mail with the Internal Revenue Service at its Fresno, California campus. ER176-178, 260-261.

(2) The Return was not circumscribed with, or accompanied by, any Constitutional objections or tax protester-type arguments. ER178 (Stipulation 3); ER181-189.

(3) The Return reported total income of $22,661 in IRA distributions and $0.00 in wages, taxable interest, and dividends, and the Return was accompanied by three IRS Forms 4852, Substitute for Form W-2 Wage and Tax Statement, each indicating a correction of Forms W-2. ER181-189.

(4) The Commissioner received the Return on August 17, 2009. ER178 (Stipulations 5-6); ER261. See also ER321.

(5) The Commissioner processed the Return on September 21, 2009. ER323-327; ER258, 261-263. See also ER321

(6) The Commissioner mailed to Petitioners an IRS Notice CP16 that stated that the Commissioner found a mistake on the Return, changed the amount of the overpayment shown thereon, and applied the entire corrected amount of overpayment to Petitioners' tax account for 2006. ER323-325, 257-258, 261-262. See ER321. The notice included an explanation of the specific changes made to the amount of federal income tax withheld and reported on the Return. The Commissioner's calculations of $0.00 of taxable income and $0.00 of total tax shown thereon were identical to the corresponding amounts reported on the Return. ER325.

(7) On October 17, 2012, the Commissioner mailed to the Waltners a letter purporting to be a statutory notice of deficiency for tax year 2008 ("NOD"). ER178, 200-215.

(8) In September of 2013 in Docket No. 21953-13L, during oral argument on Mr. Waltner's motion for summary judgment in that case, the Commissioner's counsel affirmed to the Tax Court that the Commissioner's position was that the Return was a *valid* return. ER262-263, 434, 441-442. He did not deny that judicial admission in the case below.

(9) The government never alleged, and the court never found: (i) that the Return was fraudulent; (ii) that any factual item declared on the Return was false; or (iii) that any tax calculation made on the Return was substantially incorrect.

(10) The Tax Court ordered Petitioners' counsel to pay costs under § 6673(a)(2). Thereafter, but before entry of the court's decision, Petitioners' counsel filed a Status Report in which he stated his intention to appeal the § 6673(a)(2) sanction. FER1; A-48

REASONS WHY THIS PETITION SHOULD BE GRANTED

I. Revealing *no* legal standard for applying the doctrine of collateral estoppel, and, instead, relying on an impermissible interpretation of § 6501(c)(3), the Judgment conflicts with decisions of the court below, of this Court, and of six other Circuit Courts of Appeal.

In the appeal below, the Ninth Circuit upheld the Tax Court's reckless disregard of long-standing rules for applying the doctrine of collateral estoppel, including the requirements (i) that the party that asserts the doctrine must establish that the parties in both the prior and current cases were identical or

in privity, and (ii) that the issue to be precluded (a) was identical to an issue raised in a prior case under identical legal standards, (b) was actually litigated in the prior case, (c) was finally decided on the merits of the issue asserted to be precluded, and (d) was a critical and necessary part of the judgment in the prior case. *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (CA9 1992); *Hydranautics v. FilmTec Corporation*, 204 F.3d 880, 885 (CA9 2000); *Cincinnati Ins. Co. v. Beazer Homes Invs., LLC,* 594 F.3d 441, 445 (CA6 2010) ("*different legal standards as applied to the same set of facts create different issues*." Emphasis the court's.).

This Court has held that courts may further inquire "whether other special circumstances warrant an exception to the normal rules of preclusion." *Montana v. U.S.*, 440 U.S. 147, 155 (1979). However, the Ninth Circuit was guided neither by the "normal rules of preclusion" nor by "other special circumstances warrant[ing] an exception" thereto. The government never raised the issue of the Return's "validity" in any case until it did so in the Tax Court in its effort to avoid Petitioners' statute of limitations defense. The issue precluded was not relevant to the law that the court misinterpreted in this case.

By ruling without adhering to any legal standard, the Ninth Circuit created a conflict between it and its sister Circuits, created uncertainty for courts within its own Circuit in applying the doctrine, and set a dangerous example for the Tax Court.

A. By relying on judicial notice to support an application of collateral estoppel, the Ninth Circuit departed from its own precedents and

from those of the Second, Fifth, Seventh, Eighth and Eleventh Circuits.

The court below affirmed the Decision, which was grounded on the Tax Court's judicial notice of a prior ruling by the Claims Court. See ER266. But taking judicial notice, and then relying on the fact so noticed, was improper for two reasons: (1) the trial court impermissibly noticed much more than an adjudicative fact as required by Federal Rules of Evidence ("FRE"), Rule 201 and (2) the trial court effectively relieved the Commissioner of having to meet his well-established burden of proof in his assertion of the collateral estoppel doctrine.

In *Allen v. McCurry, supra,* 449 U.S. at 94-95, this Court articulated the fundamental principle of fairness that guides the application of collateral estoppel:

> [O]ne 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.

Therefore, the Tax Court and the Court of Appeals were not permitted to *presume* that Petitioners had a "full and fair opportunity" (i) to litigate in a prior case, (ii) under the same legal standards, (iii) the precise issue sought to be precluded in the case below, every one of which elements Petitioners had disputed. Op.Br. 30-33; Rep.Br. 14-16 (*e.g.,* "the United States never alleged or argued in the refund case that the Return was "invalid" for any purpose and thus the "validity" matter never was fully and fairly litigated").

As the Ninth Circuit has rightly held in *other* cases, "the Court may not take [judicial] notice of disputed matters." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (CA9 2001), and, quoting the Seventh Circuit's articulation of the rule, "a court cannot judicially notice that the matters in issue are the same as those in a former suit. Such matters must be pleaded and proved." *Guam, supra,* 288 F.2d at 23. *Accord U.S. v. Jones*, 29 F.3d 1549, 1553 (CA11, 1994) ("If it were permissible for a court to take judicial notice of a fact merely because it has been found to be true in some other action, the doctrine of collateral estoppel would be superfluous," citing 21 C. Wright & K. Graham, FEDERAL PRACTICE AND PROCEDURE: Evidence § 5104 at 256-257 (1977 & Supp.1994)).

However, in *Reyn's Pasta Bella, LLC v. Visa USA, Inc.,* 442 F.3d 741, fn. 6 (CA9 2006)—the case on which the Tax Court relied—the Ninth Circuit inexplicably abandoned its reasoning and its holding in *Guam*. In *Reyn's Pasta*, though, the Ninth Circuit's judicial notice and consideration of the prior case at least was addressed to the content of actual court documents from the prior case that had been admitted into evidence in the case below "[t]o determine what issues were actually litigated." However here, in contrast, nothing from the prior case was in the record of the case below. Therefore, there was nothing that either the Tax Court or the Ninth Circuit properly could have considered in their respective attempts to apply the doctrine of collateral estoppel.

Besides the Eleventh Circuit, the Second, Fifth and the Eighth Circuits have ruled that "even though a court may take judicial notice of a 'document filed

in another court … to establish the fact of such litigation and related filings,' a court cannot take judicial notice of the factual findings of another court." *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 831 (CA5, 1998) quoting *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.,* 969 F.2d 1384, 1388-89 (CA2 1992) and citing *Holloway v. A.L. Lockhart*, 813 F.2d 874, 878-79 (CA8 1987) (a judicially-noticed fact "used as a predicate for the application of collateral estoppel…is inappropriate") and *Jones, supra*.

As the Fifth Circuit discussed in *Taylor,* the Seventh Circuit had considered it "conceivable that a finding of fact may satisfy the indisputability requirement of Fed.R.Evid. 201(b)," but agreed that "courts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these are disputable and usually are disputed." *Taylor* at 830, quoting *General Electric Capital Corporation v. Lease Resolution Corporation,* 128 F.3d 1074, 1082, fn. 6 (CA7 1997). In *Taylor,* the Fifth Circuit expressly held that "a court cannot (at least as a general matter) take judicial notice of a judgment for other, broader purposes" than "for the limited purpose of taking as true the action of the … court in entering judgment for [one party] against [the other party]….The judicial act itself was not a fact 'subject to reasonable dispute.'"

Here, the trial court took judicial notice not only of the prior court's action, but also of its findings of fact *and of its legal determinations*. "Relevant considerations include whether there is a substantial overlap between the evidence in the two cases and whether both suits involve application of the same rule of law. *See Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1116 (9th Cir.1999)." *Kourtis v. Cameron*,

419 F.3d 989, 995 (CA9 2005). Another court's *legal determination* "is neither an adjudicative fact within the meaning of Rule 201 nor beyond 'reasonable dispute.'" *Taylor*, *supra,* 162 F.3d at 831.

This Court should clarify for all federal courts that the Second, Fifth, Seventh, Eighth and Eleventh Circuits (and the Ninth itself previously in *Guam, supra*) correctly held that judicial notice is improper in the context of determining whether the elements of the doctrine of collateral estoppel have been met.

B. The Ninth Circuit's application of collateral estoppel without evidence is contrary to its own precedents and to those of the Fourth and Eighth Circuits on which the Ninth previously has relied.

In accordance with national standards of fairness and the Rules of Evidence, the Ninth Circuit previously has held that, if a party seeking to preclude an issue fails to introduce sufficient portions of the record of a prior proceeding to show what issues were fully and fairly litigated and necessarily determined, (i) that party has failed to meet his burden to plead and to prove the identity of issues, and (ii) he is barred from raising the doctrine of collateral estoppel on appeal. *Clark, supra*, 966 F.2d at 1320-1321; *Hernandez, supra,* 624 F.2d at 937; and *Lasky, supra*, 600 F.2d at 769.

> The burden of pleading and proving the identity of issues rests on the party asserting the estoppel. *Haung Tang v. Aetna Life Insurance Co.*, 523 F.2d 811, 813 (9th Cir. 1975). To sustain this burden a party must introduce a record sufficient to reveal the controlling facts and pinpoint the

> exact issues litigated in the prior action. *United States v. Lasky*, 600 F.2d 765, 769 (9th Cir. 1979).

Hernandez, supra, 624 F.2d at 937.

> It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." *Id*. Where the record before the district court was inadequate for it to determine whether it should apply the doctrine of collateral estoppel, we will not consider the issue on appeal.

Clark, supra, 966 F.2d at 1321(quoting *Lasky, supra*, 600 F.2d at 769).

In *Lasky*, the trial court relied upon opinions from the Fourth and Eighth Circuits: *Bryson v. Guarantee Reserve Life Insurance Company*, 520 F.2d 563 (CA8 1975) and *U.S. v. Smith,* 446 F.2d 200, 203 (CA4 1971). *Bryson* articulated "the general rule that a party who wishes to avail himself of a prior judgment as *res judicata* must introduce the whole record of the prior proceeding. 46 Am.Jur.2d Judgments § 600 (1969)." *Bryson, supra*, 520 F.2d at 566. Discussing "the limited record before the trial court and upon appeal," the Eighth Circuit Court of Appeals determined that "the record before the trial court will not support the application of *res judicata* principles…being deficient in establishing both the identical nature of the causes of action and parties or their privies to the state case." *Id*. at 567-568.

Here, *neither* the Tax Court nor the Court of Appeals had *any* record before it of the prior case. The insufficiency of the record was absolute.

In *Smith*, as the Ninth Circuit ruled in *Clark,* the Court of Appeals for the Fourth Circuit held that, "where the appellant had similarly failed to establish a record in the trial court as to the issues necessarily determined…in a prior trial, he was barred from raising the issue of collateral estoppel on appeal." 446 F.2d at 203.

In contrast, the Ninth Circuit in the instant case did not bar the Commissioner from raising the doctrine of collateral estoppel on appeal, nor did it otherwise adhere to these nationally-recognized legal standards. Instead and in contravention of its own precedents and those of its sister Circuits on which it previously has relied, the Ninth arbitrarily and unfairly applied the doctrine of collateral estoppel in this case despite the total absence of any evidence in the record in support of it. The Ninth Circuit thus completely relieved the Commissioner of his burden to prove any of the elements of the doctrine. In so doing, the Ninth Circuit decided the case adversely to Petitioners and in favor of the Commissioner on the basis of nothing more substantial or less arbitrary than whim.

A court that does not follow its own precedents is unpredictable, unreliable, and arbitrary. Hapless litigants in the Ninth Circuit whose adversary asserts but fails to prove any element of the doctrine of collateral estoppel now have a disadvantage in a way that litigants in almost every other Circuit do not have to contend.

C. The Ninth Circuit's gymnastic re-framing of the issues and misstatement of the governing law created conflict with decisions of this Court and the First and Eleventh Circuits.

The Tax Court held that the notice of deficiency that the Commissioner issued months after the expiration of the three-year statute of limitations was not untimely because of the exception to the statute of limitations "[i]n the case of failure to file a return." § 6501(c)(3). It arrived at this conclusion after taking judicial notice of the Claims Court's legal determination that the Return was not a "valid return," as if Petitioners or the government ever had raised any issue involving this term, and as if § 6501(c)(3) uses this term.

Petitioners never raised the issue of whether the Return was a "valid" return because the statutory exception invoked by the Commissioner in his Answer to Amendment to Petition (ER168-169) in the Tax Court below does not apply when, as here, a return was filed. The "valid return" issue is a red herring. But even if it were not so, the courts below, in conflict with precedents in this Court and in the First and Eleventh Circuits, misrepresented the statutory exception, itself, and enlarged the criteria that courts historically have applied to determine a return's validity.

1. The Judgment rests on a statutory interpretation that is in conflict with precedents of this Court that construe § 6501(c)(3).

This Court has held, "If Congress explicitly puts a limit upon the time for enforcing a right which it

created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). And the exceptions thereto should not be interpreted more broadly than their plain and unambiguous language. *Badaracco, supra,* 464 U.S. at 391-392 (strictly construing §§ 6501(a) and (c)(3)); *Hartford v. Gibbons & Reed Co.*, 617 F.2d 567, 569 (CA10 1980) ("exceptions to statutes of limitations must be construed strictly." Citation omitted.). As this exception allows for a limitless period for assessing taxes, it must be construed strictly *in favor of the citizen*. *Gould v. Gould*, 245 U.S. 151, 153 (1917).

Contrary to the assertions of the Commissioner, which were adopted in whole by the courts below, Congress did not say, in § 6501(c)(3), "in the case of failure to file a '*valid* return.'" The absence of this adjective must be presumed to be intentional and legally significant. *See In Re Taylor*, 223 B.R. 747, 753 (CA9 BAP 1998) ("where Congress has failed to include language in statutes, it is presumed to be intentional when the phrase is used elsewhere in the Code.")[5] Therefore, Congress *did not intend* the statute to read "failure to file a *valid* return." So, to add a qualifying adjective that is not present in the statute is an impermissible interpretation. As this

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[5] As Petitioners advised the court on Appeal (Op.Br., p. 33, n. 5):

> Congress has used the term "valid" elsewhere in the Code, *e.g.,* in §451 and §1362 (election), §1471 (waiver), §3306 (certificate), §5064 and §5708 (insurance claim), §6323 and §7426 (lien), and §6428 (ID number). There does not appear to be *any* use of the term "valid return" in Title 26, and the term "valid return" is used only once in the Treasury Regulations, 26 CFR 301.6020-1 (returns prepared by the Commissioner).

Court aptly stated, "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco, supra*, 464 U.S. at 398. And yet this statutory misrepresentation lies at the heart of the Commissioner's assertion of the doctrine of collateral estoppel.

This Court stated that § 6501(c)(3), strictly construed, specifically describes the situation where no return is filed "at all." *Badaracco*, *supra,* 464 U.S. at 392 ("Subsection (c)(3) covers the case of a failure to file a return at all (whether or not due to fraud)"). This Court found that the provisions of § 6501(c)(3) "appear to be unambiguous on their face." *Id.* at 392.

> Section 6501(c)(3) applies to a "'failure to file a return." It makes no reference to a failure to file a timely return (cf. § § 6651(a)(1) and 7203), nor does it speak of a fraudulent failure to file. The section literally becomes inapplicable once a return has been filed.

Id. at 401.

The interpretation by the courts below of § 6501(c)(3) to read "valid return" where Congress chose not to use the phrase introduces subjectivity to the law in the Ninth Circuit that cannot be squared with national interests of fundamental fairness,[6] consistent application of the law, or orderly court administration.

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[6] This Court once stated that "the phrase ["due process" in the Fifth Amendment] expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Lassiter v. Department of Social Servs. of Durham Cty.,* 452 U.S. 18, 24 (1981). The determination includes a context-specific balance of the interests at stake. *Id.*

The Judgment is based on an impermissible revision of a statutory exception to the statute of limitations on assessment, and, therefore, tax litigants in the Ninth Circuit who assert a statute of limitations defense in deficiency cases are now deprived of certainty, finality and consistency in the administration of income tax law. This Court has the opportunity to establish for the lower courts much-needed consistency in the interpretation of these statutes.

2. The Judgment conflicts with precedents of this Court and the First and Eleventh Circuits that consider a return that starts the limitations period.

The Court of Appeals affirmed the Tax Court's Decision without any clarification in the record of what either court meant by adding the term "valid return" to the statute. Even if adding language to a statute were permissible, the import of the Judgment is that these courts meant something more than a processible return on the prescribed form executed under penalty of perjury. § 6011(a); § 6061, § 6065, § 6611(g). The Decision is thus in conflict with those of its sister Circuits. *E.g., Columbia Gas System, Inc. v. U.S.*, 70 F.3d 1244, 1245 (Fed.Cir. 1995) ("A taxpayer establishes a filing date upon filing a return in processible form. I.R.C. § 6611(h).")[7]

> [A] return…is processible if (1) filed on a permitted form; (2) filed in proper form with the

[7] *And see Grant v. Commissioner,* 62 TCM 550 (1991) (holding forms in question were not "returns" for purposes of § 6501(c)(3) because they were devoid of financial information and jurat clauses).

> taxpayer's name, address, identifying number, and the required signature; and (3) filed with sufficient information (whether on the return or required attachments) to permit the mathematical verification of tax liability on the return. See I.R.C. § 6611(h)(2)(B)(i)(ii).

Columbia, supra, at 1246 (on what is now § 6611(g)).

The Return was processible, as the Commissioner amply demonstrated by processing it. *Id.* at 1246 ("IRS's successful processing of the returns supports [a] determination that [the filer] submitted processible and mathematically verifiable returns.") And the Commissioner never alleged that the Return was false or fraudulent.

In order to reach their erroneous conclusions about the exception to support the Commissioner's untimely assertion of underreported income, the courts below had to simply and wantonly *nullify* the already-filed, already-processed Return. But, in *Germantown, supra,* construing the earlier enactment of sections 6501(a) and (c)(3), this Court held that the nullification of purportedly incorrect returns is unallowable.

> It cannot be said that the petitioner, whether treated as a corporation or not, made no return of the tax imposed by the statute. Its return may have been incomplete in that it failed to compute a tax, but this defect falls short of rendering it no return whatever.

Id. at 310. As this Court said in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), the operation of statutes of limitation "does not discriminate between the just and the unjust claim."

It is axiomatic that whether a filed return establishes a meritorious claim for refund, or whether it contains errors or omissions, has no bearing on whether it was filed "at all." Such determinations can be made only *after* the filing, and during the examination and processing, of the return.

The Ninth Circuit has previously determined what constitutes a return on which a notice of deficiency may be based:

> If the forms submitted show the amount of tax owed, as in this case, or otherwise permit the Service to calculate the tax liability claimed by the taxpayer, they are sufficient to be considered a "return" for purposes of section 6211(a)(1)(A).

Conforte v. CIR, 692 F.2d 587, 592 (CA9 1982).

This Court should clarify that Congress intended to give the IRS three years in which to make accuracy and deficiency determinations, and that, therefore, a return on which the Commissioner bases a notice of deficiency must be a return for purposes of the period of limitations for assessing that deficiency. Any other conclusion is illogical and confusing.

This view finds support in the definition of "deficiency" at § 6211, and in this Court's discussion of the predecessor to sections 6501(a) and (c)(3):

> We think the language of the sections is such that it cannot be said the fiduciary return filed by the petitioner was a return of the tax in respect of which the liability arises but was no return of the tax imposed by the statute….if the return in question complies with the one description, it equally complies with the other. We find no

> adequate reason for attributing a different meaning to the two phrases.

Germantown, supra, 309 U.S. at 308-309. *See* § 6213(g). Forty-five years later, this Court reiterated this common-sense approach to statutory construction in *Badaracco, supra,* discussing § 6501:

> The word "return," however, appears no less than 64 times in § 6501. Surely, Congress cannot rationally be thought to have given that word one meaning in § 6501(a), and a totally different meaning in §§ 6501(b) through (q).

464 U.S. at 397.

Even assuming, *arguendo,* that the phrase "valid return" actually appeared in the statutory exception at issue here, the courts below still would be improperly construing the phrase as referring to a subjective evaluation of the completeness or accuracy of the information contained in the filed return. This construction conflicts with settled law in other circuits and in trial courts that construes statutory criteria for returns.

In *Plunkett v. Commissioner*, 118 F.2d 644, 647 (CA1 1941), the petitioner's return was determined to be deficient and "not a proper return" because it was not "properly executed"—*i.e.,* signed or verified. In so holding, the First Circuit made clear that the amount of income reported on the return had no bearing on whether the return itself was valid *as* a return:

> It is true that if a properly executed return be filed within the time prescribed by law, though it be incorrect as to the amount of taxable income, there can be no penalty for failure to file a return...

Id. at 650. This Court has held that "assent [of the United States] that the statute [of limitations] might begin to run was conditioned upon the presentation of a return duly sworn to." *Lucas v. Pilliod Lumber Co.,* 281 U.S. 245, 249 (1930). *Cf. Reaves v. Commissioner*, 295 F.2d 336, 338 (CA5 1961) (return filed was not signed and therefore "no return was filed"); *Moore, supra,* 627 F.2d at 834 (without deciding whether a tax could be computed from the "incomplete and inaccurate" returns replete with Constitutional objections and protest material filed in that case, the court found the forms supplied "were not returns for another reason: they were not verified."); *Borgeson v. United States,* 757 F.2d 1071, 1073 (CA10 1985) (absence of perjury clause renders return a nullity); *Rittenbaum v. United States,* 109 F.Supp. 480, 483 (N.D. Ga. 1952) (forms claiming an overpayment and election that it be credited to estimated tax for the following year were valid returns and refund claims); *Estate of Simpson v. Commissioner*, 21 T.C.M. (CCH) 371 (1962) (return considered not valid because it was not subscribed under penalties of perjury); *Grant, supra.*

This Court has held that,

> a document which on its face plausibly purports to be in compliance, and which is signed by the taxpayer, is a return despite its inaccuracies…. The Court in *Zellerbach* held that an original return, despite its inaccuracy, was a "return" for limitations purposes.

Badaracco, supra, 464 U.S. at 396-397 citing *Zellerbach, supra*. "Perfect accuracy or completeness is not necessary to rescue a return from nullity…" *Zellerbach, supra*, 293 U.S. at 180. Therefore, the

courts below ignored this Court's precedents by declaring that, in the Ninth Circuit, all non-fraudulent returns that purportedly underreport income, even those that were filed and were processed without difficulty, nevertheless are subject to an interminable assessment period, and to *failure-to-file* penalties, as though they never had been filed *at all.*

The Judgment does not comport with settled law, and instead devolves to arbitrary subjectivity which breads confusion, inconsistency, and injustice that can be resolved only by this Court's review.

II. Only this Court can resolve the split between the Ninth Circuit from the Fifth Circuit on the issue of whether an early informal notice is adequate to establish a right to appeal.

The Ninth Circuit dismissed, for lack of jurisdiction, Petitioners' appeal of the portion of the Decision that imposed costs against their counsel. But as Petitioners argued:

> The Status Report constitutes an early-filed notice of Mr. Wallis's intent to appeal the sanctions orders under FRAP 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.") *See* the discussion and cases cited in *Cobb v. Lewis*, 488 F.2d 41 (5th Cir.1974) (cited with approval in Advisory Committee Note to Rule 3, 1979 Amendment, and by the Supreme Court in *Torres* [*v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988)].

Rep.Br. 18-19.

This Court's interpretation of FRAP Rule 3(c) prompted the amendment and liberalization of the Rule "in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as 'et al.'" FRAP 3(c), Advisory Committee's Note—1993 Amendment. The notes to the amendment further explain that a designation in a notice of appeal is sufficient under Rule 3(c) if "it is objectively clear that a party intended to appeal." *Id*. "If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward." *Id. See* FRAP 3(c)(4).

This Court has held that "[a]mbiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted," and that, where a litigant files an irregular notice of his intent to appeal a judgment, "the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice." *RFC v. Prudence Group*, 311 U.S. 579, 582 (1941).[8]

In a decision of the Second Circuit Court of Appeals relying on *RFC*, Judge Learned Hand held that:

> some paper must be filed in at least one court or the other, to constitute a notice of appeal….The

[8] *But see*, in *State of California v. Fred S. Renauld & Co.*, 179 F.2d 605, 608 (CA9 1950), the Ninth Circuit's decision to follow this Court's precedent in *RFC, supra,* "only where a special equity exists."

> least requirement, which will be tolerable, is that some paper shall be accessible in the records of a court upon which both judges and parties can rely. *Crump v. Hill*, [104 F.2d 36 (CA5 1938)] is entirely in accord with this; the appellant had filed in the district court a paper which indicated his intent to appeal. True, it was a waiver of notice of appeal by the appellee; but that was unanswerable evidence of the appellant's purpose."

FDIC v. Congregation Poiley Tzedeck, 159 F.2d 163, 166 (CA2 1946) (finding a mere notice served between the parties, but not filed, to be insufficient).

In the case below, the imposition of costs against Petitioners' counsel was included in the Decision against Petitioners. Petitioners' counsel filed, "after the court announce[d] a decision or order—but before the entry of the judgment or order," a Status Report in which he explicitly stated his intention to appeal the portions of the Order and the Decision in which costs were imposed against him. Petitioners filed their Notice of Appeal in which they specifically included their intention to appeal both of the § 6673 sanctions included in the Order and the Decision. Nevertheless, the Ninth Circuit failed to address—or even to mention—the Status Report which enunciated counsel's intention to appeal, and ruled that it lacked jurisdiction to review that portion of the Decision. In so ruling, the Ninth Circuit split with the Fifth Circuit in *Cobb, supra*.

Cobb was cited in the Notes of Advisory Committee on Rules—1979 Amendment to FRAP Rule 3:

> [I[t is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with [citing *Cobb*]. The proposed amendment would give recognition to this practice.

Cobb also was cited with approval by Justice Brennan in his dissenting opinion in *Torres, supra*, which case sparked further amendment of Rule 3 in 1993. And Justice Marshall, in his dissenting opinion in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 64 (1982),[9] considered the *Cobb* decision to be "particularly instructive."

Taken together, the *Cobb* decision and the several amendments to FRAP Rules 3 and 4 protect litigants from the loss of substantive rights due to technical oversights or failures. In contrast, the Judgment of the Ninth Circuit in this case results in a grievous loss of the right to appeal based on a cavalier refusal to acknowledge the record or to consider that the opposing party was duly notified and not prejudiced.

The split between the Circuits concerning how a non-party included in a judgment can appeal the portion of the judgment concerning him places all individuals similarly situated in the position of having to forum shop for the vindication of rights and

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[9] In *Griggs*, this Court interpreted the 1979 amendment to FRAP, Rule 4(a)(4) without exercising its discretion under FRAP, Rule 2 to waive the (at that time) defect in premature filing of a notice of appeal. In response to *Griggs,* FRAP 4 was amended again. *See* Notes of Advisory Committee on Rules—1993 Amendment, Note to Paragraph (a)(4).

for justice. To ensure national consistency in court administration, and to ensure that the interpretation of the Federal Rules are construed so as to effect substantial justice, this Court should clarify which Circuit Court of Appeals—the Ninth, or the Fifth—has correctly stated the Rule and its underlying principle.

The Tax Court's *sua sponte* action against Petitioners' counsel also raises a procedural conundrum—is a party's counsel, by that action, made a *party* to the case with the right to appeal independently of his clients? Or is a party determined to have standing to appeal orders against its counsel because of the financial and agency relationship between them? To Petitioners' knowledge, the courts below have not answered such questions, and the resulting ambiguity, in this case, worked to deprive Petitioners and their counsel of their right to appeal this substantial (indeed, for Petitioners, financially ruinous) order. The Court should accept *certiorari* and remand this issue for appellate review.

CONCLUSION

In its disregard of the general rules governing the application of the doctrine of collateral estoppel, the Ninth Circuit now stands alone in conflict with precedents of six other Circuit Courts of Appeals and of this Court. This conflict creates inconsistency, and it affects all litigants. A lack of clarity and national consistency regarding whether the accuracy or completeness of a processible tax return can affect whether it is considered to have been "filed," so as to start the statute of limitations on assessment, or

whether it can be nullified, so as to subject the filer to a failure-to-file penalty, are equally problematic.

And the split between the Ninth Circuit and the Fifth Circuit creates uncertainty with respect to when and how a non-party included in a judgment should be allowed to notify the parties and the court of his intention to appeal.

This Court's supervisory power is rightly invoked to resolve these splits and to settle these matters.

Petitioners' Petition for Writ of Certiorari should be granted.

Dated: August 24, 2019.

Respectfully submitted,

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APPENDIX

ORDERS, DECISION, AND JUDGMENT

Tax Court Memorandum Findings of Fact and Opinion, T.C. Memo. 2014-133 (July 3, 2014)

T.C. Memo. 2014-133

UNITED STATES TAX COURT

STEVEN T. WALTNER AND SARAH V. WALTNER, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 1729-13. Filed July 3, 2014.

Donald W. Wallis, for petitioners.

Matthew A. Houtsma and Michael W. Lloyd, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

MARVEL, Judge: Respondent determined a deficiency in petitioners' 2008 Federal income tax of $8,801 and an accuracy-related penalty under section [*2] 6662(a) of $1,760. After the parties raised additional issues in the pleadings, the issues for decision are: (1) whether respondent issued the notice of deficiency before the period of limitations on assessment expired; (2) if so, whether petitioners failed to report wage income for 2008; (3) whether petitioners failed to report income from the sale or exchange of property for 2008; (4) whether petitioners

are liable for an accuracy-related penalty under section 6662(a) or, alternatively, an addition to tax under section 6651(a)(1) for 2008; (5) whether petitioners are liable for a penalty under section 6673(a)(1) for maintaining frivolous or groundless positions in this Court; and (6) whether petitioners' counsel should be required to pay respondent's excessive litigation costs under section 6673(a)(2) or be sanctioned under Rule 33(b).

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts is incorporated herein by this reference. When they petitioned this Court, Steven T. Waltner resided in California and Sarah V. Waltner resided in Arizona.

[*3] I. Mr. Waltner's 2008 Employment Income

During 2008 Mr. Waltner was an employee of TEKsystems, Inc. (TEKsystems), Spherion Atlantic Enterprises, LLC (Spherion Atlantic), and Perot Systems Corp. (Perot Systems). During that year TEKsystems, Spherion Atlantic, and Perot Systems paid to Mr. Waltner $33,559, $210, and $41,957, respectively.

II. Mr. Waltner's Citigroup Account

During 2008 Mr. Waltner had an investment account with Citigroup Global Markets, Inc. (Citigroup). On May 16, 2008, Mr. Waltner sold shares in a mutual fund that he owned through his Citigroup account for $5,905, and on May 21, 2008, he withdrew that amount from his Citigroup account.

III. Petitioners' Purported Return

On August 11, 2009, petitioners filed a purported joint Form 1040, U.S. Individual Income Tax Return, for 2008 (2008 return). On their 2008 return

petitioners reported IRA distributions of $22,661 and zero wages or other income. They claimed a student loan interest deduction of $738, leaving them with adjusted gross income of $21,923. After claiming itemized deductions of $26,624 and exemptions of $7,000, they reported taxable income and total tax of zero. They also reported income tax withheld, total payments, and an overpayment of $10,679.

[*4] Petitioners attached to their 2008 return three Forms 4852, Substitute for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., corresponding to Forms W-2, Wage and Tax Statement, that Mr. Waltner received from his employers in 2008. On the Form 4852 relating to his employment with TEKsystems Mr. Waltner reported wages, tips, and other compensation of zero, Federal income tax withheld of $2,069, Social Security tax withheld of $2,081, and Medicare tax withheld of $487. On the Form 4852 relating to his employment with Spherion Atlantic Mr. Waltner reported wages, tips, and other compensation of zero, State income tax withheld of $2, Social Security tax withheld of $13, and Medicare tax withheld of $3. On the Form 4852 relating to his employment with Perot Systems Mr. Waltner reported wages, tips, and other compensation of zero, Federal income tax withheld of $2,673, State income tax withheld of $486, Social Security tax withheld of $2,601, and Medicare tax withheld of $608. On all three Forms 4852 Mr. Waltner stated that he determined these amounts from "[p]ersonal knowledge and records provided by the company listed as 'payer'" and that he had made no efforts to obtain correct Forms W-2 from his

employers.

[*5] Petitioners also attached to their 2008 return a document purporting to be a "correcting Form 1099-B" relating to the distributions Mr. Waltner received from his Citigroup account in 2008. On the "correcting Form 1099-B" he reported that he had received gross proceeds less commissions from Citigroup of zero and stated that "[t]his correcting Form 1099-B is submitted to rebut a document known to have been submitted by the party identified above as 'Payer' and 'Broker' which erroneously alleged a payment to the party identified above as 'Steve T. Waltner' of 'gross proceeds' in connection with a 'trade or business.'"

IV. Petitioners' Refund Suit

Petitioners filed a suit in the U.S. Court of Federal Claims, seeking to recover refunds of allegedly overpaid Federal income tax for 2003-08. See Waltner v. United States, 98 Fed. Cl. 737, 739 (2011), aff'd, 679 F.3d 1329 (Fed. Cir. 2012). The Court of Federal Claims dismissed petitioners' refund suit with respect to 2004-08 because it held that it lacked jurisdiction. See id. at 761. It explained as follows:

> [P]laintiffs in this case did not submit sufficient information for tax years 2004, 2005, 2006, 2007, and 2008 for any of the plaintiffs' returns to be considered valid tax returns. For each of the tax years, the plaintiffs claim zero in tax liability, allege that no wages were received by plaintiffs, and allege that the amount of dividends received each year was zero. The plaintiffs did not provide the IRS with sufficient information for the tax years at issue, such that the IRS [*6] could calculate their tax liability, and therefore, the

> returns filed by the plaintiffs were neither proper returns or proper claims for refund. As the plaintiffs failed to file properly completed, timely returns for each of the tax years at issue, the court lacks jurisdiction for the plaintiffs' claims for refund tax years 2004, 2005, 2006, 2007, and 2008.

Id.

The U.S. Court of Appeals for the Federal Circuit affirmed the dismissal of petitioners' refund suit. See Waltner, 679 F.3d at 1334. The Court of Appeals explained as follows:

> We agree * * * that a form that contains zeros in place of any reportable income does not constitute a valid tax return; it is not "properly executed" for purposes of § 301.6402-3(a)(5)[, Proced. & Admin. Regs.,] and does not meet the specificity requirements imposed by § 301.6402-2(b)(1)[, Proced. & Admin. Regs]. Here, taxpayers submitted amended returns for 2004, 2005, and 2006 in which they replaced the income they previously reported, which was consistent with third-party information provided to the IRS, with zeros and inserted a string of zeros in their 2007 and 2008 tax returns that directly contradicted W-2s and other forms submitted by third parties to the IRS. The taxpayers admittedly took no action to obtain "corrected" third party forms that would corroborate their claims of zero taxable income. Thus, the taxpayers' amended returns for 2004, 2005, and 2006, as well as their returns for 2007 and 2008 do not implicate an "honest and reasonable intent to supply information required by the tax code" or rise to the level of specificity required by regulation. None of the forms

> submitted by the taxpayers constitute "properly executed" returns that can serve as claims for refund over which the Court of Federal Claims has jurisdiction. We affirm the dismissal of the taxpayers' claims for tax refund for lack of jurisdiction.[*7]

Id. (fn. ref. omitted). On October 1, 2012, the Supreme Court of the United States denied the petition for certiorari in petitioners' refund suit. See Waltner v. United States, 133 S. Ct. 319 (2012).

V. Notice of Deficiency and the Pleadings in This Case

On October 17, 2012, respondent mailed to petitioners the notice of deficiency in this case. In the notice respondent determined that petitioners are liable for tax on Mr. Waltner's wage income for 2008 and for an accuracy-related penalty under section 6662(a).

Petitioners timely petitioned this Court, asserting only frivolous or irrelevant objections to the adjustments in the notice of deficiency. Although respondent initially processed petitioners' 2008 purported return and issued the aforementioned notice of deficiency as if petitioners had filed a 2008 return, in his answer respondent asserted that (1) petitioners are precluded by the doctrine of collateral estoppel from arguing that their 2008 return was a valid return, and (2) petitioners are therefore liable for an addition to tax under section 6651(a)(1) for failing to timely file a required return for 2008.

In an amendment to petition, petitioners asserted that the statute of limitations on assessment bars respondent from assessing or collecting the amounts determined in the notice of deficiency. In an answer

to amendment to [*8] petition respondent asserted that the statute of limitations on assessment does not apply because petitioners are precluded from arguing that the 2008 return was valid.

On the day of trial respondent filed an amendment to answer to amendment to petition. In the amendment to answer to amendment to petition respondent asserted that petitioners are liable for tax on the distributions from Mr. Waltner's Citigroup account.

VI. Pretrial and Trial Proceedings in This Case

On August 13, 2013, we set this case for trial on the Court's January 13, 2014, trial session in Phoenix, Arizona. On November 14, 2013, petitioners' counsel entered an appearance. On November 15, 2013, petitioners moved to change the place of trial to Jacksonville, Florida. We denied petitioners' motion. On December 30, 2013, petitioners filed a pretrial memorandum. It was signed by petitioners' counsel and contained arguments that are meritless and often frivolous.

We subsequently changed the trial date to March 3, 2014, and we held a trial on that date. Neither petitioners' counsel nor Mr. Waltner appeared at trial. Instead, Mrs. Waltner appeared on behalf of petitioners. She introduced no evidence to support the positions that petitioners took on their 2008 return, and [*9] she declined to make a closing argument after trial. She did, however, insist that the positions petitioners took on their 2008 return were correct.

VII. Frivolous Submission Penalty Under Section 6702 (Docket No. 21953-12L)

In March 2010 respondent sent to petitioners a

letter informing them that their 2008 return was frivolous and offering them a chance to submit a corrected return. Waltner v. Commissioner, T.C. Memo. 2014-35, at *4. Petitioners failed to do so, and respondent assessed a $5,000 penalty under section 6702 and issued to Mr. Waltner a notice of penalty charge, informing him of the assessed penalty. See id. Respondent issued a notice of intent to levy to Mr. Waltner to collect the section 6702 penalty. See id. Mr. Waltner requested a hearing, and respondent subsequently issued a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, sustaining the proposed levy. See id. at *4-*6.

Mr. Waltner petitioned this Court at docket No. 21953-12L. After lengthy and contentious pretrial proceedings Mr. Waltner paid the section 6702 penalty and sought to have the case dismissed as moot. See id. at *20-*21. By then, [*10] however, respondent had filed a motion to impose a penalty under section 6673(a)(1) on Mr. Waltner. See id. at *21-*22.

On February 27, 2014, less than a week before trial in this case, we granted respondent's motion and imposed a section 6673(a)(1) penalty of $2,500 on Mr. Waltner. See id. at *62-*63. Additionally, we explained at great length why the positions that petitioners took on their 2008 return—and throughout the litigation in that case—are frivolous and without merit. See id. at *24-*62.

OPINION

I. Burden of Proof

Generally, the Commissioner's determination of a deficiency is presumed correct, and the taxpayer

bears the burden of proving that the determination is improper. Rule 142(a)(1); Welch v. Helvering, 290 U.S. 111, 115 (1933). However, if the Commissioner raises a new matter, seeks an increase in a deficiency, or asserts an affirmative defense, the Commissioner has the burden of proof as to the new matter, increased deficiency, or affirmative defense. Rule 142(a)(1).

Additionally, under section 7491(a)(1), if a taxpayer produces credible evidence with respect to any factual issue relevant to ascertaining the taxpayer's liability for any tax imposed by subtitle A or B of the Code and satisfies the [*11] requirements of section 7491(a)(2), the burden of proof on any such issue shifts to the Commissioner.[1] Because petitioners have failed to introduce any credible evidence with respect to any factual issue in this case, the burden of proof remains on them.

The U.S. Court of Appeals for the Ninth Circuit, to which an appeal in this case appears to lie absent a stipulation to the contrary, see sec. 7482(b)(1)(A), (2), has held that for the presumption of correctness to attach to the notice of deficiency in unreported income cases, the Commissioner must establish some evidentiary foundation connecting the taxpayer with the income-producing activity, see Weimerskirch v. Commissioner, 596 F.2d 358, 361-362 (9th Cir. 1979),

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[1] "'Credible evidence is the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of IRS correctness).'" Higbee v. Commissioner, 116 T.C. 438, 442 (2001) (quoting H.R. Conf. Rept. No. 105-599, at 240-241 (1998), 1998-3 C.B. 747, 994-995).

rev'g 67 T.C. 672 (1977), or demonstrating that the taxpayer actually received unreported income, see Edwards v. Commissioner, 680 F.2d 1268, 1270-1271 (9th Cir. 1982). If the Commissioner introduces some evidence that the taxpayer received unreported income, the burden shifts to the taxpayer. See Hardy v. Commissioner, 181 F.3d 1002, 1004 (9th Cir. 1999), aff'g T.C. Memo. 1997-97. [*12] The parties stipulated that Mr. Waltner worked for TEKsystems, Spherion Atlantic, and Perot Systems in 2008 and that he was paid by these employers amounts totaling $75,726 in 2008. Respondent has therefore met his burden of showing that petitioners were connected to an income-producing activity and received unreported income. Lee Edwards v. Commissioner, 680 F.2d at 1270-1271; Weimerskirch v. Commissioner, 596 F.2d at 361-362. Accordingly, the burden of proof on this issue remains on petitioners.

Respondent first asserted that petitioners are liable for tax in connection with the sale or exchange of property in Mr. Waltner's Citigroup account in an amendment to answer to amendment to petition. Accordingly, the burden of proof on this issue is on respondent. See Rule 142(a)(1).

The statute of limitations is an affirmative defense, and the party asserting it must specifically plead it and carry the burden of showing its applicability. See Rules 39, 142(a); Robinson v. Commissioner, 117 T.C. 308, 312 (2001); Adler v. Commissioner, 85 T.C. 535, 540 (1985). Petitioners properly pleaded the statute of limitations as a defense in an amendment to petition. Accordingly, the burden of proof on this issue is on petitioners. However, respondent bears the burden of proving that an exception to the general three-year period of

limitations applies. See Harlan v. Commissioner, 116 T.C. 31, 39 (2001) (citing Reis v. [*13] Commissioner, 142 F.2d 900 (6th Cir. 1944), afff'g 1 T.C. 9 (1942)); Bardwell v. Commissioner, 38 T.C. 84, 92 (1962), aff'd, 318 F.2d 786 (10th Cir. 1963). Additionally, to the extent that respondent relies on the doctrine of collateral estoppel to preclude petitioners from arguing that their 2008 return was valid, the burden of proof is on respondent. See Rules 39, 142(a).

II. Statute of Limitations

A. Generally

Generally, an assessment of tax must be made within three years after a taxpayer files a return. See sec. 6501(a). However, if the taxpayer did not file a return, an assessment of tax may be made at any time. See sec. 6501(c)(3). To be considered as having filed a return, a taxpayer must have filed a valid return. See Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986). Under Beard, a valid return is one that (1) contains sufficient data to calculate a tax liability, (2) purports to be a return, (3) represents an honest and reasonable attempt to satisfy the requirements of the tax law, and (4) is executed by the taxpayer under penalties of perjury. See id.; see also Appleton v. Commissioner, 140 T.C. 273, 284-285 (2013). A taxpayer who files a document that purports to be a Federal income tax return but which contains only zeros on the relevant lines has not filed a valid return because it does not contain sufficient [*14] information for the Commissioner to calculate and assess a tax liability. See Cabirac v. Commissioner, 120 T.C. 163, 169 (2003).

Additionally, the three-year limitations period is extended to six years "[i]f the taxpayer omits from

gross income an amount properly includible therein",[2] sec. 6501©(1)(A), such amount "is in excess of 25 percent of the amount of gross income stated in the return", id and that amount is not "disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item", sec. 6501©(1)(A)(ii).

In applying section 6501©(1)(A)(ii), we must consider whether an adjustment to the taxpayer's gross income might be apparent from the face of the return to the "reasonable man". Univ. Country Club, Inc. v. Commissioner, 64 T.C. 460, 471 (1975). Although section 6501©(1)(A)(ii) does not require that the return disclose the exact amount of the omitted income, "[t]he disclosure must be more substantial than providing a clue that would intrigue the likes of Sherlock Holmes but need not recite every underlying fact." Highwood Partners v. Commissioner, 133 T.C. 1, 21 (2009) (citing Quick Trust v. Commissioner, 54 T.C. 1336, 1347 (1970), aff'd, 444 F.2d 90 (8th Cir. 1971)).

[*15] B. collateral estoppel Generally

Under the doctrine of collateral estoppel, once an issue of fact or law is "actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). Collateral estoppel is a judicially created equitable principle the purposes of which are

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[2] For purposes of sec. 6501(e)(1)(A), gross income includes those items listed in sec. 61(a). See Daniels v. Commissioner, T.C. Memo. 2012-355, at *6-*7 (citing Carr v. Commissioner, T.C. Memo. 1978-408).

to protect the parties from unnecessary and redundant litigation, to conserve judicial resources, and to foster certainty in and reliance on judicial action. Id. at 153-154.

Before we may apply collateral estoppel the following five conditions must be satisfied: (1) the issue in the second suit must be identical in all respects with the issue decided in the first suit; (2) the issue in the first suit must have been the subject of a final judgment entered by a court of competent jurisdiction; (3) the person against whom collateral estoppel is asserted must have been a party or in privity with a party in the first suit; (4) the parties must actually have litigated the issue in the first suit and resolution of the issue must have been essential to the prior decision; and (5) the controlling facts and applicable legal principles must remain unchanged from those in the first suit. See Bussell v. Commissioner, 130 [*16] T.C. 222, 239-240 (2008); Peck v. Commissioner, 90 T.C. 162, 166-167 (1988), aff'd, 904 F.2d 525 (9th Cir. 1990).

C. Analysis

Respondent contends that the three-year statute of limitations on assessment does not apply here because (1) the doctrine of collateral estoppel bars petitioners from arguing that their 2008 return was valid; (2) their 2008 return was in any event invalid under Beard v. Commissioner, 82 T.C. at 777; and (3) petitioners omitted from gross income an amount that is greater than 25% of the amount shown on their 2008 return and they failed to properly disclose the omission. We agree with respondent's primary contention that the doctrine of collateral estoppel bars petitioners from arguing that their 2008 return was valid. In Waltner, 98 Fed. Cl. at 761, the Court of

Federal Claims dismissed petitioners' refund suit because a valid return is a prerequisite for maintaining a refund suit in that court and the court concluded that petitioners' 2008 return was invalid. The Court of Appeals affirmed the dismissal of petitioners' refund suit on that basis. See Waltner, 679 F.3d at 1334.

All five conditions for applying collateral estoppel are met here. First, the issue of whether petitioners' 2008 return was valid is identical to the issue decided against petitioners by the Court of Federal Claims. Second, although the dismissal [*17] in that case was not a judgment on the merits, the issue of whether the 2008 return was valid was necessarily decided by that court when it dismissed the case for lack of jurisdiction, and that decision is entitled to preclusive effect. See Matosantos Commercial Corp. v. Applebee's Int'l, Inc., 245 F.3d 1203, 1209 (10th Cir. 2001) ("'Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question.'" (quoting 18 Charles Alan Wright et al., Federal Practice and Procedure, sec. 4436 (1981))); Okoro v. Bohman, 164 F.3d 1059, 1063 (7th Cir. 1999) ("It may seem paradoxical to suggest that a court can render a preclusive judgment when dismissing a suit on the ground that the suit does not engage the jurisdiction of the court. But the paradox is superficial. A court has jurisdiction to determine its own jurisdiction." (citing U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79 (1988), and United States v. Shipp, 203 U.S. 563, 573 (1906))). Third, the parties in this case are identical to the parties in that case. Fourth, the issue of whether the 2008 return

was valid was fully litigated in that case. Fifth, the controlling facts and applicable legal principles remain unchanged from those in that case.

[*18] Petitioners are therefore precluded by the doctrine of collateral estoppel from arguing that their 2008 return was valid. Accordingly, the statute of limitations on assessment does not bar respondent from assessing the tax at issue because petitioners failed to file a valid return for that year. See sec. 6501©(3); Appleton v. Commissioner, 140 T.C. at 284-285; Beard v. Commissioner, 82 T.C. at 777.

III. Unreported Wage Income

Gross income includes "all income from whatever source derived". Sec. 61(a). This includes compensation for services. See sec. 61(a)(1). Petitioners bear the burden of proof on this issue. See supra part I. Petitioners failed to introduce any evidence to support the Forms 4852 that they attached to their 2008 return. Accordingly, we sustain respondent's determination that petitioners are liable for tax on Mr. Waltner's unreported wages.

[*19] IV. Distributions From Mr. Waltner's Citigroup Account

Gross income also includes gains derived from dealings in property. See sec. 61(a)(3). Gain from the sale or exchange of property must be recognized, unless the Code provides otherwise. Sec. 1001(c). Section 1001(a) defines gain from the sale or exchange of property as the excess of the amount realized on the sale of the property over the adjusted basis of the property sold or exchanged. See also sec. 1.61-6(a), Income Tax Regs. Respondent bears the burden of proof on this issue. See supra part I. Respondent failed to introduce any evidence with

respect to Mr. Waltner's basis in the mutual fund shares that he sold through his Citigroup account. Accordingly, respondent has failed to prove that petitioners are liable for tax on the amount realized from that sale.

V. Addition to Tax and Penalties

A. Burden of Proof

The Commissioner bears the burden of production with respect to a taxpayer's liability for additions to tax and must produce sufficient evidence indicating that it is appropriate to impose the additions to tax. See sec. 7491©; Higbee v. Commissioner, 116 T.C. 438, 446 (2001). Once the Commissioner carries the burden of production, the taxpayer must come forward with persuasive evidence that the Commissioner's determination is incorrect or that the taxpayer [*20] had reasonable cause or substantial authority for the position. See Higbee v. Commissioner, 116 T.C. at 446-447. However, if the Commissioner first asserts penalties in the answer, the Commissioner has the burden of proof as to the new matter. See Rule 142(a)(1); Derby v. Commissioner, T.C. Memo. 2008-45, 95 T.C.M. (CCH) 1177, 1194 (2008).

Respondent first asserted an addition to tax under section 6651(a)(1) in the answer. Accordingly, respondent has the burden of proving that petitioners are liable for the addition to tax under section 6651(a)(1). See Rule 142(a)(1); Derby v. Commissioner, 95 T.C.M. (CCH) at 1194.

B. Addition to Tax Under Section 6651(a)(1)

Section 6651(a)(1) authorizes the imposition of an addition to tax for failure to timely file a return, unless it is shown that such failure is due to

reasonable cause and not due to willful neglect. See United States v. Boyle, 469 U.S. 241, 245 (1985); United States v. Nordbrock, 38 F.3d 440, 444 (9th Cir. 1994). A failure to timely file a Federal income tax return is due to reasonable cause if the taxpayer exercised ordinary business care and prudence but nevertheless was unable to file the return within the prescribed time. See sec. 301.6651-1(c)(1), Proced. & Admin. Regs. Circumstances that are considered to constitute reasonable cause for failure to timely file a return are typically those outside of the [*21] taxpayer's control, including, for example: (1) unavoidable postal delays; (2) the timely filing of a return with the wrong office; (3) the death or serious illness of the taxpayer or a member of the taxpayer's immediate family; (4) a taxpayer's unavoidable absence from the United States; (5) destruction by casualty of a taxpayer's records or place of business; and (6) reliance on the erroneous advice of an IRS officer or employee. See McMahan v. Commissioner, 114 F.3d 366, 369 (2d Cir. 1997), aff'g T.C. Memo. 1995-547. Respondent bears the burden of proof on this issue. See supra part V.A.

We have held that respondent has established through application of collateral estoppel that petitioners' 2008 return was invalid. See supra part II.C. The record shows that petitioners' failure to file a valid 2008 return was not due to reasonable cause and was due to willful neglect. Accordingly, petitioners are liable for an addition to tax under section 6651(a)(1) for 2008.

C. Accuracy-Related Penalty Under Section 6662(a)

Section 6662(a) and (b)(1) and (2) authorizes the Commissioner to impose a 20% penalty on an underpayment of tax that is attributable to, among

other things, (1) negligence or disregard of rules or regulations or (2) any substantial understatement of income tax. The penalty under section 6662(a) applies only where a valid return has been filed. See sec. 6664(b). Because petitioners' 2008 [*22] return was invalid, see supra part II.C, petitioners are not liable for an accuracy-related penalty under section 6662(a).

D. Penalty Under Section 6673(a)(1)

Under section 6673(a)(1) we may require a taxpayer to pay a penalty not in excess of $25,000 if it appears that: (1) the taxpayer instituted or maintained proceedings in this Court primarily for delay; (2) the taxpayer asserts frivolous or groundless positions in this Court; or (3) the taxpayer unreasonably failed to pursue available administrative remedies. A taxpayer's position is frivolous or groundless if it is "'contrary to established law and unsupported by a reasoned, colorable argument for change in the law.'" Williams v. Commissioner, 114 T.C. 136, 144 (2000) (quoting Coleman v. Commissioner, 791 F.2d 68, 71 (7th Cir. 1986)).

Despite our efforts in Waltner v. Commissioner, T.C. Memo. 2014-35, to explain to petitioners that the positions that they took on their 2008 return and before this Court are frivolous, they refused to withdraw their frivolous positions in this case. At trial respondent's counsel suggested that a penalty under section 6673(a)(1) of $5,000 with respect to each petitioner was necessary to prevent petitioners from again asserting frivolous positions before this Court. We agree with respondent's suggestion that a substantial penalty is warranted, but we [*23] believe that both petitioners should be liable for the full amount of the penalty imposed. Accordingly, we

impose on petitioners a penalty under section 6673(a)(1) of $10,000.

E. Costs Under Section 6673(a)(2) and Sanctions Under Rule 33(b)

Under section 6673(a)(2) we may impose on any person admitted to practice before this Court who unreasonably and vexatiously multiplies the proceedings in any case the excessive costs reasonably incurred on account of such conduct. This Court may sua sponte impose such costs. See Best v. Commissioner, T.C. Memo. 2014-72, at *22-*23 (citing Edwards v. Commissioner, T.C. Memo. 2002-169, aff'd, 119 Fed. Appx. 293 (D.C. Cir. 2005), and Leach v. Commissioner, T.C. Memo. 1993-215). Rule 33(b) sets standards in connection with counsel's signature on a pleading and provides that upon our own motion we may sanction counsel for failure to meet those standards. Although we have found petitioners deserving of a section 6673(a)(1) penalty, we believe that petitioners' counsel may also be deserving of a sanction for unreasonably and vexatiously prolonging these proceedings. We will therefore order petitioners' counsel to show cause why we should not impose on him excessive costs pursuant to section 6673(a)(2) or sanction him pursuant to Rule 33(b). We will also order respondent to express his position on these issues and to provide us with his computations of the excess [*24] costs, expenses, and attorney's fees reasonably incurred on account of petitioners' counsel's conduct in this case.

We have considered the parties' remaining arguments, and to the extent not discussed above, conclude those arguments are irrelevant, moot, or without merit. To reflect the foregoing,

Appropriate orders will be issued, and decision will be entered under Rule 155.

Tax Court Order denying reconsideration (September 19, 2014)

UNITED STATES TAX COURT
WASHINGTON, DC 20217

STEVEN T. WALTNER & SARAH V. WALTNER, Petitioner(s), v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	))))))))	Docket No. 1729-13

ORDER

On August 4, 2014, petitioners filed a motion for reconsideration of our findings and opinion in Waltner v. Commissioner, T.C. Memo. 2014-133, see Rule 161,[1] and a motion to impose sanctions on respondent's counsel, see sec. 6673, Rule 33(b). On September 5, 2014, respondent filed objections to petitioners' motions. For the reasons that follow, we will deny both of petitioners' motions.

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[1]Unless otherwise indicated, all section references are to the Internal Revenue Code (Code), as amended and in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Motion for Reconsideration

We have discretion to grant a motion for reconsideration, but we usually do not do so unless the moving party can point to unusual circumstances or substantial error. Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998); see also Vaughn v. Commissioner, 87 T.C. 164, 166 167 (1986). Because petitioners have failed to point to any unusual circumstances or substantial error, we must deny petitioners' motion for reconsideration.

Petitioners contend that some of our factual findings in Waltner v. Commissioner, T.C. Memo. 2014 133, are inconsistent with the evidence or are not based on any stipulations of fact or evidence. We disagree.

First, petitioners contend that the evidence shows that petitioners' 2008 purported return was valid. This contention is without merit for two reasons. First, we disagree with petitioners' assessment of the evidence; indeed, the evidence shows that petitioners only included items of income on their return to the extent that those items did not result in them having to report taxable income or total tax greater than zero.[2] See Waltner v. Commissioner, T.C. Memo. 2014 133, at *3, *l8 n.5; see also Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986) (holding that a valid return is one that (1) contains sufficient data to calculate a tax liability, (2) purports to be a return, (3) represents an honest and reasonable attempt to satisfy the requirements of the tax law, and (4) is executed by the taxpayer under

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[2]Contrary to petitioners' assertion, the parties did not stipulate that the 2008 return was a valid return.

penalties of perjury); Oman v. Commissioner, T.C. Memo. 2010 276, 100 T.C.M. (CCH) 548, 552 555 (2010) (applying the Beard test in a case appealable to the U.S. Court of Appeals for the Ninth Circuit). Second, even if we agreed with petitioners' assessment of the evidence--which we don't--under the doctrine of collateral estoppel, we would still be forced to conclude that petitioners' 2008 return was invalid. See Waltner v. Commissioner, T.C. Memo. 2014 133, at *l6 (citing Waltner v. United States, 98 Fed. Cl. 737, 761 (2011), aff'd, 679 F.3d 1329 (Fed. Cir. 2012)).

Second, petitioners contend that the notice of deficiency cannot be valid if it is not based on a valid return. This contention is without merit because a valid return is not a prerequisite for a notice of deficiency. See secs. 6211, 6212.

Third, petitioners object to our finding that Steven Waltner was an employee of TEKsystems, lnc., Spherion Atlantic Enterprises, LLC, and Perot Systems Corp. This objection is frivolous and Without merit because petitioners concede that Mr. Waltner worked for these companies and that they paid him the amounts stated in the Forms W 2, Wage and Tax Statement, that each of these companies provided to him. See Waltner v. Commissioner, T.C. Memo. 2014 35, at *52 (citing United States v. Latham, 754 F.2d 747, 750 (7th Cir. 1985)).

Fourth, petitioners object to our findings that their petition and pretrial memorandum contain frivolous arguments. As respondent's response demonstrates, this objection is without merit.

Fifth, petitioners contend that we erroneously found that Sarah Waltner asserted at trial that the

positions that petitioners took on their 2008 return were correct. See Waltner v. Commissioner, T.C. Memo. 2014 133, at *9. This contention is without merit because the trial transcript shows that after repeatedly refusing to give a straight answer to the Court's questions Ms. Waltner finally said, "What I will respond, what I will say in response, Your Honor, is that we stand behind what [we] said in our tax return." Tr. 53 54. Contrary to petitioners' assertions, their 2008 purported return took certain frivolous positions, and Mrs. Waltner clung to those frivolous positions at trial.

Sixth, petitioners object to our taking notice of certain administrative events that occurred with respect to the section 6702 penalty at issue in docket No. 21953-12L. See Waltner v. Commissioner, T.C. Memo. 2014 133, at *9 (citing Waltner v. Commissioner, T.C. Memo. 2014 35, at *4). This objection is without merit because we took notice of those events solely for the purpose of explaining the procedural history of what occurred in docket No. 21953-12L. We did not offer our opinion as to the merits of the section 6702 penalty originally at issue in docket No. 21953-12L as petitioners suggest.

Seventh, petitioners object to our relying on the Court's opinion in Waltner v. Commissioner, T.C. Memo. 2014 35, and suggest that the opinion in that case was not based on the evidence before the Court. That opinion is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit, and we decline to consider petitioners' attempt to collaterally attack that opinion.

Eighth, petitioners contend that we erroneously concluded that Mr. Waltner received wages from his

employers. This objection is frivolous and without merit. See Waltner v. Commissioner, T.C. Memo. 2014 35, at *28 n.14 (citing Coleman v. Commissioner, 791 F.2d 68, 69 (7th Cir. 1986)).

Finally, petitioners object to our quoting certain parts of the opinion of the U.S. Court of Federal Claims in Waltner v. United States, 98 Fed. C1. 737. This objection is also without merit because we may take judicial notice of the text of judicial opinions and orders to determine what issues the other court decided. Reyn's Pasta Bella. LLC v. Visa USA. lnc., 442 F.3d 741, 746 n.6 (9th Cir. 2006); Estate of Reis v. Commissioner, 87 T.C. 1016, 1027 (1986).

Motion to Impose Sanctions

Under section 6673(a)(2) we may impose on any person admitted to practice before this Court who unreasonably and vexatiously multiplies the proceedings in any case the excessive costs reasonably incurred on account of such conduct. Rule 33(b) sets standards in connection with counsel's signature on a pleading and provides that we may sanction counsel for failure to meet those standards.

Petitioners contend that respondent's counsel has unreasonably and vexatiously multiplied the proceedings in this case. After reviewing petitioners' motion and respondent's response, we conclude that the conduct of respondent's counsel was appropriate and that sanctions are unwarranted.

Accordingly, it is ORDERED that petitioners' Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161, filed August 4, 2014, is denied. It is further

ORDERED that petitioners' Motion to Impose Sanctions, filed August 4, 2014, is denied.

(Signed) L. Paige Marvel
Judge

Dated: Washington, D.C.
September 19, 2014

Tax Court Order imposing costs under § 6673(a)(2) against Petitioners' counsel (December 15, 2014)

UNITED STATES TAX COURT
WASHINGTON, DC 20217

STEVEN T. WALTNER & SARAH V. WALTNER, Petitioner(s), v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	))))))))	Docket No. 1729-13

ORDER

In our Opinion in Waltner v. Commissioner, T.C. Memo. 2014-133, at *22-*24, we sanctioned petitioners pursuant to section 6673(a)(1) and stated that "we believe that petitioners' counsel may also be deserving of a sanction for unreasonably and vexatiously prolonging these proceedings." Accordingly, on July 15, 2014, we ordered petitioners' counsel, Donald W. Wallis, to show cause why the Court should not require him to pay respondent's excess costs, ifany, pursuant to section 6673(a)(2) or sanction him pursuant to Rule 33(b). We also ordered

respondent's counsel to state respondent's position regarding whether the Court should sanction Mr. Wallis and to set forth respondent's computation of the excess costs, ifany, that respondent incurred.

Mr. Wallis filed a response to the order to show cause in which he objected to the imposition of sanctions on him. Respondent's counsel filed a response requesting that we impose on Mr. Wallis a sanction of $16,750 pursuant to section 6673(a)(2) or Rule 33(b) for the excessive costs respondent incurred in this case. We ordered Mr. Wallis to reply to respondent's response, and he filed a reply. For the reasons that follow we will order Mr. Wallis to pay $15,550 to respondent.

Background

Previous Proceeding Involving Mr. Wallis

We have previously warned Mr. Wallis that we would sanction him if he persisted in raising frivolous arguments before this Court. In Tinnerman v. Commissioner, T.C. Memo. 2010-150, 100 T.C.M. (CCH) 20, 23 (2010), aff'd, 448 Fed. Appx. 73 (D.C. Cir. 2012), we imposed a penalty of $25,000 pursuant to section 6673(a)(1) on a taxpayer represented by Mr. Wallis. In doing so we warned Mr. Wallis as follows:

> The attention of petitioner's counsel is directed to Rule 3.1 of the Model Rules of Professional Conduct of of the American Bar Association (Model Rule 3.1), applicable here under Rule 201(a), and to section 6673(a)(2). See Takaba v. Commissioner, 119 T.C. 285, 296-305 (2002); Nis Family Trust v. Commissioner, 115 T.C. 523, 547-

> 553 (2000); see also Powell v. Commissioner, T.C. Memo. 2009-174; Edwards v. Commissioner, T.C. Memo. 2003-149, aff'd, 119 Fed. Appx. 293 (D.C. Cir. 2005). We recognize that counsel cooperated in presenting this case on the stipulation, but the filings in responses to motions and in briefs demonstrate reckless disregard of the facts and the settled law and contentions so lacking in merit as to be frivolous, dilatory, and subject to sanctions. See, e.g., United States v. Patridge, 507 F.3d 1092, 1095-1097 (7th Cir. 2007) (counsel was sanctioned in part for arguing that a collection hearing could be used to contest previously determined substantive liabilities); Johnson v. Commissioner, 116 T.C. 111 (2001), aff'd, 289 F.3d 452, 456-457 (7th Cir. 2002); see also United States v. Collins, 920 F.2d 619, 624-628 (10th Cir. 1990); United States v. Nelson (In re Becraft), 885 F.2d 547, 548 (9th Cir. 1989) (sanctions were imposed on counsel in criminal cases, notwithstanding greater leeway generally allowed under Model Rule 3.1); Charczuk v. Commissioner, 771 F.2d 471 (10th Cir. 1985), affg T.C. Memo. 1983-433. We will deny respondent's motion for a penalty against counsel under section 6673(a)(2). However, we issue this warning for the future to present counsel and to those similarly situated.

Id. at 23-24.

On appeal in Tinnerman Mr. Wallis apparently persisted in raising frivolous arguments before the U.S. Court of Appeals for the District of Columbia Circuit. Consequently, the Court of Appeals imposed a sanction of "$8,000 to be imposed jointly and severally against the Appellant and his counsel,

Donald W. Wallis, for pursuing a frivolous appeal." Tinnerman v. Commissioner, 448 Fed. Appx. 73 (citing sec. 7482(c)(4); 28 U.S.C. sec. 1912; Fed. R. App. P. 38), affg 100 T.C.M. (CCH) 20.

Proceedings Involving Petitioners

For many years petitioners have wasted the resources of this Court, other courts, respondent, and the Department of Justice with matters arising from the filings of their frivolous 2003-08 Federal income tax returns. Initially, they filed a suit in the U.S. Court of Federal Claims, seeking to recover refunds of allegedly overpaid Federal income tax for 2003-08. See Waltner v. United States, 98 Fed. C1. 737, 739 (2011), aff'd, 679 F.3d 1329 (Fed. Cir. 2012). The Court of Federal Claims dismissed petitioners' refund suit with respect to 2004-08 because it held that it lacked jurisdiction. See id. at 761. It explained as follows:

> [P]laintiffs in this case did not submit sufficient information for tax years 2004, 2005, 2006, 2007, and 2008 for any of the plaintiffs' returns to be considered valid tax returns. For each of the tax years, the plaintiffs claim zero in tax liability, allege that no wages were received by plaintiffs, and allege that the amount of dividends received each year was zero. The plaintiffs did not provide the IRS with sufficient information for the tax years at issue, such that the IRS could calculate their tax liability, and therefore, the returns filed by the plaintiffs were neither proper returns or proper claims for refund. As the plaintiffs failed to file properly completed, timely returns for each of the tax years at issue, the court lacks jurisdiction for the plaintiffs' claims for refund tax years 2004,

2005, 2006, 2007, and 2008.

Id.

The U.S. Court of Appeals for the Federal Circuit affirmed the dismissal of petitioners' refund suit. See Waltner, 679 F.3d at 1334. The Supreme Court of the United States denied the petition for certiorari in petitioners' refund suit. See Waltner v. United States, 133 S. Ct. 319 (2012). Mr. Wallis represented petitioners before the Supreme Court. M id. (No. 12-75), available at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-75.htm (last visited Nov. 20, 2014).

Petitioners have three docketed cases currently pending before the Court: (1) Steven T. Waltner & Sarah V. Waltner v. Commissioner, docket No. 8726-11L (regarding a notice of lien filed with respect to both petitioners' liability for a section 6702 penalty for 2003-2007; a notice of intent to collect by levy with respect to Mr. Waltner's liability for a section 6702 penalty for 2003, 2005, 2006, and 2007; and respondent's efforts to collect by lien and levy both petitioners' 2006 Federal income tax liability); (2) Steven T. Waltner & Sarah V. Waltner v. Commissioner, docket No. 1729-13 (this case); and (3) Steven T. Waltner & Sarah V. Waltner v. Commissioner, docket No. 12722-13L (regarding a notice of intent to collect by levy a section 6702 penalty for 2004). Mr. Waltner also previously had a docketed case before the Court that is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit: Steven T. Waltner v. Commissioner, docket No. 21953-12L (regarding a notice of intent to collect by levy Mr. Waltner's section 6702 penalty for 2008). Mr. Wallis has entered an appearance for petitioners

in each of these cases. (He subsequently withdrew from the case at docket No. 21953-12L, but he has since entered an appearance for Mr. Waltner before the Ninth Circuit). All four of these cases and the Court of Federal Claims case are based on petitioners' frivolous position that the bulk of their income--primarily the wages of Mr. Waltner--is not taxable.

In our Opinion in this case we imposed a penalty under section 6673(a)(1) on petitioners because they maintained frivolous positions before this Court and we indicated that we believed that Mr. Wallis' conduct in this case was deserving of sanction pursuant to section 6673(a)(2) and Rule 33(b). See Waltner v. Commissioner, T.C. Memo. 2014-133, at *22-*24. However, because some of the costs in this case were incurred before Mr. Wallis entered an appearance and because we recognized that some of the issues in this case were not frivolous, we instructed respondent not to include costs incurred before petitioners' counsel entered an appearance or costs attributable to the issues of (1) whether the statute of limitations on assessment and collection applies in this case; (2) whether petitioners had unreported income from the sale of assets in Mr. Waltner's Citigroup account; (3) whether petitioners are liable for an accuracy-related penalty under section 6662(a); and (4) whether petitioners are liable for an addition to tax under section 6651(a)(1). See id. at *24 n.7.

In his response respondent seeks reimbursement for (1) 48 of 91.5 hours of work performed by Attorney Michael Lloyd; (2) 17 of 37 hours of work performed by Attorney Hilary March; and (3) 15 of 18 hours of work performed by Supervisory Attorney Bridget

Tombul. The hours worked by these attorneys are detailed in declarations accompanying respondent's response. Respondent appropriately excluded hours attributable to the items we enumerated in footnote 7 of the Opinion in this case. Respondent seeks to be reimbursed at a rate of $200 per hour for the work performed by Ms. March and Mr. Lloyd and $250 per hour for the work performed by Ms. Tombul. Respondent notes, however, that petitioners filed additional, frivolous motions after the Court issued its Opinion in this case and respondent's counsel will be required to perform additional work in responding to those motions.

Mr. Lloyd is an attorney with the Internal Revenue Service (IRS), Office of Chief Counsel, Small Business/Self-Employed, in Denver, Colorado. He has been an attorney with the IRS since 1991.

Ms. March is an attorney with the IRS, Office of Chief Counsel, Procedure & Administration, in Washington D.C. Ms. March has been an attorney with the IRS since August 2011.

Ms. Tombul, an attorney, is a Senior Technician Reviewer with the IRS, Office of Chief Counsel, Procedure & Administration, in Washington D.C. She has been an attorney with the IRS for more than 15 years.

Discussion

If an attorney admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, section 6673(a)(2)(A) authorizes the Court to require the attorney to "pay personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct". In Harper v. Commissioner, 99 T.C. 533, 545 (1992), we

relied upon case law under 28 U.S.C. sec.1927 (2012) to ascertain the level of misconduct justifying sanctions under section 6673(a)(2). The language of 28 U.S.C. section 1927 (2012) is substantially identical to that of section 6673(a)(2), and the two statutes serve the same purposes in different forums. See Harper v. Commissioner, 99 T.C. at 545. In Harper v. Commissioner, 99 T.C. at 545-546, we observed that, although most of the U.S. Courts of Appeals require a finding of bad faith as a condition for imposing sanctions under 28 U.S.C. section 1927 (2012), a few have adopted the lower threshold of recklessness. The U.S. Court of Appeals for the District of Columbia Circuit has not adopted either standard. See LaPrade v. Kidder Peabody & Co., Inc., 146 F.3d 899, 905 (D.C. Cir. 1998) ("This court has not yet established whether the standard for imposition of sanctions under 28 U.S.C. * * * [section] 1927 should be 'recklessness' or the more stringent 'bad faith.'"). But see Reliance Ins. Co. v. Sweeney Corp., Md., 792 F.2d 1137, 1138 (D.C. Cir. 1986) (stating that bad faith is not required). The venue for appeal of the sanctions we impose on Mr. Wallis may be to the U.S. Court of Appeals for the District of Columbia Circuit. See sec. 7482(b)(1) (second sentence); Byers v. Commissioner, 740 F.3d 668 (D.C. Cir. 2014), affg T.C. Memo. 2012-27. But compare Johnson v. Commissioner, 289 F.3d 452 (7th Cir. 2002) (affirming Tax Court's imposition of a section 6673(a)(2) penalty without discussing venue), 116 T.C. 111 (2001), with Dornbusch v. Commissioner, 860 F.2d 611 (5th Cir. 1988) (appellate venue lies in the U.S. Court of Appeals for the District of Columbia Circuit under the second sentence of section 7482(b)(1) in the case of an appeal of a criminal

contempt sentence imposed on a witness by the Tax Court). If the appellate venue for Mr. Wallis is not the U.S. Court of Appeals for the District of Columbia Circuit, it is likely the U.S. Court of Appeals for the Ninth Circuit. See sec. 7482(b)(1)(A). In Fink v. Gomez, 239 F.3d 989, 993 (9th Cir. 2001), the U.S. Court of Appeals for the Ninth Circuit has stated that "recklessness suffices for * * * [sanctions under 28 U.S.C. section] 1927, but bad faith is required for sanctions under the court's inherent power." Because we are uncertain of appellate venue, and because we find that petitioners' counsel's conduct would constitute bad faith under Ninth Circuit cases applying a bad faith standard, see, e.g., Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) ("A finding of bad faith is warranted where an attorney 'knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.'") (quoting In re Keegan Mgmt. Co., Sec. Litig., 78 F.3d 431, 436 (9th Cir. 1996)), we shall--for purposes of this case--adopt that standard, see Takaba v. Commissioner, 119 T.C. at 297-298; Nis Family Trust v. Commissioner, 115 T.C. at 548.

We may consider Mr. Wallis' record of asserting frivolous claims before this Court and other courts--thereby exposing his clients to sanctions--in determining whether he had bad faith in asserting frivolous arguments in this case. See Johnson v. Commissioner, 289 F.3d at 456-457. "[I]ndeed * * * [we] would * * * [be] remiss not to consider it." Id. (citing S Indus., Inc. v. Centra 2000, Inc., 249 F.3d 625, 628-629 (7th Cir. 2001), *In re Joint E. & S. Dists. Asbestos Litig.*, 22 F.3d 755, 759 n.8 (7th Cir. 1994), *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001), and

Doering v. Union Cnty. Bd. of Chosen Freeholders, 857 F.2d 191, 197 n.6 (3d Cir. 1988)). Additionally, "dogged good-faith persistence in bad conduct becomes sanctionable once an attorney learns or should have learned that it is sanctionable." Id. (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978), and In re TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985)). Mr. Wallis knew--or should have known--that some of the positions that petitioners were raising before this Court were frivolous. Nonetheless, he entered an appearance and persisted in advancing those positions. He also signed petitioners' amended petition and a reply to respondent's answer to the amended petition, in which pleadings he asserted petitioners' frivolous positions. In doing so he unreasonably and vexatiously multiplied the proceedings before this Court.

Indeed, Mr. Wallis continues to assert the same frivolous positions in his response to the order to show cause and in his reply to respondent's response. Mr. Wallis' knowing assertion of frivolous positions before this Court supports a finding that he acted in bad faith. See Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d at 648. Additionally, the fact that Mr. Wallis persisted in asserting frivolous arguments before this Court after being warned that such conduct is sanctionable, See Tinnerman v. Commissioner, 100 T.C.M. (CCH) at 23, further supports a finding that he acted in bad faith, see Johnson v. Commissioner, 289 F.3d at 456-457. Indeed, the U.S. Court of Appeals for the D.C. Circuit has already sanctioned Mr. Wallis for similar conduct. See Tinnerman v. Commissioner, 448 Fed. Appx. 73. We conclude that Mr. Wallis--in bad faith--

unreasonably and vexatiously multiplied the proceedings before this Court within the meaning of section 6673(a)(2). Alternatively, we could sanction Mr. Wallis under Rule 33(b) for the same reasons.

Attorney's fees awarded under section 6673(a)(2) are computed by multiplying the number of excess hours reasonably expended on the litigation by a reasonable hourly rate. The product is known as the "lodestar" amount. Harper v. Commissioner, 99 T.C. at 549. The hourly rate properly charged for the time of a Government attorney is the "amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation." Id. at 551. However, we shall only impose on Mr. Wallis those excess costs that are related to the frivolous positions that he advanced in this case or that are attributable to submissions, or parts thereof, that we conclude he filed in bad faith. Accordingly, in addition to those costs described in footnote 7 of the Opinion in this case, we shall exclude 6 hours that Mr. Lloyd spent reviewing and responding to petitioners' motions to continue the trial and to change the place of trial dated November 25 and 26, 2013, respectively, and reviewing petitioners' motions to reconsider or vacate our denial of those motions dated December 12, 2013. We find that the remainder of the excessive hours that respondent seeks reimbursement for are reasonable for the work described. See United States v. $12,248 U.S. Currency, 957 F.2d 1513, 1520 (9th Cir. 1991).

Mr. Wallis does not object to respondent's requested hourly rate of $200 for Ms. March and Mr. Lloyd's time and $250 for Ms. Tombul's time. In Takaba v. Commissioner, 119 T.C. at 303-305, we

found that an hourly rate of $150 for a Chief Counsel trial attorney and $200 for an Associate Area Counsel located in Hawaii in 2000-2002 was reasonable. As respondent's response more fully explains a cost-of-living adjustment to the amount found to be reasonable in Takaba is appropriate. We therefore conclude that respondent's requested hourly rates are reasonable.

Having established the compensable hours and the reasonable hourly rate we calculate the "lodestar" amount as follows:

Attorney	Hours allowed	Hourly rate	Total
Ms. Tombul	15	$250	$3,750
Ms. March	17	200	3,400
Mr. Lloyd	42	200	8,400
Total			15,550

We conclude that Mr. Wallis should be required to pay the lodestar amount of $15,550 to respondent. Although this computation does not include any costs that respondent may have incurred in this case following the filing of respondent's response, we will not order respondent to supplement his response to include any additional excessive costs he may have incurred since the filing ofhis response because we conclude that the lodestar amount as calculated to date is an adequate award to compensate for the excessive costs under the circumstances ofthis case.

It is therefore

ORDERED that the order to show cause dated July 15, 2014, as regards petitioners' counsel, is made absolute. It is further

ORDERED that petitioners' counsel, Donald W.

Wallis, shall personally pay excess costs of $15,550 to respondent pursuant to section 6673(a)(2), that he shall make payment by means of a certified check, cashier's check, or money order in favor of the Internal Revenue Service, that such payment be delivered to respondent's counsel at the Office ofAssociate Area Counsel, Suite 300 North, 600 17th St., Denver, CO 80202, not later than 30 days from the date this order is served, and that respondent shall report to the Court in writing ifsuch payment is not timely received.

(Signed) L. Paige Marvel

Judge

Dated: Washington, D.C.

December 15, 2014

SERVED Dec 17 2014

Tax Court Order and Decision ("Decision") (May 9, 2017)

UNITED STATES TAX COURT
WASHINGTON, DC 20217

STEVEN T. WALTNER & SARAH V. WALTNER,	)	Docket No. 1729-13
Petitioner(s),	)	
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

ORDER AND DECISION

On July 3, 2014, the Court filed its Opinion, T.C. Memo. 2014-133, and directed that the decision in this case be entered under Rule 155.[1] In its Opinion, the Court sustained respondent's determination that

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

petitioners are liable for tax on Mr. Waltner's unreported wages for 2008, held that petitioners are liable for an addition to tax under section 6651(a)(1) for 2008, and held that petitioners are liable for a section 6673(a)(1) penalty of $10,000 for frivolous positions in this case.[2] The Court also ordered petitioners' then counsel, Donald W. Wallis, to show cause why we should not impose on him excessive costs pursuant to section 6673(a)(2) or sanction him pursuant to Rule 33(b) for unreasonably and vexatiously prolonging these proceedings.

On January 9, 2015, petitioners filed a computation for entry of decision.[3] On January 20, 2015, respondent filed a computation for entry of decision. Petitioners' computation for entry of decision only includes a calculation for the addition to tax under section 6651(a)(1). In respondent's computation for entry of decision he agrees with petitioners' computation with respect to the addition to tax under section 6651(a)(1), but also computes a deficiency in Federal income tax of $8,801 as a result of Mr. Waltner's unreported wages in 2008. Petitioners contend without merit that respondent was not authorized to calculate the amount of the deficiency. However, under Rule 155 the parties are directed to submit computations pursuant to the Court's determination of the issues. Mr. Waltner's unreported wages were an issue and in its Opinion the Court sustained respondent's determination with

[2] Respondent filed a motion to impose sanctions pursuant to section 6673 on March 4, 2014.

[3] While the parties' computations for entry of decision were under advisement, petitioners also filed a motion for entry of decision on March 4, 2016.

respect to the unreported wages. Therefore, respondent's computation conforms with Rule 155 and the Opinion of the Court.

On July 15, 2014, pursuant to our Opinion in this case, we ordered petitioners' then counsel, Mr. Wallis, to show cause why the Court should not require him to pay respondent's excess costs, if any, pursuant to section 6673(a)(2) or sanction him pursuant to Rule 33(b). We also ordered respondent's counsel to state respondent's position regarding whether the Court should sanction Mr. Wallis and to set forth respondent's computation of the excess costs, if any, that respondent incurred. Mr. Wallis filed a response to the order to show cause in which he objected to the imposition of sanctions on him. Respondent's counsel filed a response requesting that we impose on Mr. Wallis a sanction of $16,750 pursuant to section 6673(a)(2) or Rule 33(b). Mr. Wallis filed a reply to respondent's response.

In an order dated December 15, 2014, we ordered Mr. Wallis to personally pay excess costs of $15,550 to respondent pursuant to section 6673(a)(2) not later than 30 days from the date of our December 15, 2014, order. In a status report dated January 14, 2015, Mr. Wallis informed the Court that he would not pay the excess costs unless the Court's Order was affirmed on appeal. On February 12, 2015, petitioners filed a motion to withdraw Mr. Wallis as counsel. We granted petitioners' motion on February 19, 2015. Although Mr. Wallis is no longer an attorney admitted to practice before this Court and he no longer represents petitioners in this case, he was admitted to this Court during the time that he represented petitioners and this is the period of time at issue for purposes of determining whether he

should be required to pay respondent's excess costs pursuant to section 6673(a)(2). Therefore, Mr. Wallis remains liable for excess costs determined in the Court's Order dated December 15, 2014.

Upon due consideration and pursuant to the Opinion of the Court, filed July 3, 2014, and incorporating herein the facts recited in respondent's computation, it is

ORDERED that petitioners' motion for entry of decision is denied. It is further

ORDERED that respondent's motion to impose sanctions pursuant to section 6673 is granted. It is further

ORDERED that in addition to regular service the Clerk of the Court shall make service of a copy of this Order on Donald W. Wallis at 780 North Ponce de Leon Blvd., St. Augustine, FL 32084. It is further

ORDERED AND DECIDED that there is a deficiency in income tax due from petitioners for the taxable year 2008 in the amount of $8,801, no penalty is due from petitioners under section 6662(a) for 2008, and a $978.75 addition to tax under section 6651(a)(1) is due from petitioners for 2008. It is further

ORDERED AND DECIDED that petitioners shall pay to the United States a $10,000 penalty under section 6673(a)(1). It is further

ORDERED AND DECIDED that petitioners' former counsel, Donald W. Wallis, shall personally pay excess costs of $15,500 to respondent pursuant to section 6673(a)(2), that he shall make payment by means of a certified check, cashier's check, or money order in favor of the Internal Revenue Service, that

such payment be delivered to respondent's counsel at the Office of Associate Area Counsel, Suite 300 North, 600 17th St. Denver, CO 80202.

(Signed) L. Paige Marvel
Chief Judge

ENTERED: MAY 09 2017

Ninth Circuit Order denying rehearing *en banc* (March 28, 2019)

United States Court of Appeals
for the Ninth Circuit

STEVEN T. WALTNER and 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.

Memorandum ("Judgment") of the Court of Appeals (January 17, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN T. WALTNER and SARAH V. WALTNER, Petitioners-Appellants,	No. 17-72261
v.	Tax Ct. No. 1729-13
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee	MEMORANDUM*

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.

Petitioners' counsel's status report on § 6673(a)2) sanctions (January 14, 2015)

UNITED STATES TAX COURT
WASHINGTON, DC 20217

STEVEN T. WALTNER & SARAH V. WALTNER,	)	Docket No. 1729-13
Petitioner(s),	)	
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

PETITIONERS' STATUS REPORT

Petitioners hereby submit their Status Report concerning the excess costs, expenses, and attorneys' fees that the Court has required the undersigned to pay personally under IRC Section 6673(a)(2).

In the Court's Order dated December 15, 2014 ("Order"), the Court ordered petitioners' counsel, Donald W. Wallis, personally to pay "excess costs" in the amount of $15,550.00. The Order states (1) that Mr. Wallis "shall make payment by means of a certified check, cashier's check, or money order," (2) that the payment shall be made "in favor of the Internal Revenue Service," (3) that the payment must be "delivered to respondent's counsel at the Office of Associate Area Counsel, Suite 300 North, 600 17th Street, Denver, CO 80202," and (4) that the payment must be made "not later than 30 days from the date this order is served." The Order requires respondent to "report to the Court in writing if such payment is

not timely received."

This Court's jurisdiction to collect or enforce collection of sanctions is established by statute. IRC Section 6214(e) states: "For provision giving Tax Court jurisdiction to order a refund of an overpayment and to award sanctions, see section 6512 (b)(2)." Section 6512(b)(2) states:

> (2) Jurisdiction to enforce
> If, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest. An order of the Tax Court disposing of a motion under this paragraph shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

Thus, the statute provides only for this Court to order a refund of an overpayment previously determined by this Court. Contrary to the reference in Section 6214(e), it makes no provision for the enforcement of this Court's award of sanctions.

Furthermore, Section 6673(a)(2) does not contain the plain statement found in Subsection (a)(1) that the requirement to pay a sanction must be made (1) in this Court's Decision, and (2) to the United States. But, also, the plain language of Subsection (a)(2)(A) is not in conflict with it. Like Section 6512(b)(2), it is just silent. Therefore, it is not unreasonable to interpret Section 6673(a)(2) to mean that Congress intended the payment requirement to

be part of, and reflected in, the Decision.

Petitioners' counsel acknowledges that the Court has required him to pay personally excess costs, expenses, and attorneys' fees under IRC Section 6673(a)(2)(A). The Court has imposed this requirement in connection with this "case of a petitioner seeking redetermination of tax liability," and Petitioners' counsel anticipates that the requirement will be included in its Decision. The entire Decision of this case, once it is entered, will be appealed to the Ninth Circuit Court of Appeals under the Federal Rules of Appellate Procedure and according to 26 U.S.C. §7482(b)(1)(A). The Order will be reflected in the Decision, and therefore will be part of that appeal.

Petitioners' counsel has not been, and he will not be, able to pay the required amount on or before the date set in the Order. Hence, he will not be making a payment to the Internal Revenue Service on January 14, 2015.

Should all or any part of the payment requirement be affirmed on appeal, petitioners' counsel will have become able to make the payment by the time that the Court of Appeals issues its mandate. On January 12, 2015, in a telephone conference, petitioners' counsel advised respondent's counsel, Matthew Houtsma, Esq., of the foregoing and of the appeal of the upcoming Decision.

Respectfully submitted this 14th day of January, 2015.

/s/ Donald W. Wallis

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CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article III, Section 2

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and … to controversies to which the United States shall be a party…. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

U.S. Constitution, Amendment V:

> No person shall … be deprived of … property, without due process of law….

STATUTES

26 U.S.C. § 6011(a)

26 U.S.C. § 6011—General requirement of return, statement, or list

(a) General rule

When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

26 U.S.C. § 6061(a)

26 U.S.C. § 6061—Signing of returns and other documents

(a) General rule

Except as otherwise provided by subsection (b) and sections 6062 and 6063, any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary.

26 U.S.C. § 6065

26 U.S.C. § 6065—Verification of returns

Except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

26 U.S.C. § 6211(a) and (b)

26 U.S.C. § 6211—Definition of a deficiency

(a) In General

For purposes of this title in the case of income, … taxes imposed by subtitles A … the term "deficiency" means the amount by which the tax imposed by subtitle A … 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 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) thereof, 32, 34, 35, 36, and

36B, 168(k)(4) 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.

26 U.S.C. § 6212(a)

26 U.S.C. § 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 … 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 office of the taxpayer advocate and the location and phone number of the appropriate office.

26 U.S.C. § 6213(a) and (g)

26 U.S.C. § 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.

. . .

(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.

26 U.S.C. § 6214(a)

26 U.S.C. § 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 redetermine the correct amount of the deficiency even if the amount so redetermined 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.

26 U.S.C. § 6501(a) and (c)(3)

26 U.S.C. § 6501—Limitations on assessment and collection

(a) General Rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed

(whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. . . .

(c) Exceptions

(3) No return

In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

26 U.S.C. § 6611(g)

26 U.S.C. § 6611—Interest on overpayments

(g) No interest until return in processible form

(1) For purposes of subsections (b)(3) and (e), a return shall not be treated as filed until it is filed in processible form.

(2) For purposes of paragraph (1), a return is in a processible form if—

(A) such return is filed on a permitted form, and

(B) such return contains—

(i) the taxpayer's name, address, and identifying number and the required signature, and

(ii) sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return.

26 U.S.C. § 6651(a)(1)

26 U.S.C. § 6651—Failure to file tax return or to pay tax

(a) Addition to the tax In case of failure—

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), . . . on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; . . .

26 U.S.C. § 6673(a)(1) and (2)

26 U.S.C. § 6673—Sanctions and costs awarded by courts

(a) Tax court proceedings

(1) Procedures instituted primarily for delay, etc. Whenever it appears to the Tax Court that—

(A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,

(B) the taxpayer's position in such proceeding is frivolous or groundless, or

(C) the taxpayer unreasonably failed to pursue available administrative remedies,

the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.

(2) Counsel's liability for excessive costs Whenever it appears to the Tax Court that any attorney or other person admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require—

(A) that such attorney or other person pay personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct . . . .

26 U.S.C. § 7482(a)(1)

26 U.S.C. § 7482—Courts of review

(a) Jurisdiction

(1) In General

The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

28 U.S.C. § 1254

28 U.S.C. § 1254—Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .