

No. _____

IN THE

Supreme Court of the United States

JACK S. KANNRY, JOYCE F. KANNRY,

Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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RULE 14.1(a): QUESTION PRESENTED FOR REVIEW

By way of permitted introductory preface, the Internal Revenue Service (“IRS”), perhaps the one federal agency which affects every American family, in having to meet annual income tax obligations, derives its authority solely from federal statutes and its own regulations, intended to be consistent with such legislative mandates. Just as all taxpayers must comply with such requirements, so too must the IRS, as to which compliance the taxpayers have a right to rely. One such statute, known as the Stafford Act, promulgated to provide taxpayer relief arising from federally declared disasters, such as Hurricane Sandy, and consistent IRS regulations for filing of amended returns to recover for otherwise uncompensated disaster losses, was relied upon by petitioners and very likely countless other taxpayers subject to this disaster, but not even considered, let alone properly applied by the IRS.

Several other IRS errors of commission and omission, some of which IRS tax counsel belatedly conceded, are intended to be subsumed herein.

The question thereby presented is whether the IRS should be free to pick and choose which mandated statutes and regulations to apply, and to avoid other highly relevant ones, by ignoring or side stepping them, upon which countless disaster-victim taxpayers have properly relied, and will do so in the future, such that the impact of the decision below is to create a widespread deleterious result for many current and future taxpayers as to the questionable consistency and reliability of

that agency's conduct, in effect constituting a rending of the very fabric of the nation's integrated tax system?

RULE 14.1(b)(i) & (ii):

PARTIES TO THE PROCEEDING AND RELATED CASES

Parties to Proceeding

The names of all parties to the proceeding in this Court appear on the cover of this petition.

Related Cases

- United States Tax Court, Docket No. 19091-16L, Jack S. Kannry and Joyce F. Kannry, Petitioners v. Commissioner of Internal Revenue, Respondent. Order and Decision entered September 21, 2018.
- United States Tax Court, Docket No. 19091-16L, Jack S. Kannry and Joyce F. Kannry, Petitioners v. Commissioner of Internal Revenue, Respondent. Order and Decision entered December 14, 2018.
- United States Court of Appeals for the Second Circuit,, Docket No. 19-494, Jack S. Kannry and Joyce F. Kannry, Petitioners-Appellants v. Commissioner of Internal Revenue, Respondent-Appellee. Summary Order and Decision entered December 20, 2019.
- United States Court of Appeals for the Second Circuit,, Docket No. 19-494, Jack S. Kannry and Joyce F. Kannry, Petitioners-Appellants v. Commissioner of Internal Revenue, Respondent-Appellee. Summary Order and Decision entered March 5, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jack S. Kannry and Joyce F. Kannry respectfully petition this Court for a writ of certiorari to review the summary orders of the United States Court of Appeals for the Second Circuit affirming the order below of the United States Tax Court and denying the petition for panel rehearing or rehearing en banc.

RULE 14.1 (d): ORDERS BELOW

There are no official citations or unofficial reports of the orders entered in the case by the United States Tax Court or the United States Court of Appeals for the Second Circuit. The full text of each of the four such orders, enumerated above under “Related Cases,” are provided in the accompanying Appendix at 1a to 17a, inclusive.

RULE 14.1 (e): JURISDICTION

The Second Circuit entered its summary order on December 20, 2019 and denied panel rehearing or rehearing en banc by summary order dated March 5, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254, providing for review of cases from federal courts of appeal.

RULE 14.1 (f): STATUTES AND REGULATIONS INVOLVED IN CASE

Involved statutes and regulations, with appropriate citations, are as follows, and with pertinent text verbatim set out in the accompanying Appendix due to length:

Statutes

Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.Code § 5121, Congressional finding and declarations

Disaster Losses, 26 U.S. Code § 165(i)

Limitations on Assessment and Collection, 26 U.S. Code § 6501(a)

Notice of Deficiency, 26 U.S. Code § 6212

Restrictions Applicable to Deficiencies; Petition to Tax Court, 26 U.S. Code § 6213

Collection after Assessment, 26 U.S. Code § 6502

Lien for Taxes, 26 U.S. Code § 6321

26 U.S.Code § 7803(a)(3)

Regulations

Election in Respect of Losses Attributable to a Disaster, 26 C.F.R. 1.165-11

RULE 14.1 (g): STATEMENT OF THE CASE

Petitioners seek vacatur and directed withdrawal of an IRS filed federal tax lien (a collection activity, as distinguished from an assessment of taxes precursor), as being invalid for the tax year 2011, and premature for tax years 2012-14, pursuant to a summary judgment motion in the United States Tax Court (Appendix, 98a and 120a). It is recognized that the petitioners' obligation to this Court is not merely error correction for its own sake, but rather the necessity of a showing of nationwide importance as to the conduct of a governmental agency, such as the IRS, which will likely govern its future conduct (e.g., a tax ruling that could affect the financial planning of many taxpayers, as suggested by one commentator). Put another way, it is believed that perhaps the most important factor, that may serve to elevate a claim of error into an issue that this Court will find merits its review, is the impact of the decision below which will have widespread deleterious effects, particularly on the conduct of a governmental agency and, in this instance, the income tax obligations of millions of American families.

Similar Casualty Losses to Millions of American Taxpayers

Here, the IRS was responsible for multiple prejudicial errors of commission and omission (some of which were belatedly recognized and reversed by the IRS counsel in Tax Court). These were not at all "harmless errors", as characterized below, the nature of which not only adversely affected these petitioners, but potentially millions of American taxpayers at large.

Specifically, as to tax year 2011, the principal matter at issue, in 2012 petitioners' residence incurred the wrath of Hurricane Sandy, with casualty damages uncompensated by flood insurance in excess of \$100,000. It has been estimated that such Super Storm caused at least \$70 billion in damages and affected more than 300,000 business properties and 75,000 homes and other structures in the U.S. While this disaster was probably one of the worst in U.S. history, affecting primarily the nation's east coast, there have been, particularly in recent years, any number of other hurricanes, tornadoes, cyclones, wildfires and other natural disasters, which impacted literally millions of American taxpayers throughout the country and subjected them to staggering casualty losses.

Statutory Disaster Loss Relief through Amended Tax Return

However, the federal government, through baseline legislation known as the Stafford Act (Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.Code § 5121 et seq.), and consistent statutes governing the IRS, provide disaster casualty loss tax relief for the many afflicted taxpayers throughout the country (20a, Disaster Losses, 26 U.S. Code § 165(i)) as well as comparable IRS regulation (22a, Election in Respect of Losses Attributable to a Disaster, 26 C.F.R. 1.165-11). Likewise, in the IRS Disaster Resource Guide for Individuals and Businesses (36a), the Stafford Act and its purpose in permitting disaster tax losses is clearly recognized. Those authorities also indicate that a proper vehicle for deducting any such disaster tax loss would be an amended tax return, Form 1040X. Further detail on the application of the Form 1040X is found in the IRS instruction

for use of that form, wherein taxpayers are advised that “Form 1040X is your new tax return, changing your original return to include new information” (37a), and with the Form 1040X itself structured by the IRS for taxpayer use to reflect original amounts, net changes and correct amounts for the tax year, as amended (38a), i.e., a merger of originally filed tax items with the amended to create a new revised tax, reflective of the incurred disaster casualty loss. Petitioners, having been coded by the IRS as a victim of Hurricane Sandy (33a), and like the many other American taxpayers suffering such disaster losses, had a right to and did in fact rely on the foregoing authorities in a proper effort to recoup their disaster casualty losses by an income tax reduction, in keeping with the Stafford Act principles.

IRS Multiple Errors, Some Belatedly Concede, Have Comparable Implications for All Taxpayers

In the interest of required brevity for this phase of the proceeding in this Court, petitioners respectfully refer this Court to a fuller exposition of the relevant facts, believed essential to understand the petition, as contemplated under Rule 14.(1)(iv), and as set forth in petitioners’ summary judgment declaration and reply (Appendix 98a and 120a). At this juncture, to meet concise statement requirements, petitioners note the following facts, and prejudicial IRS errors that occurred on each occasion, which are supported by referenced Appendix documents:

Events Leading to IRS Notice of Federal Tax Lien Filing

Following petitioners' filing of their Form 1040X amended return for 2011 to reflect the claimed disaster loss tax reduction, in the permitted manner and time discussed above, with such return integrating the original tax return amounts in final amended format, the IRS, though its Tax Compliance Officer ("TCO") at the Small Business/Self Employed office, notified petitioners, by November 14, 2013 letter, that such amended return was to be examined for the claimed disaster casualty loss (43a). During such examination over a 1-1/2 year period, petitioners furnished all additionally requested documentation to support the claim. By letter dated May 13, 2015, the IRS TCO advised as to full disallowance of such claim (56a), and by May 28, 2015 TCO letter requested petitioners' consent to extend the assessment period (62a) because of the approaching three years statute of limitations deadline for further IRS assessment. Petitioners declined such consent, pending requested, and never provided, clarification of such disallowance determination (59a, 64a).

As reflected in the IRS TCO handwritten notes during that period, on May 28, 2015 she advised petitioners by phone that "if documents (consent to assessment extension period) are not signed and returned, case will be closed and he and spouse will lose their appeal rights." (54a). Yet, in that same time frame, the TCO transmitted to petitioners for guidance the IRS Publication 1035, Extending the Tax Assessment Period (67a), which expressly provides that, upon refusal to sign an assessment extension consent, the IRS assessment procedure is to issue a Notice of

Deficiency for the proposed assessment, thereby enabling the taxpayers to proceed to Tax Court to challenge the casualty loss claim denial (69a) and at the same time preserve the IRS right of further assessment, depending on the result in that forum. By the IRS “closing” of the case at that juncture, petitioners were deprived of any procedural mechanism for challenging the local IRS office denial of the casualty loss claimed in their amended return.

Although the IRS did, prior to the assessment statute of limitations expiration, transmit to petitioners a notice of additional tax, for which petitioners requested an explanation (71a), never received, that was not at all the required Notice of Deficiency, as belatedly recognized by IRS Tax counsel in 2017 and abated. Yet, that improper amount was nevertheless included in the subsequently filed NFTL as an assessment, and never removed.

The IRS misapplication of statutory and regulatory requirements, in “closing” its case file, rather than issuing a proper Notice of Deficiency, and thereby precluding a petitioners substantive challenge in Tax Court to their denied disaster casualty loss claim, as well as the resultant statute of limitations expiration without any Notice of Deficiency, left the Form 1040X amended return wholly intact, with the tax balance thereon totally paid (42a). Those facts were required to be reflected in the filed NFTL, but were not. Significantly, this manner of conduct by the IRS, if uniformly applied, would have the same deleterious effect on many American taxpayers, who rely on consistency by the IRS in adhering to statutory and regulatory mandates.

The Filed NFTL

The March 10, 2016 NFTL (77a) filed against petitioners reflects an unpaid assessment balance for 2011 of \$59,074.93, based solely on the originally filed Form 1040, as well as the conceded “deficiency” abatement previously discussed. No mention whatsoever is to be found in that document of the properly filed and fully viable Form 1040X amended return (38a), which would reduce to zero the NFTL assessment amount for 2011, after considering the tax balance payment for such amended return.

As to tax years 2012-14, the assessment amounts for each such period have yet to be finalized by the applicable local IRS offices, with correspondence exchanges in the assessment period reflecting that these offices still had under consideration issues raised by petitioners concerning assessment amounts for tax, penalties and interest. Illustrative is the IRS February 23, 2016 letter transferring all such tax year accounts to its Philadelphia office for further consideration (75a) and the IRS April 13, 2016 CDP History Sheet re petitioners’ “other reasons” for NFTL being premature (81a). The NFTL did not address the less than final assessment nature for those years, and as such was a premature collection activity.

Petitioners were entitled to have the IRS follow all statutory requirements as to the validity of NFTL entries, but instead found that erroneous invalid and premature “assessments” were applied. The many American taxpayers subjected to NFTL requirements would also be adversely affected by such erroneous

interpretations, if uniformly applied by the IRS. As an initial collection activity, the NFTL is not appropriate for implementation where, as here, assessment issues remained otherwise disposed of, as for 2011 in the filed amended return, or open, as for tax years 2012-2014.

Collection Due Process (“CDP”) Hearing Aspects and Settlement Officer (“SO”) Conclusions Belatedly Reversed by IRS Tax Counsel

The only appellate avenue provided by the IRS for petitioners to initially challenge its NFTL filing was its CDP hearing process, presided over by the IRS SO. Petitioners did so in their April 11, 2016 request (82a), citing as a permitted ground for a lien withdrawal on the basis of “NFTL should not have been filed, as being premature and not in accordance with statutory requirements” (82a, para. 8).

In a required review of the IRS record, undertaken by the SO prior to the CDP hearing, she determined that there was no need for a 2011 statutory Notice of Deficiency, since petitioners had agreed to each deficiency (79a) (at a period in time more than a year before IRS tax counsel abated such so-called deficiency as being erroneous). However, separate and apart from there having been no proper Notice of Deficiency issued, IRS tax counsel ultimately determined that SO finding to be erroneous – there had been such agreement by petitioners. Moreover, although plainly in the records, the SO made no mention whatsoever that there existed open assessment matters for tax years 2012-2014, under contemporaneous consideration by the IRS local offices, again a further error on the part of the SO.

Such erroneous SO conduct, while prejudicial to these petitioners, would be highly detrimental to the many American taxpayers required to undertake these same CDP hearing procedures, and then faced with comparable flawed outcomes, some of which here were even conceded by IRS tax counsel, albeit belatedly.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Review of a summary order of the United States Court of Appeals for the Second Circuit is sought. The Court of first instance in this proceeding is the United States Tax Court, the basis for the federal jurisdiction being that it is a court of record established by Congress under Article 1 of the United States Constitution.

RULE 14.1 (h): ARGUMENT

Preliminary Statement

Pursuant to Rule 10 (c), petitioners assert that the United States Court of Appeals for the Second Circuit has decided an important question of federal law that has not been, but should be settled by this Court. While the asserted argument does include erroneous factual findings and the misapplication of properly stated rules of law, that is not the principal basis for this petition, although believed to be worthy of consideration in the context of the overriding issue here. That is the potential effect on millions of current and future American taxpayers of inconsistent

conduct and unauthorized lack of adherence by the IRS to the statutes and regulations as to which it is bound.

As a succinct guiding principle for this petition, enunciated by this Court and relied upon here and by millions of American taxpayers, “[t]he Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury under § 7801(a) of the 1954 Code for the administration and enforcement of internal revenue laws.” *Donaldson v. United States*, 400 U.S. 517, 534 (1971). Such IRS responsibilities require the IRS to scrupulously adhere to the Congressional statutory scheme, also incorporated in consistent IRS regulations, as well as in instructions and forms promulgated for taxpayers comparable guidance in that overall taxing system. However, when the IRS fails to do so, as on multiple occasions to these petitioners, potential havoc is created and an inability for the many taxpayers at large, currently and prospectively, to be able to rely on uniform IRS determinations consistent with such statutory scheme.

A brief illustration here is found in the tax assessment standards applicable to the effect of a properly filed Form 1040X amended return for 2011 to reflect an uncompensated disaster casualty loss. The courts below apparently relied on the general proposition, applicable in a non-disaster loss case, that the originally filed Form 1040 return shows a self-assessed tax that cannot be changed by amendment. In fact, the IRS filed NFTL, the validity and premature nature of which is challenged in this proceeding, was barren of any mention or effect of the amended return in this disaster loss situation. Additionally, totally ignored in all forums

below and in the NFL was the existence and mandatory application of the previously discussed Stafford Act, together with cited Internal Revenue Code statutes and regulations, as well as explicit IRS instructions and structure of the Form 1040X form itself (see, also related cited statutes and regulations, 18a to 31a). These undeniably show the Congressional intent to provide tax relief to the countless victims of federally declared disasters by enabling them to amend for the appropriate tax year to reflect the effect of uncompensated disaster casualty losses. Thus, not only have these petitioners been totally and wrongfully deprived of such tax relief, but it is hardly a quantum leap to recognize that the vast majority of current and future taxpayers so afflicted would meet the same wrongful fate at the hands of the IRS, whether it is a result of Hurricane Sandy, as for the petitioners, or other past and likely future federally declared disasters arising from hurricanes, tornadoes, cyclones and wildfires throughout our nation.

Although there should be no possible doubt as to the meaning and interpretation of the above Congressional mandates, notably under the *contra preferentum* canon of construction that applies to tax laws, “a question as to the meaning of a taxing act [is] to be read in favor of the taxpayer.” *Int’l. Harvester Credit Corp. v. Goodrich*, 300 U.S. 537, 547 (1956). The foregoing illustration is only one of several IRS errors of commission and omission, some of which were belatedly conceded as flawed by IRS tax counsel during the initial Tax Court proceeding, but significantly further adding to the uncertainty of IRS holdings on similar issues for many American taxpayers.

Petitioners thereby believe that such issues are of nationwide importance, since singly or in the aggregate, as potentially affecting current and future taxpayers, they are of sufficient importance in terms of nationwide relevance or impact concerning the conduct of a principal national governmental agency that this Court should have the final word on such issues. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 505-06 (2007). In that framework, although errors below are generally not considered sufficient to make a case certworthy, this Court may nevertheless be inclined to grant certiorari in a case meeting the criterion of nationwide importance, as here for a negative impact on the taxpayers of America, where the Court also believes that the lower court erred on the merits. Consequently, the following points, although stated in the context of IRS errors in this case, are intended in all instances to underscore the national impact to taxpayers at large on the same issues.

I. Filing of 2011 Form 1040X Amended Tax Return In Place of Originally Filed Return is Statutorily Authorized for Taxpayers' Casualty Losses Arising from Federally Declared Disaster, and Consistently Followed in IRS Regulations

The Court of Appeals conclusions that “there is nothing in either the Internal Revenue Code or the regulations thereunder that requires the IRS to accept the amended tax return in place of the original return previously filed” and that “an amended return does not ...change an assessment that has been made... .” (6a), are not applicable in the instance of a federally declared disaster, under previously

discussed relevant federal statutes and IRS regulations governing the treatment of casualty losses arising from such occurrences.

Following the late October 2012 Hurricane/Superstorm Sandy, the President of the United States issued major disaster and emergency declarations under authority of the Stafford Act, encompassing certain areas in a number of states, including New York. Petitioners' Long Beach, New York, residence was in one such location, and the IRS subsequently stated in a January 17, 2013 letter to petitioners that “[y]our account has been coded as being a victim of Hurricane Sandy. Therefore, you will be entitled to all provisions provided by FEMA.” (33a).

Further to the federal legislative intent is 26 U.S. Code § 165(i) (20a), which provides that a taxpayer, suffering a loss attributable to such federally declared disaster, under the Stafford Act, “may elect to claim a deduction for that loss on the taxpayer’s federal income tax return for the taxable year immediately preceding the taxable year in which the disaster occurred” (IRS Rev. Ruling 2003-29). Additionally, that Revenue Ruling states that: “Section 1.165-11(e) of the Income Tax Regulations provides that the election to deduct a disaster loss for the preceding year must be made by filing a return, an *amended return*, or a claim for refund... .”[26 CFR 1.165-11(e)] (22a). (emphasis added). These requirements are also followed in the IRS Disaster Resource Guide for Individuals and Businesses, which states that “[i]f you have already filed your return for the preceding year, you may claim the loss by filing an amended return, Form 1040X.” (35a to 36a).

Here, where the federally declared disaster occurred in 2012, petitioners elected to so file an amended tax return for the preceding year, 2011, and did so in accordance with such IRS guidelines, including the instructions for Form 1040X, applicable to 2011 (37a), which state, under the heading of General Instructions:

Form 1040X will be your new tax return, changing your original return to include new information. The entries you make on Form 1040X under the columns headed Correct Amount and Correct Number or Amount are the entries you would have made in your original return had it been done correctly.

Similarly, Form 1040X itself (38a to 41a) includes columns to be filled in with original amount per Form 1040, amount of increase or decrease, and corrected amount, for each item of income and deductions, tax liability and payment. The format of this form shows it to be a composite form, truly in accord with the amendment concept, and reflecting the intended aggregate effect of the casualty loss deduction by modifying the original filed return, in keeping with the Stafford Act.

In a handwritten note by an IRS tax compliance officer (“TCO”) during a subsequent audit of the petitioners’ amended return, she states that, “[c]laim shows tp (taxpayer) was trying to reduce from previously balance owed when filing original return.” (54a, 5/28/15 TCO note). The implication is, that, in that TCO’s opinion, such intended tax reduction is an improper purpose. Yet, to the contrary, that is precisely the purpose of the federally declared disaster statute and IRS

related regulations, i.e., to enable such substantial taxpayer residential casualty losses to at least be partially recouped through an income tax reduction.

Accordingly, the notion that the taxpayers' self-assessed tax for 2011 cannot be changed by an amended tax return, while perhaps applicable in other situations, is not at all the case where such amendment for federally declared disaster casualty losses is statutorily and regulatorily authorized. Petitioners submit that this needs to be recognized by the Court, since the filed federal tax lien is fatally flawed by no consideration of the significant tax effect of the 2011 amended return.

II. Rejection of Hurricane Sandy Casualty Loss by IRS Small Business/Self-Employed Office Did Not Permit Any Taxpayer Appellate Recourse. Nor Did It Generate a Deficiency Assessment, Now Time Barred and Leaving Composite Amended Return for 2011, as Filed, Wholly Intact

As stated by the Court of Appeals, “[a]n amended return constitutes a claim for refund that the Commissioner may review and adjust either by way of an immediate rejection of the refund claim or by tentative allowance, subsequent audit, and, if necessary, issuance of a notice of deficiency.” *Fayeghi v. Comm'r*, T.C. Memo, 1998-297, 1998 WL 477715, at *4 (1998) (6a)

Here, there can be no doubt as to petitioners' amended return for 2011 having been allowed by the IRS and then subsequently audited as to the claimed casualty loss. As described by the Court of Appeals, “[a]fter an audit, however, the Internal Revenue Service (“IRS”) disallowed the Kannrys' claimed deductions in May 2015. In March 2016, the IRS mailed the Kannrys an NFTL informing them of

a lien against their property in the amount of their unpaid income taxes for the years 2011-2014. The NFLT showed an unpaid amount for tax year 2011 that reflected the May 2015 disallowance of the Sandy-related deductions claimed on the Kannrys' amended 2011 return." (2a to 3a).

However, omitted from those conclusions is any discussion of what actually occurred between May 2015 and March 2016, encompassing several enumerated IRS errors of commission and omission, and their severely prejudicial effect on petitioners' undeniable but totally thwarted appellate rights related to that amended return. They are:

- Following completion of the IRS audit of the 2011 Form 1040X amended tax return casualty loss deduction, by May 13, 2015 letter, petitioners were advised that such claimed deduction was proposed to be fully disallowed in the amount of \$21,241, which was substantially less than the full 1040X casualty loss claim and seemingly bore no relationship to such claim, and that the disallowance was "as shown on the enclosed examination report or at the end of 17eter." (56a to 58a). Yet, no examination report was concurrently furnished nor any explanation for the proposed disallowance amount [ERROR 1].
- Then, by May 28, 2015 TCO letter, petitioners were requested to extend the additional tax assessment period beyond the shortly to expire statute of limitations for such assessment (62a to 63a), and were

furnished by the TCO, for guidance, an enclosed IRS Publication 1035, Extending the Tax Assessment Period (67a to 70a), “for a more detailed explanation of your rights, options and procedures” (62a).

- Inasmuch as petitioners were unable to obtain requested clarification from the TCO as to the basis for such disallowance, in letters dated May 20, 2015 (59a) and June 1, 2015 (64a), there being absolutely no IRS response to either such writing [ERROR 2], they declined to so consent, anticipating that if the IRS sought to assess additional tax, it would do so pursuant to Publication 1035 instructions and guidance, i.e., “the issuance of a notice of deficiency” (69a, first bullet point).
- That expectation was also consistent with the holding of the Tax Court in *Fayeghi*, supra, cited by the Court of Appeals, as to the issuance of a notice of deficiency, if necessary following audit of an amended return. No such requisite statutory notice of deficiency was ever served by the IRS, prior to the statute of limitations expiration for any additional assessment, or for that matter at any time thereafter [ERROR 3].
- Instead, the IRS issued a July 27, 2015 Notice CP22E, Changes to 2011 Form 1040, as to which petitioners exercised their right of disagreement by August 10, 2015 letter, with there being no substantive response to that writing by the IRS [ERROR 4]. The never explained amount of \$4,873 proposed increase in tax, plus penalties

and interest, set forth in that CP22E Notice, was not a deficiency assessment against the amended return, simply a proposed and unexplained pre-assessment change. Nevertheless, it has been included in the NFLT as part of the “unpaid balance of assessment” for 2011 (77a) [ERROR 5]. The Court of Appeals concluded that “[a]ny harm to the Kannrys’ substantial rights arising from the erroneous inclusion in the NFLT of the now-abated amount has been mitigated by the abatement” (7a). Yet, it is not the relatively small amount of this attempted “assessment” on which this issue turns, to yield a “harmless error” conclusion, but rather the belated timing of that abatement, which could not undo the substantial harm to petitioners’ rights.

- The TCO next advised petitioners that if Form 872 (Consent to Extend the Time to Assess Tax) was not signed and promptly returned by petitioners, the case would be closed and petitioners would lose their appeal rights (54a, 5/2/8/2015 TCO handwritten entries, subpara. B and c). Thus, the IRS counsel belated recognition in 2017 of the improper 2011 “assessment” to be abated, literally years after the assessment statute of limitations expiration and, with it, the time allowable for a requisite notice of deficiency, did not thereby create any procedural mechanism for petitioners to challenge the local IRS office

denial of the casualty loss claimed in their amended return [ERROR 6].

- Accordingly, since all required remaining 2011 aggregate combined tax under the originally filed return and amended return was concurrently paid with the filing of petitioners' amended return, there was no 2011 tax balance owed for inclusion on the March 1, 2016 NFLT (77a). The NFLT should not have shown any entry under "unpaid balance of assessment" for 2011 [ERROR 7], and is thereby fatally flawed, warranting its withdrawal.

III. In the CDP Hearing Determination the Appeals Settlement Officer ("SO") Has Not Indicated Any Required Substantive Consideration of the Administrative Record, but Only Dialogue at the Informal Hearing

In the SO declaration in support of the Commissioner's motion for summary judgment, she clearly recognized her obligation to review in detail and consider the IRS administrative record and to not merely rely upon the dialogue with petitioners at the CDP hearing itself.

A classic illustration is the instances of the SO, having absolutely ignored the filed 2011 1040X amended tax return [ERROR 8], thereby dramatically affecting the potential underlying tax liability for that year and erroneous "assessment" entries on the NFLT at issue. Likewise, as noted earlier, the SO also ignored the open assessment issues for tax years 2012-2014, still under consideration by IRS

local offices, and part of the record she was required to review in the CDP process. Had she done so, there would have had to have been recognition of the NFTL, a collection activity, being premature as filed and warranting withdrawal [ERROR 9]. Yet, it is beyond dispute that the IRS administrative record had been available to the SO, and stated by her to have been reviewed, prior to her CDP determination.

A Tax Court decision underscores the importance of fact checking by the SO in reviewing the IRS record documents prior to conducting the CDP hearing to assure proper performance [*Peterson v. Commissioner*, T.C. Memo 2016-17]. That Court held:

Where, as in this case, a taxpayer identifies an irregularity in the assessment procedure, the Appeals Officer cannot rely solely on the tax transcripts in order to verify that a notice of deficiency has been sent. See *Hoyle v. Commissioner*, 131 T.C. at 205, n. 7 (“[W]hen a taxpayer alleges no notice of deficiency was mailed he has . . . identified an irregularity. (Id. At p. 6)).

Here, despite petitioners' protests to the contrary, the SO denied any petitioners' entitlement to a statutory notice of deficiency for tax year 2011, which was clear error. [ERROR 10]. As confirmed by the Commissioner in its brief below, albeit long after the fact:

On appeal, taxpayers repeatedly protest that the IRS should have issued a notice of deficiency upon the conclusion of the examination in July 2015. With respect to the additional assessment of tax for 2011 – and only with respect to that assessment –taxpayers are correct. The IRS should have issued a notice of deficiency before making that assessment.

The SO also expressed a belief, contrary to fact, that petitioners had agreed to an additional tax assessment for 2011, which was not at all true and subsequently, albeit much belatedly, abated by IRS tax counsel as being erroneous. [ERROR 11]. However, such “deficiency” was still in effect at that pre-abatement time and improperly included in the NFTL. Despite petitioners’ indignant outcries at the CDP hearing, the SO contended that there was a self-assessed tax for that year, and nothing further to discuss on that subject [ERROR 12]. It appeared obvious that a pre-conceived fait accompli had been already determined by the SO.

That state of affairs was reflected by the SO-limited dialogue at the CDP hearing, where the petitioners barely got a word in edgewise and the SO lectured as to her view of self-assessed taxes and collection alternatives. The amply documented references in the record and other readily available IRS writings on file, and reflected in the joint filings below, should certainly have given the SO pause, and occasioned further inquiry prior to her summary determination, which included the several errors discussed, all highly prejudicial to petitioners and contrary to fact.

IV. As to Tax Years 2012-2104 Assessments Included in NFTL, IRS Local Offices Recognized Existence of Open and Unresolved Issues to be Further Considered, Rendering NFTL Collection Activity Premature as to Those Years

Concerning tax years 2012, 2013 and 2014, although petitioners agree that there was no requirement for notices of deficiency, the SO had to know, based on the record she presumably reviewed, that the assessment phase in each such year

was still open, based on the extensive taxpayers' ongoing correspondence with applicable local IRS offices.

As stated by the Commissioner in the Appellee brief below, concerning the ongoing taxpayers' correspondence with IRS local offices concerning disagreements with proposed tax assessments for those years:

[T]he notices for 2012, 2013 and 2014 also advised taxpayers how to express any disagreement with the identified changes. Taxpayers exchanged some letters with the IRS following receipt of these notices and some of that correspondence is a part of the administrative record before Appeals. The record does not reflect any final resolution of the issues taxpayers have raised through such correspondence."

This is precisely the reason the IRS assessment phase remains open for those years and the NFLT filing, as an initial collection activity, was premature as to such years [ERROR 13].

V. Other Relevant Cases and Authorities Supporting Issues of National Importance Concerning Government Agency Improper Conduct

If Finality of IRS NFLT Determination Should be Upheld

Although the statute granting the Court certiorari jurisdiction over court of appeals cases does not require finality, it has long expressed a preference for granting certiorari where a court of appeals judgment is final. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). Here, the filed NFLT was an initial IRS collection activity, intended by that agency as a step that would then enable it

to seek collection from petitioners, without any recourse by petitioners to oppose such process. As such, an upheld NFTL would constitute a final determination, foreclosing any further “percolation” of this case, as one commentator stated the principle.

Propriety of Certiorari for Issues Capable of Being Decided Below

It has been said that this Court generally grants certiorari only to decide questions that were actually decided below, or at least were properly raised below and should have been decided for an appropriate resolution of the case. *Clingman v. Beaver*, 544 U.S. 581, 591 (2005), citing *Cooper Industries, Inc. v. Avail Services, Inc.* 543 U.S. 157 (2004). In this case, as set forth in this petition and Appendix documents, all the issues leading to IRS error were fully and properly raised below, and in a number of instances ignored in those forums (e.g. the existence and effect of a 2011 filed 1040X amended tax return; the import of the Stafford Act and other cited IRS statutes and regulations specifically addressing the requirements and procedures for an amended return for an IRS coded taxpayer victim of a federally declared disaster for the recoupment of casualty losses; the expiration of the three years statute of limitations on any further IRS desired deficiency assessment against the petitioners’ 2011 amended return).

Overarching Principles of Taxpayer Bill of Rights Honored in Breach by IRS

The long-standing IRS Publication 1, Your Rights as a Taxpayer, The Taxpayer Bill of Rights, (A-32), which all taxpayers receive from that agency for principles of IRS practice guidance, and since codified by Congress [26 U.S.C. § 7803(a)(3)], warrants mention. This document is particularly telling in the context of the clear IRS expressed intent therein to impart an image of high quality professionalism, timely and substantial responses to inquiries, appellate rights and other provisions, upon which millions of American taxpayers rely. Sadly, here, such IRS obligations were largely ignored in this case and, more importantly, similar erroneous and inconsistent IRS conduct would be expected in taxpayer cases across the nation.

CONCLUSION

The potential broad impact of some dozen IRS errors at its local and appellate levels on taxpayers throughout this nation, currently and prospectively, should be considered of great significance, as to warrant this Court holding that such inconsistent and shoddy conduct of a major sector of the federal government cannot be condoned.

Petitioners' summary judgment motion in the Tax Court sought a directed withdrawal of the invalid NFLT for the above reasons, since there are no genuine disputes of material fact and the applicable law applied to the undeniable facts, as set forth by petitioners, should be beyond dispute, warranting the requested relief.

Accordingly, petitioners submit that the filed NFLT is wholly defective, as being invalid for 2011 and premature for 2012, 2013 and 2014, and that this petition for a writ of certiorari should be granted to enable petitioners to pursue the ultimate evacatur and withdrawal of the NFLT.

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Respectfully submitted,

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