In the Supreme Court of the United States

No. 22A____

SEAVIEW TRADING, LLC, ET AL., APPLICANTS

v.

COMMISSIONER OF INTERNAL REVENUE

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

To the Honorable Elena Kagan
Associate Justice of the United States
and Circuit Justice for the Ninth Circuit

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for applicants respectfully request a 60-day extension of time, to August 7, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The court of appeals entered judgment following rehearing en banc on March 10, 2023. App.1a. Without an extension, the time for filing a petition for a writ of certiorari will expire on June 8, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case centers on the meaning of one of the most fundamental terms in the tax system: "filed." The date on which a partnership tax return is deemed "filed" is critical for taxpayers, as the date determines when the clock begins to run against the IRS's three-year statute of limitation to adjust taxpayers' reported income for a given year. 26 U.S.C.

§ 6229(a) (2000).[1] That time runs either from the "date on which the partnership return for such taxable year was filed," or "the last day for filing such return for such year." *Id.* If no return is filed, the IRS may assess taxes on the partnership "at any time." *Id.* § 6229(c)(3) (2000).

The Tax Code does not define when a return is "filed." Instead, it directs partnership returns to be "filed or made at such time, in such manner, and at such place as may be prescribed in regulations." 26 U.S.C. § 6230(i) (2000). The Treasury Department regulations, in turn, set "procedural requirements" for filing partnership returns including specifying the "time" ("the fifteenth day of the fourth month following the close of the taxable year of the partnership") and "place" ("with the service center prescribed in the relevant IRS revenue procedure, publication, form, or instructions to the form"). 26 C.F.R. § 1.6031(a)-1(e) (2001). Nothing in the regulations prescribes how *delinquent* partnership returns should be filed. The IRS manual and other IRS guidance have instructed partnerships to file their delinquent returns with revenue officers and requesting IRS officials. *See, e.g.*, IRS Manual § 1.2.1.6.18 (2006); IRS Office of Chief Counsel, Chief Counsel Advice No. 199933039, *Filing Delinquent Returns Directly with Revenue Officers* (Aug. 20, 1999), at 4.

2. Seaview Trading, LLC is classified as a partnership by the IRS for tax purposes. This case is about Seaview's 2001 partnership return which, under the Treasury Department regulations, Seaview needed to file at the IRS service center located in Ogden, Utah, by April 15, 2002. Seaview believes it mailed this return to the Ogden service center on July 3, 2002, but Seaview cannot prove that the IRS received the return.

In July 2005, an IRS Revenue Agent informed Seaview that the IRS had not received the 2001 partnership return and requested a copy of the return. Seaview sent the

[1] Because this case is about the filing of a 2001 partnership tax return, this application refers to the Tax Code effective in 2000.

IRS a copy of the 2001 return in September 2005, and the IRS confirmed receipt. In October 2005, the IRS opened an audit of the 2001 partnership return. Over the next few years, the IRS repeatedly referenced the copy of the return and used it in its official proceedings. Seaview again sent a copy of the 2001 return to the IRS in July 2007, at the request of an IRS attorney. Yet in October 2010—more than three years past *any* of Seaview's submissions of its 2001 return to IRS officials—the IRS issued a notice adjusting Seaview's income by disallowing a $35,496,542 loss.

3. Seaview challenged this adjustment in the Tax Court arguing, inter alia, that the IRS's assessment was untimely. In rejecting that claim, the Tax Court held the limitations period never began to run because Seaview never "filed" its return with the Ogden service center. App.10a. The Ninth Circuit initially reversed. App.11a. The panel explained that neither the Tax Code nor the IRS's regulations "define when a delinquent return is 'filed.'" C.A. Dkt. 57-1, at 14. So, the panel applied the "ordinary meaning of the term" and held that Seaview had filed its return in 2005 when Seaview sent the return to the requesting IRS agent. *Id.* at 14-15, 21. This reading, the panel pointed out, comports with the IRS's longstanding internal view of the law, rather than the agency's "current litigating position." *Id.* at 19.

The government petitioned for rehearing, highlighting the nationwide importance of the issues. Granting rehearing en banc, the Ninth Circuit affirmed the Tax Court's decision in a published opinion, with Judge Bumatay dissenting. App.18a-19a. Seaview, the en banc majority held, had failed to "meticulously comply" with the Treasury Department's "place-for-filing" regulation by failing to send the 2001 return to the Ogden service center. App.11a. Indeed, despite sending copies of the return to both an IRS revenue agent and IRS attorney, providing the IRS with a certified receipt for the initial 2002 mailing of the return, and cooperating with an audit of the 2001 return, the Ninth Circuit held Seaview had "*never* properly filed its return" and thus the three-year statute of limitations "never

began to run." App.8a-9a, 12a-13a (emphasis added). Under the court's reading, Seaview remains "subject to the provision allowing taxes attributable to partnership items to be assessed 'at any time.'" App.12a (quoting 26 U.S.C. § 6229(c)(3) (2000)).

Judge Bumatay, in dissent, warned that the Ninth Circuit's decision "throws our tax system into disarray," making it so that "taxpayers can no longer trust what the IRS has told them about how to file delinquent tax returns." App.19a. The IRS had "backtrack[ed]" on more than 20 years of guidance telling taxpayers to file untimely tax returns with "requesting IRS officials." App.19a. Because the court let the IRS "speak[] out of both sides of its mouth," now "any taxpayers who filed their delinquent tax returns by sending them directly to requesting IRS officials may find that their returns were *never* deemed filed and, even worse, they may be liable to the IRS *forever*." App.19a-20a (quoting *Bittner v. United States*, 598 U.S. 85, 97-98 n.5 (2023)).

Judge Bumatay reiterated that the Treasury Department's regulations prescribed filing requirements only for *timely* partnership returns, and the absence of instructions for *untimely* returns meant the court should follow the "plain meaning of 'filing.'" App.19a, 23a-28a. Under the ordinary meaning of "filing," a partnership return "is 'filed' when an IRS official authorized to obtain and process a delinquent return asks a partnership for such a return, the partnership delivers the return to the IRS official in the manner requested, and the IRS official receives the return." App.28a. As Seaview "filed" its partnership return with the IRS agent in 2005, the IRS's statute of limitations had "long since run" by the time the IRS tried to adjust Seaview's reported income in 2010. App.20a.

4. Counsel respectfully requests a 60-day extension of time to file a petition for certiorari. This case presents significant and complex issues regarding the proper interpretation of the Tax Code and IRS regulations. A 60-day extension would allow counsel time to research and analyze the issues presented and to prepare the petition for filing. In addition,

undersigned counsel has a number of other pending matters that will interfere with counsel's ability to file the petition on June 8, 2023. In particular, counsel is preparing to submit petitions for certiorari in this Court in *Esformes v United States*, Nos. 19-13838, 19-14874 (11th Cir.), due on June 1, 2023, and in *AstraZeneca UK Ltd. v. Atchley*, No. 22A-868, due on July 3, 2023. Counsel also has a brief in the Tenth Circuit in *KPH Healthcare Services v. Mylan*, No. 23-3014, due May 31, 2023, another in the D.C. Circuit in *Blasket Renewable Investments, LLC v Kingdom of Spain*, No. 23-7038, due June 29, 2023, and a forthcoming matter in the Fifth Circuit.

Respectfully submitted,

/s/ Lisa S. Blatt
LISA S. BLATT
Counsel of Record
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

Counsel for Applicants

MAY 5, 2023

CORPORATE DISCLOSURE STATEMENT

In the 2001 tax year at issue in this case, Seaview Trading, LLC, was owned by Robert A. Kotick, who owned his interest through AGK Investments, LLC, and Charles M. Kotick, who owned his interest through KMC Investments, LLC.

Charles M. Kotick has since passed away, and Seaview Trading, LLC, is now owned solely by Robert A. Kotick, through AGK Investments, LLC, 807080A LLC, and BN-Three Corp.

No publicly held corporation owns 10% or more of Seaview Trading, LLC.

/s/ Lisa S. Blatt
LISA S. BLATT

MAY 5, 2023