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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1592

UNITED STATES OF AMERICA

v.

CHARLES J. WEISS,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:19-cv-00502)
District Judge: Honorable Joel H. Slomsky

Argued: May 3, 2022

Before: GREENAWAY, JR., PORTER, and PHIPPS,
Circuit Judges.

(Filed: November 2, 2022)

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OPINION OF THE COURT

PHIPPS, *Circuit Judge*.

After assessing delinquent taxes, the United States has ten years to collect them, *see* 26 U.S.C. § 6502(a)(1), and this case comes down to a matter of days within that decade. Importantly, that limitations period does not necessarily run continuously; it may be tolled for several increments of time, including for the period during which a specific administrative hearing before the Internal Revenue Service "and appeals therein" are pending. *Id.* § 6330(e)(1). Here, the taxpayer requested an administrative hearing, and that began tolling the limitations period. After a series of unfavorable rulings – at the hearing, in the Tax Court, and before the D.C. Circuit – the taxpayer filed a petition for a writ of certiorari, which the Supreme Court denied. But the United States waited until after the denial of that petition to commence this action. By that time, even with tolling, much, if not all, of the limitations period had elapsed. Yet in interpreting the statute, petitions for writs of certiorari are 'appeals therein,' and also an appeal remains 'pending' until the time to

file such a petition expires. Due to that additional tolling of the statute of limitations for those increments, this collection action is timely. *Id.*

I. FACTUAL BACKGROUND (UNDISPUTED BY THE PARTIES)

For the six-year period from 1986 through 1991, Charles Weiss did not pay federal income taxes. In October 1994, Weiss late-filed his tax returns for those years, self-reporting a liability of $299,202. Later that month, the Internal Revenue Service made tax assessments against him for each of those years.

By assessing those taxes, the IRS triggered a ten-year limitations period for collecting the unpaid taxes through a court proceeding or a levy, which is a legal seizure of property or a right to property. *See* 26 U.S.C. §§ 6331(b), 6502(a)(1). Weiss's subsequent bankruptcies tolled that limitations period three times between 1994 and 2009, yielding a new expiration date for the statute of limitations: July 21, 2009.

In anticipation of that deadline, the IRS began the process of collecting the unpaid taxes through a levy. It mailed a *Final Notice – Notice of Intent to Levy and Notice of Your Right to a Hearing* letter to Weiss on or about February 13, 2009. That notice, also referred to as a Letter 1058A, informed Weiss that the IRS intended to levy his unpaid taxes for the years 1986 to 1991, and that he had an opportunity to request a Collection Due Process hearing. A Collection Due Process hearing is an administrative proceeding before an

appeals officer with the IRS Independent Office of Appeals in which a taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy." *Id.* § 6330(c)(2)(A); *see id.* § 6330(b); *cf. id.* § 6330(c)(4) (precluding certain previously resolved issues from being raised at a Collection Due Process hearing). The notice, although expressing an intent to levy Weiss's property, was not sufficient to make a levy – that requires a notice of seizure – and thus, the statute of limitations continued to run. *See id.* § 6502(b) (stating that a levy is considered made on the date that notice of seizure is given); *see also id.* § 6335(a) (providing for notice of seizure).

In response to that notice, Weiss timely requested a Collection Due Process hearing through a Form 12153. *See id.* § 6330(a)(3)(B); *see also Weiss v. Comm'r*, 2018 WL 2759389, at *2–3 (D.C. Cir. May 22, 2018) (per curiam) (concluding that Weiss's request was timely), *cert. denied*, 139 S. Ct. 612 (2018). That request suspended the statute of limitations for the period during which the hearing "and appeals therein" were "pending." 26 U.S.C. § 6330(e)(1). On the date that Weiss requested the hearing, no less than 129 days remained in the limitations period.

Weiss did not prevail at the hearing or in any of his review-as-of-right challenges in federal court. The IRS Independent Office of Appeals ruled against him at the Collection Due Process hearing. Weiss sought review of that determination by timely filing a petition with the United States Tax Court. *See id.* § 6330(d)(1). Over five years later, the Tax Court affirmed that

determination. *See Weiss v. Comm'r*, 147 T.C. 179, 181 (2016). Weiss then timely appealed the Tax Court's ruling to the United States Court of Appeals for the District of Columbia Circuit, but he fared no better there. *See* 26 U.S.C. § 7483. The D.C. Circuit affirmed the Tax Court's judgment, and Weiss petitioned for panel rehearing and rehearing *en banc*. *See Weiss v. Comm'r*, 2018 WL 2759389 (D.C. Cir. May 22, 2018). After denying those petitions, the D.C. Circuit issued a mandate on August 23, 2018.

As a last resort, Weiss timely filed a petition for a writ of certiorari with the Supreme Court of the United States on October 24, 2018. *See* 28 U.S.C. § 1254(1) (allowing for review of court of appeals decisions by writ of certiorari). Through an order on December 3, 2018, the Supreme Court denied that petition. *See Weiss v. Comm'r*, 139 S. Ct. 612 (2018).

At that point, instead of proceeding to levy Weiss's property, the government initiated a collection action in the District Court. *See* 28 U.S.C. §§ 1340, 1345; *see also* 26 U.S.C. § 7402(a). Through a complaint filed on February 5, 2019, the government sought to collect from Weiss his delinquent taxes plus accrued interest, which together totaled $773,899.84.

II. Procedural History

The issue before the District Court was the timeliness of this action. The parties stipulated to the material facts and cross-moved for summary judgment. They disagreed as to the meaning of two terms in the

tolling provision of § 6330(e)(1): whether the phrase 'appeals therein' includes petitions for writs of certiorari and whether a denial of a petition for a writ of certiorari constitutes a 'final determination' in a Collection Due Process hearing.

The District Court resolved both of those issues in favor of the government. It concluded that a petition for a writ of certiorari falls within the 'appeals therein' clause. It also held that the Supreme Court's denial of such a petition constitutes a 'final determination' in a Collection Due Process hearing. On those grounds, the District Court entered summary judgment for the government.

Through a timely appeal, Weiss invokes this Court's appellate jurisdiction and challenges both bases for the District Court's finding of timeliness. *See* 28 U.S.C. § 1291; Fed. R. App. P. 4(a).

III. Discussion

This case lends itself well to *de novo* review of the summary-judgment record. *See* Fed. R. Civ. P. 56(a); *see Cranbury Brick Yard, LLC v. United States*, 943 F.3d 701, 708 (3d Cir. 2019). The material facts are undisputed. After the D.C. Circuit issued the mandate, no less than 129 days remained of the ten-year statute of limitations. Weiss filed a petition for a writ of certiorari 62 days later, and 40 days after that, the Supreme Court denied his petition. The date on which government commenced this action was 64 days after the Supreme Court's denial of Weiss's petition for a writ

certiorari and 166 days after the D.C. Circuit's mandate.

Using those dates, the timeliness of this case turns on questions of law. If the statute of limitations, which had no less than 129 days remaining, is tolled for either the time between the D.C. Circuit's mandate and Weiss's petition (62 days) or the time from Weiss's filing of that petition to its denial (40 days), then the government's filing of this case 166 days after the D.C. Circuit's mandate would be timely. But if both of those increments associated with Weiss's petition fail to suspend the statute of limitations, then the government's filing would be too late. As elaborated below, the time associated with Weiss's petition (a combined total of 102 days) tolls the statute of limitations, and that renders this action timely – without the need to address the applicability of the 'final determination' provision relied upon by the District Court.

Under the statute of limitations, once a tax is assessed, the government has ten years to collect it "by levy or by a proceeding in court." 26 U.S.C. § 6502(a)(1). But § 6330(e)(1) operates as a tolling statute by suspending the statute of limitations for the period during which Collection Due Process hearings and appeals therein are pending:

> Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section

> 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for *the period during which such hearing, and appeals therein, are pending.*

Id. § 6330(e)(1) (emphasis added).

In allowing tolling for that period, Congress did not define two relevant terms – 'appeals therein' and 'pending.' Without a controlling statutory definition, those terms take on their "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *see also Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin*, 444 U.S. at 42); *Crane v. Comm'r*, 331 U.S. 1, 6 (1947) ("[T]he words of statutes – including revenue acts – should be interpreted where possible in their ordinary, everyday senses."); *United States v. Jabateh*, 974 F.3d 281, 296 (3d Cir. 2020) ("[U]nder the fixed-meaning canon '[w]ords must be given the meaning they had when the text was adopted.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012)) (alteration in original)). Yet, from sources near in time to the statute's enactment, including contemporaneous dictionaries,[1] both terms are capable of

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[1] *See generally Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070–71 (2018) (using contemporaneous dictionaries to ascertain the meaning of an undefined statutory term); *see also Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (same); *Delaware Cnty. v. Fed. Hous. Fin. Agency*, 747 F.3d 215, 221 (3d Cir. 2014) ("When words are left undefined, we have turned to 'standard reference works such as legal and general dictionaries in order to ascertain their ordinary meaning.'" (quoting *Eid v. Thompson*, 740 F.3d 118, 123 (3d Cir. 2014))).

multiple meanings, and this case depends on which of those meanings apply to the tolling provision.

A. As Used in the Tolling Statute, the Phrase 'Appeals Therein' Includes a Petition for a Writ of Certiorari.

To interpret the phase 'appeals therein' requires an analysis of its two component words, each of which is capable of multiple meanings.

The first of those, 'appeal,' had two common meanings when § 6330 was enacted in 1998. Contemporary dictionaries reveal that it could be used, in a general sense, to mean a "[r]esort to a superior (*i.e.* appellate) court to review the decision of an inferior (*i.e.* trial) court." *Appeal, Black's Law Dictionary* (6th ed. 1990). Under that general meaning, the term 'appeal' would include both appeals and petitions – those filed in court and those filed administratively. *See id.* But as evidenced by a number of federal statutes and court rules, the term 'appeal' could also refer to a narrower class within that larger class: it could mean a method of seeking review of an order that is distinct from other such methods, such as a petition. As used more narrowly, appeals are typically initiated in the court that issued the order,[2] while petitions are often commenced

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[2] *See, e.g.*, Sup. Ct. R. 18(1) (1997) (stating that appeals from three-judge district court panels are commenced by filing a notice of appeal with the district court clerk); Fed. R. App. P. 3(a) (1994) (stating that appeals as of right from district courts are taken by filing a notice of appeal with the district court clerk); Fed. R. App. P. 13(a) (1994) (stating that appeals as of right from the Tax Court

through a filing with the reviewing body.[3] *Cf. Garland v. Ming Dai*, 141 S. Ct. 1669, 1677–78 (2021)

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are taken by filing a notice of appeal with the Tax Court clerk); Tax Ct. R. 190(a) (1994) (same); Bankr. R. 8003(a)(1) (1994) (stating that bankruptcy appeals as of right are taken by filing a notice of appeal with the bankruptcy clerk); 15 U.S.C. § 1071(a)(1)–(2) (1994) (stating that appeals from the Trademark Trial and Appeal Board are taken by filing a notice of appeal in the U.S. Patent and Trademark Office); 18 U.S.C. § 3742 (1994) (stating that appeals of sentences imposed by district courts are taken by filing a notice of appeal in the district court); 26 U.S.C. § 7483 (1994) (stating that review of Tax Court decision is taken by filing a notice of appeal with the Tax Court clerk); 28 U.S.C. § 2522 (1994) (stating that review of decisions of the Court of Federal Claims is taken by filing a notice of appeal with the clerk of that court); 28 U.S.C. § 2645(c) (1994) (stating that review of decisions of the Court of International Trade is taken by filing a notice of appeal with the clerk of that court); 35 U.S.C. § 142 (1994) (stating that patent appeals from Patent and Trademark Office decisions are taken by filing a notice of appeal with that office); 38 U.S.C. § 7292(a) (1994) (stating that review of decisions of the U.S. Court of Appeals for Veterans Claims is taken by filing a notice of appeal with that court).

[3] *See, e.g.*, Sup. Ct. R. 12 (1997) (stating that review on certiorari is sought by filing a petition with the Supreme Court clerk); Fed. R. App. P. 5(a) (1994) (stating that permissive appeals to the courts of appeals are sought by filing a petition with the circuit clerk); Fed. R. App. P. 15(a) (1994) (stating that review of agency orders is commenced by filing a petition with the circuit clerk); Tax Ct. R. 20 (1994) (stating that a case in the Tax Court is commenced by filing a petition with that court); 3 U.S.C. § 425(c)(5) (1997) (stating that persons aggrieved by decisions of the Occupational Safety and Health Review Commission or the Secretary of Labor may seek review by filing a petition with the U.S. Court of Appeals for the Federal Circuit); 5 U.S.C. § 7703(b)(1) (1994) (stating that decisions of the Merit Systems Protection Board are reviewed by filing a petition in the U.S. Court of Appeals for the Federal Circuit); 7 U.S.C. § 21(i)(4) (1994) (stating that decisions of the Commodity Futures Trading Commission are reviewed by

(explaining that appeals typically provide for direct review while petitions typically allow for collateral review). Also, under that narrower meaning, appeals tend to be provided as of right, while petitions more frequently depend on the discretion of the reviewing body. *Compare* Sup. Ct. R. 10 (1997) (explaining that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" that "will be granted only for compelling reasons"), *and* 28 U.S.C. § 1254(1) (1994), *with* Sup. Ct. R. 18 (1997) (explaining that a party invokes the Supreme Court's appellate jurisdiction "by filing a notice of appeal"), *and* 28 U.S.C. § 1253 (1994).[4]

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filing a petition in a court of appeals); 8 U.S.C. § 1105(a)(2) (1994) (stating that review of orders of removal by the Board of Immigration Appeals is taken by filing a petition in a court of appeals); 28 U.S.C. § 2344 (1994) (permitting review of agency orders by filing a petition in a court of appeals); 29 U.S.C. § 660(a) (1994) (permitting review of orders of the Occupational Safety and Health Review Commission by filing a petition in a court of appeals); 42 U.S.C. § 4915(a) (1994) (permitting review of actions of the Administrator of the Environmental Protection Agency by filing a petition in the U.S. Court of Appeals for the D.C. Circuit); *cf.* Fed. R. App. P. 35(b) (1994) (providing for petitions for rehearing *en banc* to be filed with the court of appeals); Fed. R. App. P. 40(a) (1994) (providing for petitions for panel rehearing to be filed with the court of appeals).

[4] Because the general meaning of 'appeal' fully encompasses its narrower meaning, that word is known as an autohyponym. *See* Laurence R. Horn, *Ambiguity, Negation, and the London School of Parsimony*, 14 N.E. Linguistics Soc'y 108, 110–18 (1984) (discussing a number of common autohyponyms). A common autohyponym is the word 'finger,' which can refer generally to all the digits on one's hand, but it can also refer to only the non-thumb digits. *See* Anu Koskela, *Inclusion Contrast and Polysemy in Dictionaries: The Relationship Between Theory, Language Use & Lexiographic Practice*, 12:4 Rsch. in Language 319, 320–22

At the time of the tolling statute's enactment, the word 'therein' also had two ordinary, common meanings. It could mean "[i]n that place." *Therein, Black's Law Dictionary* (6th ed. 1990); *see also Webster's New International Dictionary* ('*Webster's Third*') 2372 (3d ed. 1993). In context, under that meaning, the phrase 'appeals therein' would refer to appeals pending in the same place as the Collection Due Process hearing, which would be within the IRS, not in a federal court. But under the other definition, 'therein' could mean "in such matter." *Webster's Third* 2372 (defining 'therein' as "in that particular[;] in that respect[;] in such matter"). Under that meaning, the phrase 'appeals therein' in context would refer to appeals of a Collection Due Process hearing determination.

Because the terms 'appeals' and 'therein' each had two meanings, there are four possible combinations for the meaning of the phrase 'appeals therein.' But three of those combinations would render the expression 'appeals therein' meaningless because they reference processes that do not exist, such as administrative appeals of Collection Due Process hearings within the IRS. By contrast, the fourth combination – 'appeals' in the general sense and 'therein' as 'in such matter' – produces

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(2014). A common legal term that is an autohyponym is '*res judicata*': it has a general meaning that encompasses both claim preclusion and issue preclusion, but it also has a narrower meaning that refers only to claim preclusion. *See United States v. 5 Unlabeled Boxes*, 572 F.3d 169, 173–74 (3d Cir. 2009); *see also Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535–36 (5th Cir. 1978); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4402 (3d ed. Apr. 2022 update).

a reasonable outcome that is consistent with multiple canons of construction.

Three combinations of the terms 'appeals' and 'therein' yield meanings that nullify the phrase's effect in contravention of the canon against superfluity, which holds that every word in a statute should be given effect. *See generally Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) ("[T]he Court is 'obliged to give effect, if possible, to every word Congress used.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))). First, if the term 'appeals' is read narrowly (to exclude petitions for review) and the term 'therein' is used locationally (to mean only administrative appeals within the IRS), then the phrase describes nothing. The IRS does not provide for an administrative appeal process, *see* 26 U.S.C. § 6330(b)–(d); *see also* 26 C.F.R. § 301.6330-1(b)(2), so if 'appeals therein' referred to only administrative appeals within the IRS, it would be superfluous. Second, for essentially the same reasons, the broad meaning of the term 'appeals' coupled with the locational definition of 'therein' would also render the combined expression useless: the IRS does not permit administrative appeals or administrative petitions, *see* 26 U.S.C. § 6330(b)–(d); *see also* 26 C.F.R. § 301.6330-1(b)(2), so again the phrase would have no effect. Third, if 'appeals' is read narrowly, and 'therein' is read as 'in such matter,' then that too would produce a meaningless result. Seeking review of a Collection Due Process hearing requires filing a petition in the Tax Court, not an appeal, *see* 26 U.S.C. § 6330(d)(1); *see also* 26 C.F.R. § 6330-1(b)(2), (f)(1),

and if the phrase 'appeals therein' excludes petitions, then it does no work.

The fourth combination, however, does not offend the canon against superfluity. If the term 'appeals' receives its broader meaning (to include petitions) and the word 'therein' means 'in such matter,' then the phrase 'appeals therein' refers to any appeals or petitions from a Collection Due Process hearing. That understanding accounts for the entire judicial review process: the Tax Court reviews petitions from the Collection Due Process hearing, *see* 26 U.S.C. § 6330(d)(1); *see also* 26 C.F.R. § 301.6330-1(b)(2), (f)(1); the appellate courts review appeals from the Tax Court as well as petitions for panel rehearing and *en banc* rehearing, *see* 26 U.S.C. § 7482(a)(1); Fed. R. App. P. 35, 40; and petitions for certiorari from the appellate courts may be filed with the Supreme Court, *see* 28 U.S.C. § 1254(1).

Also, with respect to the meaning of the term 'appeal,' the fourth combination comports with the general-terms canon, which holds that general terms should be interpreted generally. *See Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 557 & n.4 (9th Cir. 2016) ("General words are to be understood in a general sense."); *see also Gov't Emps. Ret. Sys. of V.I. v. Gov't of V.I.*, 995 F.3d 66, 107 (3d Cir. 2021) (Matey, J., concurring in part) ("[G]eneral terms 'are to be accorded their full and fair scope' and 'are not to be arbitrarily limited.'" (quoting Scalia & Garner, *supra*, at 101)); 3A J.G. Sutherland, *Statutes and Statutory Construction* § 66:6 (8th ed. 2018) ("Courts construing tax

collection statutes employ the usual maxims of construction."). And here, the tolling statute contains no suggestion that the term 'appeals' should be given its narrow meaning. *See* 26 U.S.C. § 6330. Although in other sections of the tax code, Congress distinguished between notices of appeal and petitions for certiorari, *see, e.g., id.* § 7481(a), it did not do so here. Thus, under the general-terms canon, the term 'appeals' as used in § 6330 should receive its general meaning.

Altogether, these considerations remove any uncertainty as to the meaning of the phrase 'appeals therein': it applies to any appeals and petitions seeking review of a Collection Due Process hearing, including a petition for a writ of certiorari.

B. Under the Tolling Statute, a Collection Due Process Hearing or Appeal Therein Is 'Pending' from Its Commencement Until the Date When It Can No Longer Be Challenged.

Even with clarity on the meaning of 'appeals therein,' the calculation of the tolling period depends on the term 'pending.' Section 6330(e)(1) suspends the statute of limitations "for the period during which such hearing, and appeals therein, are pending." 26 U.S.C. § 6330(e)(1). In this context, the term 'pending' functions as a predicate adjective, modifying 'such hearing, and appeals therein.' And when Congress enacted § 6330(e)(1), the term 'pending' had two common ordinary meanings as an adjective.

Under one definition, 'pending' could mean "[b]egun, but not yet completed." *Pending, Black's Law Dictionary* (6th ed. 1990); *see also Webster's Third* 1669 (defining "pending" as "not yet decided," "in continuance," and "in suspense"). With that meaning for 'pending,' the hearing and the 'appeals therein' would be pending until the agency resolved the hearing or a court decided the appeal, but after resolution, neither the hearing nor an 'appeal therein' would remain pending. In the context of § 6330(e)(1), that would result in intermittent tolling such that the statute of limitations would be suspended for potentially several distinct periods. Tolling would occur while the hearing was active, but it would cease for the interval between resolution of the initial hearing and the filing of an appeal. Similarly, the statute of limitations would be suspended while the 'appeals therein' were active, but the tolling would stop for the time between resolution of an appeal and the filing of any successive appeal permitted by law.

Alternatively, the term 'pending' had the common ordinary meaning of "[a]waiting an occurrence of conclusion of an action," such that it described "a period of continuance or indeterminacy." *Pending, Black's Law Dictionary* (6th ed. 1990); *see also Webster's Third* 1669 (defining 'pending' as "impending" or "imminent"). Under that meaning, a hearing or an appeal therein would be pending after its resolution for the period while the ruling remained indeterminate due to the possibility of an impending or imminent appeal. Under this definition, the tolling under § 6330(e)(1) would be

continuous – from the date of the commencement of the hearing through to the date on which the possibility of future appellate review expired.

For purposes of § 6330(e)(1), only the second definition works. The tolling clause identifies a singular 'period' of suspension. The first definition of 'pending,' however, would involve several distinct periods of piecemeal tolling. The statute of limitations would be suspended for the hearing and every appeal, but not for the interim periods between resolution and appeal. If Congress had intended to account for such intermittent tolling, it could have used the word 'periods.' But by instead using the singular term, 'period,' the statute allows only the second meaning of 'pending,' such that it describes a continuous period inclusive of not only the hearing and 'appeals therein' but also any intervening periods of indeterminacy during which an appeal or petition could be filed.

Applying the second definition here, the statute of limitations remained tolled for the 62 days between the D.C. Circuit's mandate and Weiss's petition for a writ of certiorari.

C. This Action Is Timely Because the Statute of Limitations Tolled for the Time Associated with Weiss's Petition for a Writ of Certiorari.

With that understanding, this action is timely. At least 129 days remained on the statute of limitations when the D.C. Circuit issued its mandate. Due to the

meanings of the terms 'appeals therein' and 'pending,' that period is not reduced either by the time that Weiss took to file his petition for a writ of certiorari (62 days) or by the time that the Supreme Court took to deny the petition (40 days). Thus, the government had 129 days after the Supreme Court's denial of Weiss's petition to commence this action, and it did so within 64 days – leaving at least 65 days of the ten-year statute of limitations to spare.

IV. CONCLUSION

For the foregoing reasons, the District Court's judgment will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES J. WEISS, Defendant	CIVIL ACTION NO. 19-502

OPINION

Slomsky, J. **February 1, 2021**

I. INTRODUCTION

Before the Court is the Government's Motion for Summary Judgment. (Doc. No. 45.) Seeking to collect Defendant Charles J. Weiss' unpaid income taxes plus interest for the years 1986 to 1991, the Government avers it is entitled to summary judgment in light of Defendant's sworn federal income tax returns and his stipulations to the amount of taxes owed. Defendant does not contest the total amount of his income tax liabilities for the years 1986 to 1991.

For the reasons discussed infra, and viewing the facts in the light most favorable to Defendant as the nonmovant, the Government's Motion for Summary Judgment (Doc. No. 45) will be granted.

II. BACKGROUND

This case has a long history of litigation, which is summarized as follows:

> Defendant Charles Weiss did not pay his income taxes for the years 1986 through 1991, and under 26 U.S.C. § 6502(a)(1), the Government had ten years to collect the taxes from the time it made an assessment. It did so in 1994 and over the years the 10-year period was tolled due to Weiss filing for bankruptcy on several occasions. Eventually, Weiss filed for a hearing on the assessment, which is also referred to as a collection due process ("CDP") hearing. The parties agreed that 129 or 130 days remained on the statute of limitations from the time that Weiss mailed in the form for this hearing. The hearing was held, and his claims were rejected. This decision was upheld by the United States Tax Court in August 2016. On November 23, 2016, Weiss appealed the decision of the Tax Court to the United States Court of Appeals for the District of Columbia Circuit. On May 22, 2018, the D.C. Circuit affirmed the decision of the Tax Court. On August 23, 2018, the D.C. Circuit issued its mandate. On October 24, 2018, Weiss filed a petition for a writ of certiorari with the United States Supreme Court, seeking review of the D.C. Circuit's ruling. On December 3, 2018, the petition for a writ of certiorari was denied. On February 5, 2019—64 days after the Supreme Court denied the petition for a writ of certiorari—the Government brought the present action against Weiss to reduce to

> judgment his unpaid assessments plus statutory additions. . . .

(Doc. No. 37 at 2.)

As noted above, 26 U.S.C. § 6502(a) allows the Government to begin a proceeding to collect Defendant's unpaid income taxes within 10 years from the date the Government assessed Defendant's income tax liabilities. The statute reads as follows:

> Where the assessment of any tax imposed by this title has been made within the period of limitation[1] properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> > (1) within 10 years after the assessment of the tax, . . .
>
> If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

§ 6502(a).

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[1] "The amount of any tax imposed by this title shall be assessed within 3 years after the return was filed. . . ." 26 U.S.C. § 6501(a). Defendant filed his income tax returns for the years 1986 to 1991 in October of 1994. (See Doc. No. 14 ¶¶ 12, 16, 20, 24, 28, 32.) The Government therefore timely assessed Defendant's income tax liabilities in 1994. (See Doc. No. 1 ¶ 5.)

In the Complaint timely filed on February 5, 2019, the Government pled that "[i]n accordance with Weiss' sworn federal income tax returns," the income tax assessments show Defendant "is indebted to the United States in the amount of $773,899.84 as of February 11, 2019, plus statutory additions to tax that will continue to accrue on the unpaid balance until paid in full." (Doc. No. 1 ¶ 5, 9.) On May 24, 2019, Defendant filed an Answer. (Doc. No. 7.) On September 18, 2019, the parties filed a Joint Stipulation. (Doc. No. 14.) Among other things, the parties stipulated to the assessments made on Defendant's income tax returns for the years 1986 to 1991. (See id. ¶¶ 12-35.) The parties agreed that Defendant's income tax liabilities, exclusive of interest, are as follows: (1) $47,185 for 1986; (2) $47,856 for 1987; (3) $36,954 for 1988; (4) $50,460 for 1989; (5) $55,224 for 1990; and (6) $61,523 for 1991. (See id. ¶¶ 13, 17, 21, 25, 29, 33.) Moreover, the Government attached to the Stipulation copies of the IRS account transcript for each tax year as further proof of each assessments' accuracy. (See id. at 13-45.)

On November 13, 2020, the parties filed a second Joint Stipulation regarding Defendant's tax liabilities. (Doc. No. 44.) The parties stipulated that as of October 6, 2020, Defendant's federal income tax liabilities, inclusive of interest, are as follows: (1) $145,275 for 1986; (2) $132,672 for 1987; (3) $128,907 for 1988; (4) $131,246 for 1989; (5) $110,129 for 1990; and (6) $184,359 for 1991. (See id. ¶ 1.) They noted that Defendant "does not and will not challenge the amounts

. . . though he may continue to dispute his obligation to pay such amounts."[2] (Id. ¶ 2.)

On December 15, 2020, the Government filed the instant Motion for Summary Judgment. (Doc. No. 45.) In the Motion, it argues that there are no genuine issues of material fact in this case regarding "the federal income tax assessments made against the defendant," and therefore it is entitled to judgment on those assessments—plus interest—which as of October 6, 2020 totals to $832,588. (Id. at 1.) "[I]n order to avoid summary judgment," the Government explains that Defendant "must come forward with credible evidence showing that a genuine issue of material fact remains as to the income tax assessments made against him, or that the United States is not entitled to a judgment as a matter of law." (Doc. No. 45-1 at 3.) It argues that Defendant cannot do so because "the income tax assessments made against him were based on his own sworn federal income tax returns," and he "stipulat[ed] to the current amount of the liabilities." (Id.)

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[2] Throughout this litigation, Defendant has contested whether the Government filed this lawsuit within 10 years of assessing the taxes, in accordance with the 26 U.S.C. § 6502(a) statute of limitations. (See Doc. Nos. 7, 17, 33.) His argument on the limitations period is the only reason he disputes his obligation to pay his income tax liabilities plus interest. (See Doc. Nos. 14, 44.) The Court has already found Defendant's statute of limitation arguments to be without merit. (See Doc. Nos. 31, 37.) He is raising the issue for a third time in his Response in Opposition to the instant Motion for Summary Judgment (see Doc. No. 48), and once again it is considered infra.

On January 12, 2021, Defendant filed a Response in Opposition to the Government's Motion. (Doc. No. 48.) In his Response, Defendant does not refute the total amount of income tax liabilities owed to the Government "though he may continue to dispute his obligation to pay such amounts." (Doc. No. 48-2 at 3 ¶ 4.)

On January 22, 2021, the Government filed a Reply. (Doc. No. 49.) "In responding to the Government's motion," it notes that Defendant "does not dispute the dollar amounts of his tax liabilities. . . . He concedes there are no material disputed issues of fact." (Id. at 1.) "The parties stipulated to those dollar amounts, . . . and—as the parties agreed would happen because Weiss would not enter a consent judgment—the Government then moved for summary judgment." (Id.)

III. STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In reaching this decision, the court must determine whether "the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Favata v. Seidel, 511 F. App'x 155, 158 (3d Cir. 2013) (quoting Azur v. Chase Bank, USA, Nat'l Ass'n, 601 F.3d 212, 216 (3d Cir. 2010)).

A disputed issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. See Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). For a fact to be considered "material," it "must have the potential to alter the outcome of the case." Favata, 511 F. App'x at 158. If there is no factual issue, and if only one reasonable conclusion could arise from the record regarding the potential outcome under the governing law, summary judgment must be awarded in favor of the moving party. See Anderson, 477 U.S. at 250.

IV. ANALYSIS

Upon reviewing the pleadings, motions, and joint stipulations, it is evident there is no genuine dispute of material fact present in this case. Therefore, under governing law, the Government is entitled to a judgment against Defendant for the unpaid income taxes plus interest for the years 1986 to 1991.

A. Summary Judgment Will Be Granted Because There Is No Genuine Dispute of Material Fact on the Tax Liabilities of Defendant

No genuine issues of material fact exist in this case because the parties have twice stipulated to all material facts. "[F]actual stipulations are 'formal concessions . . . that have the effect of withdrawing a fact

from issue and dispensing wholly with the need for proof of the fact." Christian Legal Soc. Ch. of the U.C., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 677-78 (2010) (alteration in original) (citation omitted). In other words, a joint stipulation to facts "admits that there is no dispute as to the facts[.]" 83 C.J.S. Stipulations § 86 (footnote omitted).

Here, the parties filed joint Stipulations on September 18, 2019 and November 13, 2020. (Doc. Nos. 14, 44.) In the first Stipulation, the parties stipulated to the Government's assessments of Defendant's unpaid income tax liabilities, exclusive of interest, for the years 1986 to 1991. (See Doc. No. 14 ¶¶ 13, 17, 21, 25, 29, 33.) Each years' assessment is as follows: (1) $47,185 for 1986; (2) $47,856 for 1987; (3) $36,954 for 1988; (4) $50,460 for 1989; (5) $55,224 for 1990; and (6) $61,523 for 1991. (See id.) The Government also attached to the Stipulation copies of the IRS account transcript for each tax year as further proof of each assessments' accuracy. (See id. at 13-45.)

In the second Stipulation, the parties agreed that Defendant "is indebted to the United States for the following federal income tax liabilities, inclusive of interest, as of October 6, 2020: $145,275 for 1986[;] $132,672 for 1987[;] $128,907 for 1988[;] $131,246 for 1989[;] $110,129 for 1990[;] $184,359 for 1991[,]"[3] which totals

[3] As further proof that the income tax assessments are undisputed, the Government attached to the instant Motion a Declaration of IRS Revenue Officer Perry Shumsky, who confirms that the assessment amounts are true and correct. (See Doc. No. 45-3 at 3 ¶ 10.)

to $832,588. (Doc. No. 44 ¶ 1.) The Stipulation subsequently states—and Defendant repeats in his Response in Opposition to the instant Motion—that he has reviewed the calculations and "does not and will not challenge the amounts set forth above[.]" (Id. ¶ 2; Doc. No. 48-2 at 3 ¶ 4.)

These stipulations make clear that, when viewed in the light most favorable to Defendant, there is no genuine dispute of material fact as to the total amount of income tax liabilities owed by him. Therefore, the Government's Motion for Summary Judgment (Doc. No. 45) will be granted. See Anderson, 477 U.S. at 250. Pursuant to 26 U.S.C. § 6502(a), the Government is entitled to a judgment against Defendant for the unpaid income taxes plus interest for the years 1986 to 1991 until paid in full.

B. Defendant's Statute of Limitations Claim

Despite the Court having ruled against Defendant on his statute of limitations argument in an Opinion and Order dated May 21, 2020, and in an Order dated August 20, 2020 (see Doc. Nos. 31, 37), he has once again raised the issue by directing the Court's attention to a U.S. Supreme Court case that was not previously relied upon by him. (See Doc. No. 48-3 at 3.) The limitations issue concerns whether a petition for a writ of certiorari to the U.S. Supreme Court constitutes an "appeal" under 26 U.S.C. § 6330(e)(1), the statute

which tolls the § 6502(a) ten-year statute of limitations. Section 6330(e)(1) reads as follows:

> [I]f a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing.

§ 6330(e)(1) (emphasis added).

As stated in Section II, supra, the parties agree that, from the date Defendant mailed his form requesting a Collection Due Process ("CDP") hearing, 129 to 130 days remained on the statute of limitations for the Government to collect Defendant's unpaid income taxes by proceeding in court. (See Doc. No. 37 at 2.) Fast forwarding to the time limits in question here, the D.C. Circuit issued its mandate on May 22, 2018, and Defendant filed his petition for a writ of certiorari in the U.S. Supreme Court on October 24, 2018. (See id.) On December 3, 2018, the petition was denied, and on February 5, 2018—64 days after the petition was denied—the Government filed the instant action against Defendant to reduce to judgment the unpaid assessments plus statutory additions. (See id.)

Defendant maintains that a petition for a writ of certiorari is not included in the term "appeals therein" in § 6330(e)(1), and therefore the 129 to 130 days remaining on the statute of limitations would have expired before the instant suit was filed. The reasons why Defendant is incorrect have been thoroughly discussed in the Court's May 21, 2020 Opinion and August 20, 2020 Order denying reconsideration. (See Doc. Nos. 31, 37.)

Defendant's new request in his Response in Opposition to the Motion for Summary Judgment, in which he asks for a second time that the Court reconsider its ruling on the statute of limitation issues, is not being pursued appropriately and is untimely. "A request for a court order must be made by motion." Fed. R. Civ. P. 7(b)(1); see also Mangual v. DIA – Wesley Drive, Inc., No. 1:13-00071, 2015 WL 12914540, at *1 n.1 (M.D. Pa. Feb. 18, 2015) (citation omitted) ("A request for a court order . . . must be made through the filing of a motion. . . . Here, no motion for reconsideration has been filed by [plaintiff]. . . . On this basis alone, we are inclined to deny [plaintiff]'s request in his brief-in-support."). Moreover, Eastern District of Pennsylvania Local Rule of Civil Procedure 7.1(g) states that "[m]otions for reconsideration . . . shall be served and filed within fourteen (14) days after the entry of the order concerned[.]" U.S. Dist. Ct. Rules E.D. Pa., Civ Rule 7.1(g).[4]

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[4] See also Red Roof Franchising LLC, Inc. v. AA Hosp. Northshore, LLC, 937 F. Supp. 2d 537, 543 (D.N.J. 2013) (finding that defendants' reconsideration request "commingle[d] . . . with

More than 14 days have elapsed since the Court denied Defendant's first Motion for Reconsideration. (See Doc. Nos. 37, 43.)

In any event, Defendant now brings to the Court's attention the U.S. Supreme Court decision, FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994). (See Doc. No. 48-3 at 3.) He contends that FEC held, as a general proposition, that a petition for a writ of certiorari is not an appeal (see id. at 3, 6), but this is not the holding in FEC. In FEC, the Supreme Court addressed whether the Federal Election Commission ("FEC") could file a petition for writ of certiorari under 2 U.S.C. § 437d(a)(6)[5] on its own without obtaining the Solicitor General's approval, and ultimately determined that it could not. See FEC, 513 U.S. at 92, 98. The Court compared the statutes affording the FEC independent litigating authority—§ 437d(a)(6) and 26 U.S.C. §§ 9010(d), 9040(d—and concluded that "Congress intended to restrict the FEC's independent litigating authority" when it proceeds under § 437d(a)(6), reasoning that "Congress could have thought the Solicitor General would better represent the FEC's interests in cases involving our discretionary jurisdiction 'because the traditional specialization of that office has led it to be keenly attuned to this Court's practice with respect to the granting or denying of petitions for certiorari.'" Id. at 94 & n.2.

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their arguments in opposition to [plaintiff's] Motion" is untimely as it was filed 64 days after the court's order).

[5] 2 U.S.C. § 437d has been moved to 52 U.S.C. § 30107.

Thus, the Court's holding did not exclude certiorari from being part of the appeals process or an appeal. The Court merely found that the FEC did not have independent litigating authority to file petitions for certiorari under § 437d(a)(6) largely due to the "Solicitor General's traditional role in conducting and controlling all Supreme Court litigation on behalf of the United States and its agencies." Id. at 93. The Court did not hold that a petition for a writ of certiorari was not included in a phrase such as "appeals therein" as used in the context of 26 U.S.C. § 6330(e)(1).

Furthermore, this Court agrees with the Government's description that in FEC:

> Both the majority and dissent suggest that, outside the specialized context of that case, the *ordinary* meaning of appeal *does* include Supreme Court review, whether mandatory or discretionary. *See Fed Elec. Comm'n*, 513 U.S. at 93-94 (noting that the Black's Law Dictionary definition of "appeal" would carry considerable weight if not for the cognate provision governing FEC litigation authority); *id.* at 100 (Stevens, J., dissenting) (noting that the "far more natural reading" of "appeals" includes discretionary review in the Supreme Court).

(Doc. No. 49 at 2-3) (emphasis in original).

V. CONCLUSION

For the foregoing reasons, the Government's Motion for Summary Judgment (Doc. No. 45) will be granted. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES J. WEISS, Defendant	CIVIL ACTION NO. 19-502

ORDER

AND NOW, this 1st day of February 2021, upon consideration of the Government's Motion for Summary Judgment (Doc. No. 45), Defendant's Response in Opposition (Doc. No. 48), the Government's Reply (Doc. No. 49), the Opinion and Order of the Court dated May 21, 2020 (Doc. Nos. 31-32), the Order dated August 20, 2020 (Doc. No. 37), and in accordance with the Opinion of the Court issued this date, it is **ORDERED** that the Government's Motion for Summary Judgment (Doc. No. 45) is **GRANTED**. The Clerk of Court shall mark this case closed.

BY THE COURT

/s/ Joel H. Slomsky
JOEL H. SLOMSKY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES J. WEISS, Defendant	CIVIL ACTION NO. 19-502

ORDER

AND NOW, this 20th day of August 2020, upon consideration of Defendant's Motion for Reconsideration (Doc. No. 33), the Government's Response (Doc. No. 34), and Defendant's Reply (Doc. Nos. 35, 36), it is **ORDERED** that Defendant's Motion for Reconsideration (Doc. No. 33) is **DENIED**.[1]

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[1] On February 5, 2019, the United States sued Defendant Charles J. Weiss, seeking to recover unpaid federal income taxes plus statutory additions totaling $773,899.84. On October 15, 2019, Defendant filed a Motion for Summary Judgment arguing that the Government's claim was barred because the statute of limitations expired before the Government filed suit. On November 15, 2019, the Government filed a Cross-Motion for Partial Summary Judgment asserting that the statute of limitations had not expired.

On May 21, 2020, the Court issued an Opinion and Order, granting the Government's Motion for Partial Summary Judgment and denying the Defendant's Motion. The Court found that the Government's suit was timely filed under two alternate theories. First, the Court held that a petition for a writ of certiorari is

an "appeal" covered under 26 U.S.C. § 6330(e)(1)—the relevant tolling statute—thereby suspending the collections period to permit the Government's suit to go forward. Section 6330(e)(1) provides in relevant part as follows:

> [I]f a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 . . . shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing.

26 U.S.C. § 6330(e)(1). Second, in the alternative, the Court found the Government's suit was timely under Section 6330(e)(1)'s 90-day "failsafe" provision, which permits the Government to bring suit within ninety days of a "final determination," which, in this case, was when the United States Supreme Court denied his petition for a writ of certiorari.

Defendant Charles Weiss did not pay his income taxes for the years 1986 through 1991, and under 26 U.S.C. § 6502(a)(1), the Government had ten years to collect the taxes from the time it made an assessment. It did so in 1994 and over the years the 10-year period was tolled due to Weiss filing for bankruptcy on several occasions. Eventually, Weiss filed for a hearing on the assessment, which is also referred to as a collection due process ("CDP") hearing. The parties agreed that 129 or 130 days remained on the statute of limitations from the time that Weiss mailed in the form for this hearing. The hearing was held, and his claims were rejected. This decision was upheld by the United States Tax Court in August 2016. On November 23, 2016, Weiss appealed the decision of the Tax Court to the United States Court of Appeals for the District of Columbia Circuit. On May 22, 2018, the D.C. Circuit affirmed the decision of the Tax Court. On August 23, 2018, the D.C. Circuit issued its mandate. On October 24, 2018, Weiss filed a petition for a writ of certiorari with the United States Supreme Court, seeking review of the D.C. Circuit's ruling. On December 3, 2018, the petition for a writ of certiorari was denied. On February 5, 2019-64 days after the Supreme Court denied the petition for a writ of certiorari—the Government brought the

present action against Weiss to reduce to judgment his unpaid assessments plus statutory additions, which now totaled $773,899.84.

Although 129 or 130 days remained on the statute of limitations from the time Weiss sought his initial collections hearing, the limitations period was suspended pursuant to Section 6330(e)(1) for the period during which such hearing, and appeals therein, are pending. Weiss contends that the running of the statute of limitations resumed on the 129- or 130-day period when the D.C. Circuit issued its mandate, not when the petition for a writ of certiorari was denied by the United States Supreme Court. This suit was started 64 days after the Supreme Court denied certiorari. As noted, this Court found that because pursuing certiorari in the Supreme Court was covered by the term "appeals therein," the Government's suit was timely filed. If that pursuit is not covered by the words "appeals therein," then the Government filed its suit more than 129 or 130 days after the mandate was issued by the D.C. Circuit Court of Appeals. And even if the interim period between the issuance of the mandate and the filing of the petition for a writ of certiorari is included in the running of the statute of limitations, the Government's suit was still timely filed. That period was 62 days. If 64 days are added to that time period, it consumes a total of 126 days. Under this scenario, the Government's suit was still timely filed within the 129 or 130 days.

In the Motion for Reconsideration, Defendant contends that the Court misconstrued in its initial Opinion the distinction between an appeal as of right and a discretionary appeal. Certiorari review falls under the category of a discretionary appeal. To support his contention, Weiss relies upon People of the Virgin Islands v. John, 654 F.3d 412 (3d Cir. 2011), which this Court did not discuss in its initial Opinion only because the distinction between an appeal as of right and a discretionary appeal was covered. In any event, the Court will discuss John here. Defendant contends that John held that a petition for a writ of certiorari is not an appeal. In the alternative, Defendant requests the Court certify his case for an interlocutory appeal under 28 U.S.C. § 1292(b). (Id. at 2.) On June 12, 2020, the Government filed a Response to the Motion for Reconsideration. (Doc. No. 35.) On June 19, 2020, Defendant filed a Reply. (Doc. Nos. 35, 36.)

The purpose of a motion for reconsideration "is to correct manifest errors of law or fact or to present newly discovered evidence." Howard Hess Dental Labs. Inc. v. Dentsply Intl, Inc., 602 F.3d 237, 251 (3d Cir. 2010) (quoting Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)). Thus, a proper motion for reconsideration "must rely on one of three grounds: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." Wiest v. Lynch, 710 F.3d 121, 128 (3d Cir. 2013) (quoting Lazaridis v. Wehmer, 591 F.3d 666, 669 (3d Cir. 2010)).

A motion for reconsideration should only address "factual and legal matters that the Court may have overlooked." In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 637, 640 (E.D. Pa. 2010) (quoting Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)). It is improper for a motion for reconsideration to ask the court to "rethink what it had already thought through—rightly or wrongly." Id. (quoting Glendon Energy Co., 836 F. Supp. at 1122). A motion for reconsideration is not a tool to present new legal theories or arguments that could have been asserted to support the first motion. Federico v. Charterers Mut. Assur. Ass'n, Ltd., 158 F. Supp. 2d 565, 578 (E.D. Pa. 2001).

When the moving party argues that the court overlooked certain evidence or controlling decisions of law which were previously presented, a court should grant a motion for reconsideration only if the issues overlooked might reasonably have resulted in a different conclusion. Cataldo v. Moses, 361 F. Supp. 2d 420, 433 (D.N.J. 2004). Federal courts have a strong interest in the finality of judgments and therefore should grant motions for reconsideration sparingly. In re Asbestos Prods. Liab. Litig. (No. VI), 801 F. Supp. 2d 333, 334 (E.D. Pa. 2011).

Here, the only basis for reconsideration asserted by Defendant appears to be the need to correct clear error of law or prevent manifest injustice. However, Defendants Motion for Reconsideration will be denied because the Court has already considered the matter of certiorari review being a discretionary appeal and because Weiss misconstrues John's holding and applicability to the instant case. In John, the Third Circuit Court of Appeals

considered whether a decision by the Virgin Islands Supreme Court to exclude evidence discovered under a warrant not supported by probable cause was consistent with the exclusionary rule established in United States v. Leon, 468 U.S. 897 (1984), and its "good faith" exception. John, 654 F.3d at 417. Before reaching the merits, however, the Third Circuit considered the basis for its jurisdiction over the case. Id. at 415. Specifically, the court evaluated whether it had jurisdiction under 48 U.S.C. § 1613 or 18 U.S.C. § 3731. Id. at 415-16. After studying the statutes, the court determined that Section 1613 was the "sole source of [its] authority [over the appeal.]" Id. at 417.

In reaching this decision, the court reviewed the text of each statute. Section 1613, which "defines the relations between the courts of the United States and the courts of the Virgin Islands," id. at 415, provides, in relevant part, that "the United States Court of Appeals for the Third Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of the Virgin Islands from which a decision could be had." 48 U.S.C. § 1613. The court also noted that Section 1613 states,

> The relations between the courts established by the Constitution or laws of the United States and the courts established by [Virgin Islands] law with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings.

John, 654 F.3d at 415 (quoting 48 U.S.C. § 1613). Construing Section 1613, the Third Circuit found that

> it is plain that Congress intended for this court's certiorari jurisdiction vis-à-vis the Virgin Islands Supreme Court to mirror the United States Supreme Court's certiorari jurisdiction vis-à-vis any of the fifty state courts of last resort. We can therefore review by certiorari a decision of the Virgin Islands Supreme Court if that decision is "final" within the meaning of the United States

> Supreme Court's certiorari jurisdiction statute, 28 U.S.C. § 1257.

John, 654 F.3d at 415.

Next, the court evaluated its jurisdiction under Section 3731. That section provides, in relevant part, "[a]n appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence . . . , not made after the defendant has been put in jeopardy." Id. at 416 (quoting 18 U.S.C. § 3731). The court found that Section 3731 did not confer jurisdiction on the Third Circuit in this appeal because it only referred to an appeal from a district court, and the instant case "[came] from the Virgin Islands Supreme Court—which is not part of the District Court of the Virgin Islands or any other 'district court.'" Id. at 416-17.

Summarizing the applicability of the two statutes, the court explained,

> our authority to re-examine decisions of the courts of the Virgin Islands (as distinct from the federally established courts with jurisdiction over that territory) is limited to "review by writ of certiorari [of] all final decisions of the highest court of the Virgin Islands from which a decision could be had." 48 U.S.C. § 1613.

It went on to clarify that

> Issuance of a writ of certiorari and the "appeal" contemplated by § 3731 are discrete forms of review: the former is discretionary in nature, while the latter is generally available to a losing litigant as of right.

John, 654 F.3d at 417.

In the instant case, Defendant relies on the above quoted passages and contends that John held that, as a general proposition, a petition for a writ of certiorari is not an appeal. This is not the holding in John. Instead, John's jurisdictional analysis dealt with identifying the specific vehicles by which an appellant can seek review in the court of appeals. In that sense, the Third Circuit held that an appeal from a federal district court—i.e., the kind of appeal contemplated by Section 3731—advances to a federal circuit court for appellate review by a different vehicle than an appeal to a federal circuit court from the highest court of the Virgin

Islands—i.e., the kind of appeal contemplated by Section 1613. In other words, the Third Circuit merely distinguished how certain litigants obtain federal circuit court review; the court did not in any way exclude discretionary certiorari review from the general definition of the word appeal or the appeals process. Furthermore, the use of the word "appeals" separate from the word "certiorari" in Section 1613 was not meant to exclude certiorari from being part of the appeals process or an appeal. Section 1613 merely recognizes that there are different vehicles available in different situations by which a case can be appealed to a court of the United States, which would include a court of appeals. Thus, as this Court noted in its Opinion, "[a]lthough a petition for a writ of certiorari to the United States Supreme Court involves discretionary review, as opposed to mandatory review, this distinction does not change the fact that a petition for a writ of certiorari is part of [the appeals] process." United States v. Weiss, No. 19-502, 2020 U.S. Dist. LEXIS 89373, at *15 (E.D. Pa. May 21, 2020).

Defendant's proposed interpretation of the words "appeals therein" would cause an odd or absurd result. See Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 539 F.3d 199, 210 (3d Cir. 2008) (explaining that when interpreting a statute courts consider the "overall object and policy of the statute and avoid constructions that produce odd or absurd results or that are inconsistent with common sense.") (internal citations and quotations omitted). To accept Defendant's interpretation of the words "appeals therein" in 26 U.S.C. § 6330(e)(1), which covers multiple appeals, would enable him to pursue an available remedy—i.e., the filing of a petition for a writ of certiorari—which could lead to a victory not only on the merits but also on statute of limitations grounds if the Government did not file a protective suit in the district court within the statute of limitations. If the Government did not file such a suit and Defendant is correct in his interpretation of the words "appeals therein," this would leave the Government in a position where it potentially could lose the case before or after there was even a decision on the granting or denying of the petition for a writ of certiorari because the statute of limitations would have expired. It would be a waste of the Government's time and judicial resources to put the Government to the burden of filing a protective suit in a federal district court within the 129 or 130 days while the petition for a writ of certiorari is pending. This

waste would be contrary to one of the goals of Section 6330(e)(1), which is to afford a defendant the right to file multiple appeals challenging an IRS assessment without it being enforced while he is pursuing his appeals. Defendant's position is therefore inconsistent with the benefits afforded him under the statute. Thus, for all these reasons, Defendant's claim that a petition for a writ of certiorari is not an appeal is without merit.

Next, Defendant argues that the Government's suit was not timely under Section 6330's "failsafe" provision because the final determination, for purposes of Section 6330, was when the D.C. Circuit Court of Appeals issued its mandate, not when the United States Supreme Court denied his petition for a writ of certiorari. (Id. at 16.) With respect to this argument, Defendant is merely reasserting positions the Court has already considered. For this reason, the Court need not discuss it further.

Lastly, Defendant's request for a stay of this case and certification to allow an interlocutory appeal under 28 U.S.C. § 1292(b) will be denied. Title 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge of the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b). The instant case does not present a controlling question of law as to which there is a substantial ground for a difference of opinion. The Government timely brought suit and there is no basis for certification to allow an interlocutory appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES J. WEISS, Defendant.	CIVIL ACTION NO. 19-502

OPINION

Slomsky, J. **May 21, 2020**

I. INTRODUCTION

On February 5, 2019, the United States brought this suit against Defendant Charles J. Weiss, seeking to recover unpaid federal income taxes plus statutory additions, totaling $773,899.84. On October 15, 2019, Defendant filed a Motion for Summary Judgment arguing that the Government's claim is barred because the statute of limitations expired before the Government filed suit. On November 15, 2019, the Government filed a Cross-Motion for Partial Summary Judgment asserting that the statute of limitations had not expired. For reasons that follow, the Court finds that the limitations period did not expire and therefore the Government filed this action timely. Thus, Defendant's Motion for Summary Judgment will be denied, and the

Government's Cross-Motion for Partial Summary Judgment will be granted.

II. BACKGROUND

Defendant Charles J. Weiss[1] ("Defendant" or "Weiss") did not pay his income taxes for the years of 1986 through 1991. (See Doc. No. 14 at 2-3.) To date, Weiss has not paid because of bankruptcy filings and legal challenges in other forums. In his Motion for Summary Judgment, he again attempts to block the Government's collection of his taxes. But to better understand the reasons for the delay from 1991 to the present in the collection of Weiss's taxes, a description of the events over the years is first warranted.

On October 10, 1994, Weiss late-filed his income tax returns for those years, self-reporting a liability of $299,202. (See id. at 2-6.) Later that month, the Government made tax assessments against him based on his admitted liability. (Id.) When the Government made its assessments, it triggered a statute of limitations to collect the unpaid taxes under 26 U.S.C. § 6502(a)(1), which states in part as follows:

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the

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[1] Weiss resides in Montgomery County, Pennsylvania, which is in the Eastern District of Pennsylvania. (See Doc. No. 14 at 2.)

> proceeding begun . . . within 10 years after the assessment of the tax.

Under Section 6502(a)(1), the statute of limitations would have expired in October 2004. (See Doc. No. 1.) This statute can be tolled, however, by certain actions of a taxpayer, including the filing of a bankruptcy petition. 26 U.S.C. § 6503(h). In Weiss's case, the statute of limitations was tolled when he filed for bankruptcy three times between 1994 and 2009. (See Doc. No. 19 at 4; Doc. No. 14 at 7.)

Finally, on February 11, 2009, the Government informed Weiss in a Collection Due Process ("CDP") Notice of its intent to collect his past due taxes by levy.[2] (See Doc. No. 14 at 7.) The CDP Notice was mailed to him. (See id.) Once he received the Notice, Weiss was permitted to challenge the proposed levy. On either March 13 or March 14, 2009, Weiss mailed IRS Form 12153 to request a CDP hearing for tax years 1986 through 1991. (See Doc. No. 14 at 7.) The hearing is conducted by IRS Appeals. The parties in this case now stipulate that the limitations period was tolled from the date Weiss mailed this form,[3] leaving either 129 or

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[2] Under 26 U.S.C. §§ 6331(a)-(b), if a taxpayer still does not pay after notice and demand, the IRS may collect such tax "by levy upon all property and rights to property," where the "levy" is a collection method that "includes the power of distraint and seizure by any means."

[3] 26 C.F.R. § 301.6330-1(g) states "[t]he periods of limitation under section 6502 . . . are suspended until the date the IRS receives the taxpayer's written withdrawal of the request for a CDP hearing by Appeals or the determination resulting from the CDP hearing becomes final by expiration of the time for seeking

130 days remaining on the statute of limitations for collection.[4] (See id. at 8.) The Government was prohibited from executing on the levy until Weiss's challenge was resolved.[5]

On January 22, 2010, IRS Appeals conducted a hearing over the telephone, during which Weiss fashioned an argument—one that he is not asserting in the instant action—that the statute of limitations had expired on July 21, 2009. (See Doc. No. 19-2.) On this date the limitations period would have expired based on tolling due to his bankruptcy filings. (See id. at 3.) He also posited another argument that the statute of limitations had expired because he returned his CDP form late. (See id. at 6.) IRS Appeals rejected his claims. (See id.) On June 8, 2011, Weiss filed a petition to the United States Tax Court for review of the decision by IRS Appeals. (See id.) On August 22, 2016, the Tax Court affirmed the ruling of IRS Appeals. (See id.)

On November 23, 2016, Defendant appealed the Tax Court's decision to the United States Court of Appeals for the District of Columbia Circuit. (See Doc. No. 14 at 8.) On May 22, 2018, that court affirmed the Tax Court decision, agreeing that the statute of limitations had not expired. (See id. at 9.) On July 27, 2018, a

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judicial review or the exhaustion of any rights to appeals following judicial review."

[4] Whether 129 or 130 days remained on the collection period is not significant to the outcome in this case.

[5] Under 26 U.S.C. § 6330(e)(1), "if a [CDP] hearing is requested . . . the levy actions which are the subject of the requested hearing . . . shall be suspended[.]"

petition for rehearing en banc was denied. (See id.) Neither the Government nor Weiss filed a motion to stay the issuance of the mandate under Fed. R. App. P. 41(d)(2) in the Court of Appeals. (See id.) On August 23, 2018, the D.C. Circuit awarded costs to the United States and issued its mandate. (See id.) And on September 24, 2018, the Department of Justice sent a letter to Weiss's counsel demanding payment for costs in the amount of $59.92. (See id. at 10.) On October 9, 2018, Weiss's counsel paid the costs by check. (See id.)

On October 24, 2018, Weiss filed a petition for a writ of certiorari to the United States Supreme Court, seeking review of the D.C. Circuit's ruling. (See Doc. No. 14 at 10.) On December 3, 2018, the petition for a writ of certiorari was denied. (See id.)

On February 5, 2019-64 days after the Supreme Court denied the petition for writ of certiorari—the Government brought the present action against Weiss to reduce to judgment[6] his unpaid assessments plus statutory additions for the years 1986 through 1991, which now totaled $773,899.84.[7] (See Doc. No. 1.)

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[6] The Government will seek to reduce tax claims to judgment "if the collection statute will shortly expire, all administrative remedies have been exhausted, and there is a reason to believe that collection can be effected in the future. . . ." I.R.S. Chief Couns. Directive Manual (CCDM) 34.6.2.1 (June 12, 2012). The purpose of reducing a tax claim to judgment is to ensure that the liability remains enforceable and the period for collection by levy is extended. See id.

[7] According to the Government, aside from a series of payments in 2009 totaling $14,000 and a transfer credit of $5,956 for overpayment of his 2003 income taxes, Weiss has not made any

According to the Government, at the time it filed the instant action, either 65 or 66 days remained before the expiration of the statute of limitations. After executing a waiver of service and receiving an extension of time to respond, Defendant filed his Answer to the Complaint on May 24, 2019. (See Doc. No. 7.) In his Answer, Weiss raised several defenses,[8] including the argument that the statute of limitations had expired prior to the filing of the Government's suit. (See id.)

On September 12, 2019, both parties filed a Stipulation setting forth Weiss's self-reported liability for each relevant tax year. (Doc. No. 14.) Additionally, the Stipulation recounted both the dates and results of the proceedings in the United States Tax Court, the D.C. Circuit Court of Appeals, and the United States Supreme Court. (See id.)

On October 15, 2019, Defendant filed the Motion for Summary Judgment (Doc. No. 17). In his Motion, Weiss claims that the ten-year statute of limitations for the Government to collect his past-due tax liability had expired before the Government brought the instant suit on February 5, 2019. (See id.) According to Defendant, the collection statute of limitations began to run again, at the latest, after the D.C. Circuit issued

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further payments toward the 1986 through 1991 tax assessments. (See Doc. No. 19 at 3.)

[8] Weiss also argues that all penalties, if any, were discharged in bankruptcy, certain payments and offsets may not have been credited against the amounts claimed by the Government, and there is no basis for an award of legal fees and costs to the Government. (See Doc. No. 7 at 3).

its mandate on August 23, 2018. Thus, with only 129 or 130 days remaining in the limitations period, he contends that the Government's ability to collect ended on either December 30, 2018 or December 31, 2018. Sensing that the Government would argue that his petition for a writ of certiorari, which was filed on October 24, 2018, continued to toll the statute of limitations, Defendant asserts that a petition for a writ of certiorari to the Supreme Court does not constitute an "appeal," which would toll the statute of limitations under the pertinent statute. (See id.)

On November 15, 2019, the Government filed a Cross-Motion for Partial Summary Judgment. (Doc. No. 19.) The Government challenged Weiss's assertions in two ways. First, it argues that a petition for a writ of certiorari is, in fact, an "appeal" under 6330(e)(1)—the tolling statute—thus suspending the collections period until the petition was denied. Second, the Government asserts that even absent tolling under the definition of "appeal," their suit was still timely because 6330(e)(1) has a "failsafe" provision that permits the Government to pursue collections within 90 days of a "final determination" of the taxpayer's hearing. (See id.)

On January 14, 2020, this Court held a hearing on the parties' Motions, during which the parties recited their respective positions. (See Doc. Nos. 29, 30.)

III. STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In reaching this decision, the court must determine whether "the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Favata v. Seidel, 511 F. App'x 155, 158 (3d Cir. 2013) (quoting Azur v. Chase Bank, USA, Nat'l Ass'n, 601 F.3d 212, 216 (3d Cir. 2010)). A disputed issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). For a fact to be considered "material," it "must have the potential to alter the outcome of the case." Favata, 511 F. App'x at 158. If there is no factual issue, and if only one reasonable conclusion could arise from the record regarding the potential outcome under the governing law, summary judgment must be awarded in favor of the moving party. Anderson, 477 U.S. at 250. Here, the material facts are undisputed. Therefore, the matter is ripe for summary judgment.

"The same standards and burdens apply on cross-motions for summary judgment." Allah v. Ricci, 12-4095, 2013 WL 3816043 (3d Cir. July 24, 2013) (citing Appelmans v. City of Phila., 826 F.2d 214, 216 (3d Cir. 1987)). When the parties have filed cross-motions for

summary judgment, as in this case, the summary judgment standard remains the same. Transguard Ins. Co. of Am., Inc. v. Hinchey, 464 F.Supp.2d 425, 430 (M.D. Pa. 2006). "When confronted with cross-motions for summary judgment . . . 'the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the summary judgment standard.'" Id. (quoting Marciniak v. Prudential Fin. Ins. Co. of Am., 184 F. App'x 266, 270 (3d Cir. 2006)). "If review of [the] cross-motions reveals no genuine issue of material fact, then judgment may be entered in favor of the party deserving of judgment in light of the law and undisputed facts." Id. (citing Iberia Foods Corp. v. Romeo, 150 F.3d 298, 302 (3d Cir. 1998)).

IV. DISCUSSION

As noted above, the summary judgment motions turn on the resolution of two issues: first, whether a petition for certiorari is an "appeal" under 26 U.S.C. § 6330(e)(1), and second, whether the "failsafe" provision in that section permits the Government to pursue collection within 90 days of the denial of the writ of certiorari.

As noted above, Section 6502(a)(1) establishes a ten-year statute of limitations for collection actions. Section 6330(e)(1) suspends the limitations period in certain situations. It provides in relevant part as follows:

> [I]f a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 . . . shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing.

Section 6330(e)(1) provides two methods for tolling the collections statute. First, Section 6330(e)(1) suspends the collection statute "for the period during which such hearing, and appeals therein, are pending." Second, it also provides for a 90-day "failsafe" period, wherein the statute of limitations cannot expire "before the 90th day after the day on which there is a final determination in such hearing."

A. A Petition for Certiorari to the United States Supreme Court is an "Appeal" under 26 U.S.C. § 6330(e)(1).

As noted, under Section 6330(e)(1), the statute of limitations is tolled for the period during which such hearing, and appeals therein, are pending. Both parties agree that the ordinary meaning of the word "appeals" will govern. However, the Government and Weiss disagree on what the ordinary meaning is and whether the ordinary meaning includes a petition for a writ of certiorari.

The phrase "appeals therein" is not defined in the Internal Revenue Code. Therefore, to clarify its meaning within Section 6330(e)(1), basic principles of statutory construction apply. "[A] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979).

The word "appeal" is defined in Merriam-Webster as "a legal proceeding by which a case is brought before a higher court for review of the decision of a lower court." Appeal, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/appeal (last visited April 20, 2020). The Cambridge Dictionary defines "appeal" as a "request made to a court of law or to someone in authority to change a previous decision." Appeal, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/appeal (last visited April 20, 2020). Black's Law Dictionary defines the noun "appeal" as "a proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal". Appeal, BLACK'S LAW DICTIONARY (11th ed. 2019).

The word "certiorari" fits within the broader common definition of "appeal." Black's Law Dictionary defines "certiorari" as a writ "issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." Certiorari, BLACK'S LAW DICTIONARY (11th ed. 2019). It is used "today in the United States as a general vehicle of

discretionary appeal." DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE 248 (1999). Scholars have noted that, while a petition for a writ of certiorari plays a specific role within the appellate process, it is an "appeal" nonetheless. See, e.g., CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 4004, at 22 (2d ed. 1996).[9] Therefore, despite its discretionary nature, a petition for a writ of certiorari to the United States Supreme Court is included within the definition of the word "appeal."

Courts have included a petition for a writ of certiorari within the ordinary meaning of the word "appeal." A federal district court found that a petition for a writ of certiorari constituted an "appeal" when the word was undefined in a surety bond. See WesternGeco LLC v. ION Geophysical Corp., No. 4:09-CV-1827, 2016 WL 2344347, at *1 (S.D. Tex. May 4, 2016). In addition to consulting 28 U.S.C. § 2101(c), the statute setting the filing period for both an "appeal" and a "writ of certiorari," the district court noted that "in common usage the word 'appeal' is often meant to include appeal to the Supreme Court through a petition for writ of certiorari." Id. at *8. Thus, even after considering that some statutes specifically refer to both an "appeal" and a "writ of certiorari," the court still concluded that the

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[9] "Appeal jurisdiction has been narrowly limited, and certification of questions from federal courts of appeals has fallen into almost complete desuetude. Certiorari control over the cases that come before the Court enables the Court to define its own institutional role." CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 4004, at 22 (2d ed. 1996) (emphasis added).

meaning of the word "appeal" on its own "includes appeals to the Supreme Court on writ of certiorari." Id.

The Government notes several other cases displaying a general consensus among federal courts that a petition for a writ of certiorari falls within the ordinary definition of "appeal." Two cases deal directly with whether a petition for a writ of certiorari is an "appeal." In both, the courts determined that a petition for a writ of certiorari fell within the ordinary meaning of the word "appeal." See, e.g., Matter of Petition for Disbarment of Plaskett, 2012 WL 850599, at *3 (V.I. Mar. 13, 2012) (holding that "proceedings that satisfy the ordinary definition of 'appeal' were [defendant's] direct appeal to the Third Circuit and the certiorari proceedings in the United States Supreme Court"); Fenstermacher v. Telelect, Inc., 1994 WL 675491, at *1 (D. Kan. Nov. 18, 1994) (rejecting a "strained interpretation" of local rule that referenced an "appeal" to not include "certiorari review by the [United States Supreme Court]").

Furthermore, in a case decided in the Eastern District of Pennsylvania, the court referred to a petition for a writ of certiorari as being part of an "appeal." In Thompson v. Kramer, a plaintiff sought declaratory and injunctive relief. 1994 WL 702927, at *1 (E.D. Pa. Dec. 13, 1994). In denying these requests, the court noted that "the appellate process established by Congress, which includes the right to petition for a writ of certiorari in order to appeal decisions of the Court of Appeals for the Third Circuit" rebutted the plaintiff's argument of an inadequate remedy at law. Id. at *5.

From these cases, it is evident that a petition for a writ of certiorari to the United States Supreme Court falls under the rubric "appeals therein" in Section 6330(e)(1).[10]

To overcome the considerable law that the word "appeal" includes the filing of a petition for a writ of certiorari, Weiss claims that the language of the statute must be given its "ordinary meaning . . . at the time Congress enacted the statute." (Doc. No. 17 at 13) (citing Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070 (2018)). Here, the language in 26 U.S.C. § 6330 was drafted in 1998. See Pub.L. 105-206, Title III, § 3401(b), 112 Stat. 747 (1998). As noted, 6330(e)(1) uses the phrase "appeals therein." When that section was enacted, a party was ordinarily required to file a petition for a writ of certiorari to obtain review in the United States Supreme Court. It was part of the appellate process in that court. Thus, based upon the

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[10] There are cases discussing provisions of the Internal Revenue Code in which courts simply assume that a petition for a writ of certiorari is part of an "appeal." See, e.g., Boulware v. Comm'r, 107 T.C.M. (CCH) 1419 (Tax Ct. 2014) (holding in collection action that pendency of an "appeal, which would first go to the Court of Appeals for the Ninth Circuit and then most likely to the U.S. Supreme Court" could last over two years); Overton v. United States, 202 F.3d 282 at *3 (10th Cir. Jan 7, 2000) (unpub.) (disagreeing with plaintiff's assertion "he had an appeal pending in the Supreme Court when the Tax Court issued its 1996 decision" because he had not "directed [court's] attention to evidence of this appeal"); Gass v. U.S. Dep't of Treasury, 1999 WL 250890, at *6 (D. Colo. Mar. 30, 1999) (noting in collection action that assessments and the filing of liens and levies continued against plaintiffs property "despite the pendency of plaintiffs' Supreme Court appeal").

analysis above on the common meaning of the word "appeal," certiorari review in the Supreme Court would be included in the phrase "appeals therein." Moreover, the word "appeals" in Section 6330(e)(1) is used in the plural, signifying more than one level of appellate review. This usage lends additional support that certiorari review was included in the appeals process. Although a petition for a writ of certiorari to the United States Supreme Court involves discretionary review, as opposed to mandatory review, this distinction does not change the fact that a petition for a writ of certiorari is part of that process.

Weiss further argues that if Congress meant to include permissive appeals within the words "appeals therein," it would have not used the broad language "appeals therein," but in fact would have used the language "permissive appeals" or specifically mentioned a petition for a writ of certiorari. But according to the statutory interpretation principle that "general terms are to be given their general meaning," or generalia verba sunt generaliter intelligenda, the generic phrase "appeals therein" does not distinguish between discretionary and mandatory appeals as of right and would include both. See Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 130 (2005) (citing Uravic v. F. Jarka Co., 282 U.S. 234, 240 (1931)); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012). Accordingly, Weiss's interpretation of the statute is unconvincing.

B. The Government Brought Suit Within the "Failsafe" 90-Day Period Following a "Final Determination" Under Section 6330(e)(1).

As noted earlier, the collections statute of limitations also is tolled by the "failsafe" 90-day period outlined in Section 6330(e)(1). Under that provision, the Government is empowered to bring its action against Weiss following a "final determination of [the CDP hearing]," which in this case is within ninety days after the Supreme Court's denied certiorari.

The word "hearing" covers what Weiss originally sought. Section 6330(e)(1) states that the section refers to "hearing[s] ... requested under subsection (a)(3)(B)[.]" 26 U.S.C. § 6330(e)(1). Hearings requested under that subsection are Collection Due Process ("CDP") hearings. See Hart v. IRS, No. 00-4658, 2001 WL 393699, at *1, 2001 U.S. Dist. LEXIS 3288, at *3 (E.D. Pa. Feb. 8, 2001) (explaining that the defendant requested a collection due process hearing pursuant to 26 U.S.C. § 6330(a)(3)(B)). Weiss originated his challenge to the collection of his taxes by requesting a CDP hearing. (See Doc. No. 17 at 2-3.)

Moreover, a provision in the Code of Federal Regulations provides guidance on when there is a "final determination" in the CDP hearing. This treasury regulation found in 26 C.F.R. § 301.6330-1(g) provides that "the determination resulting from the hearing becomes final by expiration of the time for seeking judicial review or the exhaustion of any rights to

appeals following judicial review." In interpreting this regulation, a federal court has confirmed that 26 C.F.R. § 301.6330-1(g) is a permissible construction of 6330(e)(1). In United States v. Kollman, 774 F.3d 592, 598 (9th Cir. 2014), the court found that the guidance in the regulation that the collections period is tolled until the expiration of the time to file an appeal was what Congress intended "when it incorporated nearly identical language into § 6330(e)(1)." Therefore, the court held that § 301.6330-1(g) is conclusive guidance for interpreting 6330(e)(1). See id. at 597-98. Following the regulation's definition of when a hearing becomes "final," the denial of Weiss's petition for certiorari was the "final determination" of his CDP hearing because it marked the point at which Weiss had fully exhausted the right to appeal its outcome.

In addition, another section of the Internal Revenue Code confirms that the denial of Weiss's petition for certiorari was the "final determination" of his hearing. Section 7481(a) of the I.R.C. states that the decision of the Tax Court shall become final "[u]pon the denial of a petition for a writ of certiorari, if the decision of the Tax Court has been affirmed[.]" 26 U.S.C. § 7481(a)(2)(B). Therefore, the decision of the Tax Court in Weiss's case, which was affirmed by the D.C. Circuit, falls within Section 7481(a)(2)(B) and was "final" when the Supreme Court denied his petition. Weiss argues that Section 7481(a)(2)(B) does not apply to the tolling provision in Section 6330(e)(1), in part because the tolling provision does not refer to "Tax Court" decisions. (See Doc. No. 21 at 7-28.) However, as

noted above, 26 C.F.R. § 301.6330-1(g) states that 6330(e)(1)'s "final determination" may denote the "exhaustion of any rights to appeals following judicial review." Here, the review process referenced in 6330(e)(1) must be construed to include a decision of the Tax Court because it is the court to which CDP determinations are appealed. See 26 U.S.C. § 6330(d). Therefore, Section 7481's definition of a Tax Court decision as "final" when certiorari is denied supports denial as the "final determination" of a CDP hearing.

Finally, this Court will address Weiss's contention that the attempt by the Government to collect costs awarded by the D.C. Circuit Court was a recognition that Weiss's appeal was "final" in that court. Costs are separate from the tax assessment being disputed in a case. See, e.g., McDonald v. McCarthy, 1990 WL 165940, at *2 (E.D. Pa. Oct. 22, 1990) (denying defendants' request to stay collection of judgment, fines, fees, and costs while their appeal was pending); Mann v. Washington Metro. Area Transit Auth., 185 F.Supp.3d 189, 194 (D.D.C. 2016) (denying a plaintiff's request to stay enforcement of the Bill of Costs pending the appeal, noting that a stay pending appeal is an "intrusion into the ordinary process of administration and judicial review" (citing Nken v. Holder, 556 U.S. 418, 427, (2009)); Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 169 (1939) (holding a fee request amidst a pending petition for certiorari was separate from a final judgment on appeal because the "inquiry was a collateral one, having a distinct and independent character"). Accordingly, since the Government's suit was filed 64 days after

certiorari was denied, it was commenced within the 90-day "failsafe" period. For this additional reason, the limitations period did not expire.

V. CONCLUSION

For all the foregoing reasons, the Government's Cross-Motion for Partial Summary Judgment (Doc. No. 19) will be granted and Defendant's Motion for Summary Judgment (Doc. No. 17) will be denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES J. WEISS, Defendant.	CRIMINAL ACTION NO. 19-502

ORDER

AND NOW, this 21st day of May 2020, upon consideration of the Joint Stipulation of Facts for Summary Judgment (Doc. No. 14), Defendant's Motion for Summary Judgment (Doc. No. 17), the Government's Cross-Motion for Partial Summary Judgment and Response to Defendant's Motion for Summary Judgment (Doc. No. 19), Defendant's Response in Opposition to the Government's Cross-Motion for Partial Summary Judgment (Doc. Nos. 21, 22), the Government's Reply (Doc. No. 28), the arguments made by counsel for the parties at the hearing held on January 14, 2020 (Doc. No. 29), and in accordance with the Opinion of the Court issued this day, it is **ORDERED** as follows:

1. The Government's Cross-Motion for Partial Summary Judgment (Doc. No. 19) is **GRANTED**. Accordingly, the above-captioned case was timely brought by the Government and may proceed.

2. Defendant's Motion for Summary Judgment (Doc. No. 17) is **DENIED**.

BY THE COURT:

/s/ Joel H. Slomsky
JOEL H. SLOMSKY, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1592

UNITED STATES OF AMERICA v.

CHARLES J. WEISS,
Appellant

(D.C. No. 2:19-cv-00502)

SUR PETITION FOR REHEARING

(Filed Jan. 5, 2023)

Present: CHAGARES, *Chief Judge*, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and FREEMAN *Circuit Judges*

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service

not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Peter J. Phipps*
Circuit Judge

Date: January 5, 2023
Tmm/cc: Michael J. Haungs, Esq.
John Schumann, Esq.
James R. Malone, Jr., Esq.