No. 21-409

ORIGINAL

In the

SUPREME COURT OF THE UNITED STATES

ANTHONY ITALO PROVITOLA,
KATHLEEN A. PROVITOLA,
Petitioners, *pro se*,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Circuit Courts of Appeal have the power to override federal statutory appellate rules with their decision to render unappealable a lower court's erroneous denial of a motion for summary judgment in an appeal from final judgment?

PARTIES TO THE PROCEEDINGS

The Petitioners were *pro se* before the Eleventh Circuit, and were the Petitioners and the Appellants below.

The Respondent is the Commissioner of Internal Revenue.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the Petitioners are private individuals who are husband and wife, and there is no non-governmental corporation that is a party.

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PETITION FOR A WRIT OF CERTIORARI

Although the Tax Court recognized the proper standard for a deduction under Section 162 to be a good faith intention to profit from the business, and although the Tax Court ultimately applied that standard, the Tax Court failed to apply its Rule 121(d) in deciding the Petitioners' motion for summary judgment with the standard of this Court announced in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986):

> (a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 322-323.

Moreover, Certiorari is plainly warranted in order

to correct the clear error of the Eleventh Circuit in following the rule prevalent among the courts of appeal holding denials of motions for summary judgment to be unappealable if a case has been tried and judgment entered. The courts of appeal are creatures of the Congress under Article I of the United States Constitution and are thereby bound by the procedural rules promulgated by the Congress.

Congress authorized the Supreme Court to prescribe rules for the lower federal courts not inconsistent with the Constitution and statutes. Their operation being restricted, in conformity with the proviso attached to the congressional authorization, to matters of pleading and practice, and judicially promulgated must neither affect the substantive rights of litigants nor alter the jurisdiction of federal courts and the venue of actions therein.

(References to "Pet.App.__" are to the Appendix bound together with this Petition, which begins with page 29 of the Petition by "Pet.App.1" as the first page of Appendix documents.

OPINIONS BELOW

The Eleventh Circuit's opinion is reproduced at Pet.App.1-2. The Tax Court's initial order denying the Petitioners' motion for summary judgment is reproduced at Pet.App.25-29.

JURISDICTION

The United States Tax Court had jurisdiction over federal income tax litigation under 28 U.S.C. §§ 1331 and 1338. The Eleventh Circuit had jurisdiction under 26 U.S.C. § 7482(a). The Eleventh Circuit filed its decision on June 11, 2021. The United States Supreme Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Eleventh Circuit's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Internal Revenue Code, 26 U.S.C. §§ 162(a), are reproduced at Pet.App.31-32. Pertinent provisions of the Federal Rules of Civil Procedure and the Rule of the United States Tax Court (Title 28 of the United States Code) are reproduced at Pet.App.33.

(References to "Pet.App.__" are to the Petition Appendix bound together with this Petition, which begins on page 28 of the Petition with "Pet.App.1" on Page 29 as the first page of Petition Appendix documents.

STATEMENT OF THE CASE

In the decision to which certiorari is here sought the Eleventh Circuit acknowledged that the relevant facts were largely undisputed.

In separate notices of deficiency dated December 31, 2013, and December 31, 2014, the IRS disallowed deductions claimed by the Petitioners for expenses for professional services reported on the schedule C for Viovison Ventures, LLC ("Viovision") of the Petitioners' Forms 1040 for 2013 and 2014, because, in its view, the Petitioners did not establish that the business expenses were paid or incurred during the taxable year or that they were ordinary or necessary. The notices determined income-tax deficiencies of $7,818 (2013) and $11,328 (2014) and imposed accuracy-related penalties of $1,536.60 (2013) and $2,265.60 (2014). *See* 26 U.S.C. § 6662.

The Petitioners timely petitioned the Tax Court for review of the 2013 and 2014 notices of deficiency on May 20, 2016, and July 31, 2017, respectively. The Petitioners thereafter timely filed their motions for summary judgment supported by declarations in both tax cases on the issues raised by the notices of deficiency.

The business in which the Petitioner, Kathleen A. Provitola engaged is actually comprised of two businesses: mass production manufacturing and, to a lesser extent, marketing. The manufacturing business that was established was for the mass production manufacture of the visual system after the start-up phase, including the organization of Viovison Ventures, LLC by the Petitioner, Kathleen A. Provitola, which was completed in 2007. Viovision Ventures, LLC, with the assistance of the law firm of Anthony I. Provitola, P. A., created and actually utilized the production system and

supply chains for that purpose.

The actions taken by the Petitioners as reported in the declarations testified to the professional services provided to Viovision, and thus demonstrated the intention of Viovision to mass produce by manufacture a patented device for the enhancement of visual perception of two-dimensional images ("visual system").

The Respondent did not respond to the motion as required by U. S. Tax Court Rule 121(d), but merely filed an affidavit that only repeated the record (wherein counsel for the Respondent confessed to having no knowledge of fact other than to formal matters of record), a memorandum of law discussing Section 162; and, in a notice of objection, a plea for more time in which to take depositions of the Petitioners and present evidence by cross-examination. The Tax Court, allowing no evidentiary effect to the Petitioners' declarations, denied the motions, citing the need for more evidentiary development. The factual issues, according to the November 7, 2017 order denying summary judgment, included "whether petitioners engaged in the Schedule C activity with an actual and honest profit motive" and "whether the legal and professional services fees paid by petitioners were ordinary and necessary expenses." Over the next two years prior to trial the Respondent did not present any evidence in opposition to the motions for summary judgement, by way of depositions as promised or otherwise, although the Petitioners twice renewed their motion for summary judgment once after the cases were consolidated in 2018 and immediately before trial in 2019; but the Tax Court again denied the motion.

The case thus proceeded to a scheduled trial in the Tax Court where it was decided on an issue which had not been previously been raised in the pleadings, and therefore one for which the Commissioner had the burden of proof: that the Petitioners' claimed deduction was for "startup" expenses. This assertion was extraneous to the issue to which the case was confined by the ruling of Judge Marvel on the Petitioners' motion for summary judgment establishing the law of the case. Nevertheless, the Tax Court Judge presiding thereupon held, citing *McKelvey v. Commissioner*, T. C. Memo 2002-63, 83 T.C.M. (CCH) 1339, 1341, at Pages 12-15 of Pages 151-155 of the Transcript of Record, under the heading "III. Startup Expenses", as follows:

> ". . . To the extent the Commissioner's start-up expenditures argument is a new matter, he would bear the burden of proof. Rule 142(a)(1). . ."

The Eleventh Circuit held in its affirmance of the Tax Court as follows:

> The denials of the Provitolas' pretrial summary-judgment motions are not reviewable on appeal. In *Lind v.II United Parcel Service, Inc.*, we held that "the denial of summary judgment is not reviewable on appeal after a full trial and final judgment on the merits." 254 F.3d 1281, 1284–86 (11th Cir. 2001). Because the Tax Court entered judgment on the merits after a full trial, we "will not review

> the pretrial denial of a motion for summary judgment." *Id.* The Provitolas' argument that this rule applies only to jury trials is not persuasive because *Lind* itself applied that rule in an appeal arising from a bench trial. *See id.* at 1283.

Lind was not a Tax Court case, but a district court case in which the parties opted for a bench trial.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Decision affirming the decision of the Tax Court conflicts with the standard announced by this Court regarding the failure of the Tax Court to grant the Petitioners' motion for summary judgment.

U. S. Tax Court Rule 121(d) states:

> ". . . When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits or declarations or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine dispute for trial. If the adverse party does not so respond, then a decision, if appropriate, may be entered against such party."

This rule largely follows the text of and is obviously

comparable with Rule 56 of the Federal Rules of Civil Procedure that announces the same standard, the clarity of which is emphasized in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986).

The Eleventh Circuit's position is inconsistent with the standard for summary judgment set forth in Rule 56(c), announced by this Court in *Celotex*, which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 322-326:

> (a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the

burden of proof. Pp. 322-323.

It is clear that the Tax Court departed from the requirements of this Rule given the failure of the Commissioner to fulfill the promise of deposing the Petitioners upon which the denial of the Petitioners' motions were based.

From Judge Marvel's Order the main condition for the Section 162 deduction is that the business is carried on with an honest intention to make a profit. This ruling follows the interpretation in *Lamont v. Commissioner of Internal Revenue*, 339 F.2d 377 (2nd Cir. 1964):

> "While the expectation of profit need not be a reasonable one, and the business need not realize an immediate profit, the activities must be entered into and carried on in good faith for the purpose of making a profit. Hirsch v. Commissioner, supra; Doggett v. Burnet, 62 App.D.C. 103, 65 F.2d 191 (1933)."

Judge Marvel's ruling on the initial presentation of the Petitioners' motions for summary judgment was made in favor of the Commissioner upon the representation of counsel for the Commissioner that the opportunity for cross-examination of Petitioners would provide evidence of the lack of such intention in the face of all of the Petitioners' evidence. No such evidence was ever presented by the Commissioner in the trial or during the two years since that ruling. Therefore, the Tax Court Judges should have granted the Petitioners'

motions for summary judgment when raised in all instances, and the Petitioners' motion should have been the end of the case in favor of the Petitioners.

II. The Eleventh Circuit erred in affirming the Judgment of the Tax Court's denials of the Petitioners' motion for summary judgment where the Tax Court failed to apply the standard of this Court to Respondent's failure over a two year period to make a showing sufficient to establish the existence of an element essential to the Respondent's case.

To permit such a ruling by the Tax Court to stand under the cover and behind the administrative preference discussed in *Lind* is to violate the provisions of the United States Constitution requiring due process of law and equal protection of the laws, especially where the Petitioners had no choice for a jury trial as in *Lind*, and were forced by the Internal Revenue Code to apply for relief to what appears to be one of the agencies of the IRS, the Tax Court. Thus it appears that this fact calls into operation the fourteenth amendment of the United States Constitution requiring equal protection of the laws, as in other cases where the constitutional violator is an agency of the federal government. The equal protection sought by the Petitioners is the non-discriminatory application of the right to appeal that broadly encompasses all appeals, and does not operate with judicial doctrine against the moving party in summary judgment proceedings.

CONCLUSION

This Court should reverse the decision of the Tax Court in these cases and enter a decision in favor of the Petitioners that the expenses at issue for the years 2013 and 2014 are deductible under Internal Revenue Code Section 162 in accordance with the Petitioners' motion for summary judgment for those years and not start-up expenses that must be amortized.

Respectfully submitted,

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