No. _____

IN THE

Supreme Court of the United States

JOHN M. MARSHALL; KAREN M. MARSHALL; MARSHALL ASSOCIATED, LLC; ESTATE OF RICHARD MARSHALL, DECEASED, Patsy L. Marshall, Personal Representative; and PATSY L. MARSHALL, Transferees,

Applicants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December 16, 2019

RULE 29.6 STATEMENT

Marshall Associated, LLC does not have a parent corporation; it does not issue stock; nor does there exist a publicly held corporation that owns 10% or more of its stock.

No. _____

IN THE

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Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Applicants John M. Marshall; Karen M. Marshall; Marshall Associated, LLC; Estate of Richard Marshall, Deceased, Patsy L. Marshall, Personal Representative; and Patsy L. Marshall (collectively, "the Marshalls") respectfully request a 30-day extension of time, up to and including January 30, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The judgment of the court of appeals was entered on July 23, 2019. (A copy of the court's decision, *Marshall v. Commissioner*, 782 F. App'x 565 (9th Cir. 2019), is attached hereto as Attachment 1.) The Marshalls timely filed a petition for panel rehearing and rehearing en banc, which

the Ninth Circuit denied on October 2, 2019. (A copy of the order denying rehearing is attached hereto as Attachment 2.) Currently, any petition for a writ of certiorari would be due on December 31, 2019. This application has been filed more than 10 days before the date a petition would be due. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision in this case.

1. This case involves transferee liability under Section 6901 of the Internal Revenue Code. Section 6901 provides the government with a streamlined procedural mechanism to collect taxes from transferees, but does not create substantive liability for the taxes. *See* 26 U.S.C. § 6901(a). In *Commissioner v. Stern*, this Court was faced with the question whether "substantive liability enforced under [§ 6901] is to be determined by state or federal law." 357 U.S. 39, 42 (1958). Although the government urged the Court to adopt a federal rule to "further 'uniformity of liability,'" *id.* at 44, the Court rejected that position, holding that, "until Congress speaks to the contrary, the existence and extent of liability should be determined by state law." *Id.* at 45. As the Court explained, "[t]he Government's substantive rights . . . are precisely those which other creditors would have under [state] law." *Id.* at 47.

The courts of appeals have interpreted *Stern* as creating a two-prong, conjunctive test to determine whether the Internal Revenue Service may collect taxes from an alleged transferee. Under this framework, the court must evaluate (1) whether the alleged transferee is liable under state law, and (2) whether that person or entity is a "transferee" under federal law. *See, e.g.*, *Salus Mundi Found. v.*

Comm'r, 776 F.3d 1010, 1012 (9th Cir. 2014); *Diebold Found. v. Comm'r*, 736 F.3d 172, 184 (2d Cir. 2013); *Starnes v. Comm'r*, 680 F.3d 417, 427 (4th Cir. 2012).

2. Brothers John and Richard Marshall founded Marshall Associated Contractors, Inc. ("MAC") in 1965. The brothers and their wives, Karen and Patsy Marshall, owned equal shares of the company. In 2003, the Marshalls completed three transactions to sell their stock in MAC, their closely held family business, to an unrelated third party. Nearly a decade later, the Internal Revenue Service challenged the transactions and sought to hold the Marshalls liable for the third party's subsequent failure to satisfy MAC's tax liability. The Tax Court "collapsed" the three transactions, recharacterizing them as a liquidating distribution from MAC to the Marshalls. The court then concluded that the Marshalls were "transferees" of MAC's assets for purposes of 26 U.S.C. § 6901, and held the Marshalls liable for more than $41 million in unpaid taxes.*

3. The Ninth Circuit affirmed. *See infra* Attachment 1. While the court of appeals purported to apply the two-prong analysis, it did not, in fact, apply the state law applicable to private creditors to determine whether the three transactions could be collapsed to make the Marshalls liable for MAC's unpaid taxes—as *Stern* requires. Instead, the court relied on the Oregon Uniform Fraudulent Transfer Act (which, properly analyzed, does not permit collapsing), a Ninth Circuit case applying the *Arizona* Uniform Fraudulent Transfer Act, and two Oregon cases that

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* The Tax Court found John, Karen, and Patsy Marshall each liable for $8,689,384; Richard Marshall's estate liable for $8,660,115; and Marshall Associated, LLC liable for $6,766,500.

do not address the law applicable to private creditors, to hold that the Marshalls were liable.

4. This case implicates considerable confusion among the courts regarding the appropriate analysis under *Stern* and, in particular, the directive that substantive liability be determined as a matter of state private creditor law. The decision below continues a concerning trend of federal courts ignoring the law applicable to private creditors in the relevant state in favor of general principles of federal law or "uniformity" to collapse transactions and find liability. *See, e.g.*, *Slone v. Comm'r*, 810 F.3d 599, 605, 607–08 (9th Cir. 2015) (requiring the Tax Court to apply federal law to determine whether to collapse transactions); *Feldman v. Comm'r*, 779 F.3d 448, 454–57 (7th Cir. 2015) (applying general principles of federal tax law to collapse transactions). This approach improperly expands the IRS's ability to collect taxes from parties that did not incur the liability, causes federal creep on a critical area of state law, and is directly contrary to this Court's mandate in *Stern*. 357 U.S. at 45. This Court's review is warranted.

5. The petition in this case is currently due on December 31, 2019. A brief extension of time is warranted to prepare and file a petition for a writ of certiorari in this case.

6. The additional time sought in this application is necessary because the attorneys with principal responsibility for drafting the petition have competing professional commitments over this same time period—and because of the intervening holidays.

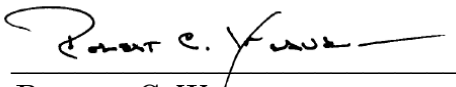
7. Additionally, the Marshalls recently retained Supreme Court counsel. Specifically, Latham & Watkins LLP was retained in recognition of their extensive experience before this Court. An extension of time is appropriate to enable those attorneys to become familiar with the extensive, complex record.

8. The Ninth Circuit has already issued its mandate in this case. Consequently, the requested 30-day extension would not delay the issuance of the mandate. Moreover, the extension requested would not work any meaningful prejudice on any party.

9. For these reasons, the Marshalls respectfully request that the time for filing a petition for a writ of certiorari in this case be extended to and including January 30, 2020.

December 16, 2019

Respectfully submitted,



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ATTACHMENT 1

NOT FOR PUBLICATION

FILED

JUL 23 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN M. MARSHALL; KAREN M. MARSHALL, Transferees, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 17-72955 Tax Ct. No. 28782-11 MEMORANDUM*
MARSHALL ASSOCIATED, LLC, Transferee, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 17-72958 Tax Ct. No. 28661-11
ESTATE OF RICHARD L. MARSHALL, DECEASED, Patsy L. Marshall, Personal Representative; PATSY L. MARSHALL,	No. 17-72960 Tax Ct. No. 27241-11

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

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeals from Decisions of the
United States Tax Court

Argued and Submitted July 11, 2019
Portland, Oregon

Before: TASHIMA, GRABER, and OWENS, Circuit Judges.

Petitioners John, Karen, Richard, and Patsy Marshall ("the Marshalls") and Marshall Associated, LLC ("MA, LLC") appeal from the Tax Court's decisions on their petitions challenging notices of transferee liability regarding unpaid taxes by Marshall Associated Contractors, Inc. ("MAC"). We have jurisdiction under 26 U.S.C. § 7482. We review the Tax Court's conclusions of law de novo and its factual findings for clear error. *Slone v. Comm'r*, 810 F.3d 599, 604 (9th Cir. 2015) (*Slone I*). We affirm.

1. The Tax Court properly held that the Marshalls and MA, LLC are liable for MAC's unpaid taxes under 26 U.S.C. § 6901 and the Oregon Uniform Fraudulent Transfer Act ("OUFTA"). *See id.* at 604-05 (setting forth two-pronged *Stern* test).

For the state-law prong, the Tax Court properly determined that, under OUFTA, the multiple steps in the transaction through which the Marshalls sold their MAC stock could be "collapsed" and deemed a "transfer" from MAC to the Marshalls if the Marshalls had at least constructive knowledge that MAC's taxes would not be paid. *See* Or. Rev. Stat. §§ 95.200(12) (defining "[t]ransfer" broadly as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset"), 95.290 (providing that "the principles of . . . equity" supplement OUFTA's provisions), 95.300 (providing that OUFTA "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of [OUFTA] among states enacting it"); *Slone v. Comm'r*, 896 F.3d 1083, 1085-88 (9th Cir. 2018) (*Slone II*) (holding that a similar stock sale could be collapsed under the comparable Arizona UFTA if the former shareholders had at least constructive knowledge of the tax-avoidance purpose), *cert. denied*, 139 S. Ct. 1348 (2019); *Diamond Fruit Growers, Inc. v. Goe Co.*, 409 P.2d 909, 910 (Or. 1966) (holding that a court of equity may "look through the form of the transaction to the substance").

The Tax Court did not clearly err in finding that the Marshalls had at least constructive knowledge that MAC's taxes would be unpaid following the stock sale. *See Mark v. State ex rel. Dep't of Fish & Wildlife*, 84 P.3d 155, 163 (Or. Ct.

App. 2004) (holding that, under Oregon law, "[c]onstructive knowledge exists when a person is aware of 'information as would lead a prudent man to believe that the fact existed, and that if followed by inquiry must bring knowledge of the fact home to him'" (citation omitted)); *see also Slone II*, 896 F.3d at 1087-88.

In addition, the "transfer" from MAC to the Marshalls and MA, LLC was constructively fraudulent under OUFTA because the federal tax claim arose before the stock sale, MAC did not receive "a reasonably equivalent value in exchange," and MAC was left insolvent. Or. Rev. Stat. § 95.240(1).

For the federal-law prong, the Tax Court properly determined, looking through the form of the MAC stock sale to its substance, that it lacked any business purpose other than tax avoidance and that the transaction lacked any economic substance other than the creation of tax benefits. *See Slone I*, 810 F.3d at 605-06; *see also Slone II*, 896 F.3d at 1086.

2. The Tax Court also properly determined the amount owed by the Marshalls and MA, LLC. The Tax Court did not clearly err in finding that the Marshalls failed to show that MAC's tax liability should be reduced by refreshing MAC's expired net operating losses. *See Boyd Gaming Corp. v. Comm'r*, 177 F.3d 1096, 1098 (9th Cir. 1999) ("The determination that a taxpayer failed to produce sufficient evidence to support a deduction constitutes a factual finding subject to the 'clearly erroneous' standard of review." (citation omitted)).

Further, the Tax Court properly determined that, under Oregon law, the Marshalls are liable for pre-notice interest. *See* Or. Rev. Stat. § 82.010(1)(a) (providing that interest is payable on "[a]ll moneys after they become due"); *Strawn v. Farmers Ins. Co. of Or.*, 297 P.3d 439, 458 (Or. 2013) (noting that the justification for interest under Or. Rev. Stat. § 82.010(1)(a) is that "[o]nce due, the debtor has the use of money to which the debtor is not entitled, while the delay in payment deprives the creditor of that use").

Finally, the Tax Court did not improperly double count the noncash assets as a transfer to both the Marshalls and MA, LLC because they are jointly and severally liable for MAC's unpaid tax liabilities and the noncash assets will be considered only once in collecting against the Marshalls and MA, LLC. *See* Or. Rev. Stat. § 95.270(2) (generally limiting transferee liability to "the value of the asset[s] transferred").

AFFIRMED.

ATTACHMENT 2

FILED

OCT 2 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN M. MARSHALL; KAREN M. MARSHALL, Transferees, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 17-72955 Tax Ct. No. 28782-11 ORDER
MARSHALL ASSOCIATED, LLC, Transferee, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 17-72958 Tax Ct. No. 28661-11
ESTATE OF RICHARD L. MARSHALL, DECEASED, Patsy L. Marshall, Personal Representative; PATSY L. MARSHALL, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL	No. 17-72960 Tax Ct. No. 27241-11

REVENUE,

Respondent-Appellee.

Before: TASHIMA, GRABER, and OWENS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Graber and Owens voted to deny the petition for rehearing en banc, and Judge Tashima so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.