No. 18-1003

ORAL ARGUMENT SCHEDULED: DEC. 4, 2018

In the United States Court of Appeals for the District of Columbia Circuit

DAVID T. MYERS,
Appellant/Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
Appellee/Respondent.

ON APPEAL FROM THE UNITED STATES TAX COURT
No. 2181-15W
Hon. Tamara W. Ashford, Tax Court Judge, Presiding

SUPPLEMENTAL BRIEF FOR THE APPELLANT DAVID T. MYERS

Joseph A. DiRuzzo, III
DiRuzzo & Company
401 East Las Olas Blvd., Suite 1400
Ft. Lauderdale, FL 33301
954.615.1676 (Office)
954.827.0340 (Fax)
jd@diruzzolaw.com

Pro Bono Counsel for the Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
ARGUMENT 1
I. THE APPELLANT'S APPEAL WAS TIMELY 1
A. All Motions filed Pursuant to Either Tax Ct. R. 161 or 162 Re-start the Ninety-Day Period to file a Notice of Appeal. 2
B. The Appellants' Motion for Reconsideration is More Properly Treated as Motion to Vacate under Tax Ct. R. 162. 6
II. THE LIMITATIONS PERIOD IN 26 U.S.C. § 7483 IS NOT JURISDICTIONAL, AND IT IS SUBJECT TO WAIVER BY THE APPELLEE. 8
CONCLUSION 10
CERTIFICATION OF COMPLIANCE 11
CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Cases

Annamalai v. Comm'r, 884 F.3d 530 (5th Cir. 2018) 10

Bowles v. Russell, 551 U.S. 205 (2007) 9

Davies v. Comm'r, 715 F.2d 435 (9th Cir. 1983) 10

Gurta v. Comm'r, 848 F.2d 190 (6th Cir. 1988) 10

Hamer v. Neighborhood Hous. Servs., 193 L. Ed. 2d 249 (2017) 9

Henderson v. Shinseki, 562 U.S. 428 (2011) 9

Kontrick v. Ryan, 540 U.S. 443 (2004) 10

Maranto v. Comm'r, 188 F.3d 514 (9th Cir. 1999) 10

Nordvik v. Comm'r, 67 F.3d 1489 (9th Cir. 1995) 3, 4

Robert Louis Stevenson Apartments, Inc. v. Commissioner, 337 F.2d 681 (8th Cir. 1964) 4, 5

Sanderson v. Comm'r, 231 F. App'x 534 (8th Cir. 2007) 3

Sebastian v. Comm'r, 298 F. App'x 351 (5th Cir. 2008) 3

Severance v. Comm'r, 10 F.3d 810 (10th Cir. 1993) 10

Spencer Med. Assocs. v. Comm'r, 155 F.3d 268 (4th Cir. 1998) 3

Trohimovich v. Comm'r., 776 F.2d 873 (9th Cir. 1985) 3

Twenty Mile Joint Venture, PND, Ltd. v. Comm'r, 200 F.3d 1268 (10th Cir. 1999) 10

United States v. Dieter, 429 U.S. 6 (1976) 5

United States v. Healy, 376 U.S. 79 (1964) 5

United States v. Ibarra, 502 U.S. 1 (1991) 3, 5, 6

United States v. Kwai Fun Wong, 191 L. Ed. 2d 533 (2015) 9

Statutes

26 U.S.C. § 7482(a) 9

26 U.S.C. § 7483 ..... 1, 9

Rules

Fed. R. App. P. 13(a)(1)(B) 1, 2

Tax Ct. R. 161 7

Tax Ct. R. 162 7

Tax Ct. R. 163 2

ARGUMENT

I. THE APPELLANT'S APPEAL WAS TIMELY

The United States Tax Court (the "Tax Court") dismissed the Appellant's Petition from the Tax Court on June 7, 2017. JA-206. Eighteen days later, on June 25, 2017, the Appellant timely filed a self-styled "Motion for Reconsideration" with the Tax Court. JA-005 (at Doc. # 58); JA-213. Eighteen days later, on July 13, 2017, the Tax Court denied the Appellant's "Motion for Reconsideration." JA-207. Seventy-five days later, on September 26, 2017, the Appellant filed his Notice of Appeal in Tax Court and with this Court, giving rise to this matter. JA-211.

The Internal Revenue Code provides that "[r]eview of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered." 26 U.S.C. § 7483. The statute is supplemented by the Federal Rules of Appellate Procedure, which states that "[i]f, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later." Fed. R. App. P. 13(a)(1)(B). Undisputedly, the Appellant's Notice of Appeal was filed within ninety days of the Tax Court's order denying the Appellant's "Motion for Reconsideration." Therefore, in determining if the Appellant satisfied the time

limitation of 26 U.S.C. § 7483, this Court must decide if the Appellant's self-styled "Motion for Reconsideration" should be treated as a "motion to vacate or revise the Tax Court's decision" described in Fed. R. App. P. 13(a)(1)(B).

This Court should find that the Appellant's "Motion for Reconsideration" was a "motion to vacate or otherwise revise the Tax Court's decision." There are two reasons for this. *First*, every Appellate Court which has weighed in on that matter has found that a motion for reconsideration under Tax Ct. R. 161 is a "motion to vacate or revise the Tax Court's decision", and so the issue of whether the Tax Court properly categorized the Appellant's "Motion for Reconsideration" as a motion under Tax Ct. R. 161, rather than a motion to vacate under Tax Ct. R. 162 is irrelevant. *Second*, and in the alternative, the Tax Court erred in characterizing the Appellant's "Motion for Reconsideration" as a motion under Tax Ct. R. 161.

A. All Motions filed Pursuant to Either Tax Ct. R. 161 or 162 Re-start the Ninety-Day Period to file a Notice of Appeal.

Tax Ct. R. 161 applies to Motions for Reconsideration of Findings or Opinion, whereas Tax Ct. R. 162 applies to Motions to Vacate or Revise Decision. A motion must be filed either under Tax Ct. R. 161 or 162, not both. Tax Ct. R. 163. While there is prior case law which suggests that filing a motion to reconsider under Tax Ct. R. 162 does not toll or terminate the period for filing a Notice of Appeal, this law is

no longer good, and the majority view is that motions filed under either Tax Ct. R. 161 or 162 will toll the period for filing a Notice of Appeal.

In 1995, the Ninth Circuit explained that the rule set forth in Fed. R. App. P. 13(a)(1)(B) applies to motions to reconsider under Fed. Tax Ct. R. 162. *Nordvik v. Comm'r*, 67 F.3d 1489, 1493 (9th Cir. 1995). The Ninth Circuit in *Nordvik* specifically overturned prior Ninth Circuit precedent, *Trohimovich v. Comm'r.*, 776 F.2d 873, 875 (9th Cir. 1985), which came to the opposite conclusion. The Ninth Circuit based its decision on *United States v. Ibarra*, 502 U.S. 1, 6-7 (1991) (*per curiam*), where the Supreme Court held that the period for filing a notice of appeal begins to run, for civil and criminal cases, when the trial court enters a decision on a party's motion for reconsideration. *Nordvik* has been followed by the Fourth (the Fourth Circuit stated it "can find no case law contrary to *Nordvik*" on this issue), *Spencer Med. Assocs. v. Comm'r*, 155 F.3d 268, 270 (4th Cir. 1998)), Fifth (*Sebastian v. Comm'r*, 298 F. App'x 351, 354 (5th Cir. 2008)), and Eighth (*Sanderson v. Comm'r*, 231 F. App'x 534, 535 (8th Cir. 2007) (a "timely motion for reconsideration [under Tax Ct. R. 162] and timely appeal from the denial of that motion permit us to review the underlying dismissal order"), Circuits.

Under *Nordvik*, though, whether the Appellant's Motion for Reconsideration is treated as being filed under Tax Court Rule 161 or 162 is of no consequence. A

timely filing under either rule is sufficient to require that the Tax Court rule on the motion prior to the appeal period beginning. Because the Appellant's Motion for Reconsideration was timely, the appeal period did not begin until the Tax Court entered is order denying the Appellant's Motion for Reconsideration.

This Court should accept Ninth Circuit's decision in *Nordvik* as highly persuasive on the present matter. This is not only because all circuits which have reviewed *Nordvik* have adopted it, but the reasoning behind the Ninth Circuit's decision is compelling. As the Ninth Circuit explained, it is Supreme Court precedent which dictates this result.

> The benefits of the general rule set forth in *Ibarra* are equally applicable to tax cases. If the time for appeal begins running after denial of a motion for reconsideration, then the tax court has an opportunity to correct its own alleged errors. This procedure reduces the burden placed on courts of appeal.

Nordvik, 67 F.3d at 1493.

The Ninth Circuit in *Nordvik* also considered the advisory committee notes for Fed. R. App. P. 13. According to the Ninth Circuit, Fed. R. App. P. 13 creates a "broad category" of motions, including motions for reconsideration, which "terminate the running of time for appeal." *Nordvik*, 67 F.3d at 1494. The Ninth Circuit noted that the committee notes for Fed. R. App. P. 13 relied heavily on *Robert Louis Stevenson Apartments, Inc. v. Commissioner*, 337 F.2d 681 (8th Cir. 1964).

The Eight Circuit's decision in *Robert Louis Stevenson Apartments* did not turn on a formulistic interpretation of the statute governing Tax Court appeals. Rather, the pertinent issue is "if the taxpayer's motion, whatever he chose to label it, had been granted, the decision of the Tax Court necessarily would have had to have been revised." *Id.* at 683. As noted in *Nordvik*, it is not just Fed. R. App. P. 13 which dictates this result, but also the Supreme Court decision in *Ibarra*. In *Ibarra* the Supreme Court rejected adopting rules which require appellate courts to make determinations regarding the nature of post-judgment or post-order motions to determine if such motions toll the appeals period.

The Supreme Court relied heavily on its prior decisions in *United States v. Healy*, 376 U.S. 79 (1964) and *United States v. Dieter*, 429 U.S. 6 (1976) in arriving at this holding. The Supreme Court stressed the importance of clarity and consistency in determining which motions toll an appeal period. The Supreme Court rejected superficial distinctions based on the type of post-judgment or post-order motion filed, because "it is far better that all such motions be subsumed under one general rule." *Ibarra*, 502 U.S. at 7. Moreover, "[w]ithout a clear general rule litigants would be required to guess at their peril the date on which the time to appeal commences to run." *Id.*

This is precisely why the Ninth Circuit refused to draw an arbitrary line between a motion for reconsideration having no significance under Fed. R. App. P. 13 and a motion to vacate triggering Fed. R. App. P. 13. Courts of Appeals benefit from trial courts being able to correct their own mistakes. As the Supreme Court in *Ibarra* explained "district courts are given the opportunity to correct their own alleged errors, and allowing them to do so prevents unnecessary burdens being placed on the courts of appeals." *Ibarra*, 502 U.S. at 5. If there is no clear rule about which post-order and post-judgment motions toll the appeal period, "[p]rudent attorneys would be encouraged to file notices of appeal from orders of the district court, even though the latter court is in the course of considering a motion for rehearing of the order." *Ibarra*, 502 U.S. at 7.

Therefore, this Court should follow *Nordvik* and *Ibarra* and find that a post-order motion filed under either Tax Ct. R. 161 or 162 tolls the period to file a Notice of Appeal.

B. The Appellant's Motion for Reconsideration is More Properly Treated as Motion to Vacate under Tax Ct. R. 162.

In the case at bar, the Appellant filed a self-styled "Motion for Reconsideration" on June 25, 2017. JA-005 (at Doc. # 58); JA-213. The Tax Court treated this motion as a motion for reconsideration of opinion under Tax Court Rule 161 rather than a

motion to vacate under Tax Court Rule 162. As a threshold matter, a *pro se* litigant should not have his substantive rights determined by the vagaries of the Tax Court electronic filing system. The relief sought in the Appellant's self-styled Motion to Reconsider is clear. "The Petitioner would like to ask the court to respectfully reconsider their decision to dismiss this case for lack of jurisdiction for a number of reasons as the Petitioner will briefly explain below." JA-214. The relief sought in the Appellant's self-styled Motion for Reconsideration is clearly that the Tax Court change its decision dismissing the Appellant's petition, not simply requesting that the Tax Court change its opinion or findings of fact.

This is exactly the situation that the Supreme Court cautioned appeals courts to attempt to avoid in *Ibarra*. It does not behoove this Court to adopt a rule that requires this Court to look inside of the Appellants' motion to determine if the motion is truly a motion to vacate or if it is a motion for reconsideration. The Tax Court Rules offer no substantive guidance as to what differentiates the two motions. *Compare* Tax Ct. R. 161 *with* Tax Ct. R. 162. To the extent that such a difference exists, it is that a motion to vacate is a request that the Tax Court enter a different decision, and a motion for reconsideration is a request that the Tax Court simply rehear the matter (or consider additional evidence).

The substance of the Appellant's motion makes it clear that the Appellant was seeking not a new hearing, but the opposite ruling. The prayer of the Appellant's motion is that "the Court will reconsider their decision and allow Judge Ashford to issue a ruling that corresponds with the transcript of what actually happened in her court room at said hearing." JA-215. The Appellant's motion clearly indicated that the Appellant believes that the Tax Court Judge entered the wrong decision – not that more evidence was necessary, or some piece of evidence or law was not considered, but that the Tax Court Judge entered a decision that was not consistent with what occurred in her courtroom. There is no prayer to reopen the record, or to present new evidence, it is simply a request that the opposite decision be entered.

The caption of the motion is irrelevant to its substance, especially for a *pro se* litigant. Given that the relief requested in the Appellant's motion was that the Tax Court enter a different decision based on the hearing it already conducted, this Court should find that the motion was, in fact, a motion to vacate under Tax Ct. R. 162, and that its filing necessitated the period for filing an appeal be restarted at such time as the Tax Court entered its ruling disposing the Appellant's motion.

II. THE LIMITATIONS PERIOD IN 26 U.S.C. § 7483 IS NOT JURISDICTIONAL, AND IT IS SUBJECT TO WAIVER BY THE APPELLEE.

Section 7483 provides:

> Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the

> decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

26 U.S.C. § 7483.

Section 7483 does not speak in jurisdictional terms. Indeed, 26 U.S.C. § 7482(a) grants appellate courts jurisdiction to hear Tax Court appeals. The Supreme Court "has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that a time bar is not jurisdictional" and that "in applying the clear statement rule, we have made plain that most statutory time bars are nonjurisdictional." *United States v. Kwai Fun Wong*, 191 L. Ed. 2d 533, 542-543 (2015) (cleaned up). Thus, Section 7483 is nonjurisdictional as filing deadlines "are quintessential claim-processing rules." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). *See generally* Appellant's opening brief at pp. 22-27 (discussing Section 7623(b)(4) as nonjurisdictional in nature). Although *Bowles v. Russell*, 551 U.S. 205 (2007), held that the deadline to file a civil appeal from a district court is jurisdictional, it did so purely on a *stare decisis* exception to the general rule, and in *Hamer v. Neighborhood Hous. Servs.*, 193 L. Ed. 2d 249, 257 n.9 (2017), the Supreme Court limited *Bowles* to applying only to appeals between Article III courts (in contrast to appeals from an Article I court (such as the Tax Court)).

It is black letter law that nonjurisdictional claims processing rules are subject to waiver or forfeiture. *See Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) ("a claim-processing rule, ... can nonetheless be forfeited if the party asserting the rule waits too long to raise the point."). Accordingly, the Section 7483 deadline is a nonjurisdictional claims-processing rule subject to waiver and forfeiture, which, by failing to raise this issue earlier in this appeal, the Appellee has waived and/or forfeited the argument that Myers did not timely appeal.

Finally, Circuit Court opinions holding that Section 7483 is jurisdictional, *see, e.g., Davies v. Comm'r*, 715 F.2d 435, 436 (9th Cir. 1983), *Gurta v. Comm'r*, 848 F.2d 190 (6th Cir. 1988) (table), *Severance v. Comm'r*, 10 F.3d 810 (10th Cir. 1993) (table), *Maranto v. Comm'r*, 188 F.3d 514 (9th Cir. 1999) (table), *Twenty Mile Joint Venture, PND, Ltd. v. Comm'r*, 200 F.3d 1268 (10th Cir. 1999), all pre-date the Supreme Court's *Kontrick* decision and have been abrogated. *But see Annamalai v. Comm'r*, 884 F.3d 530, 532 (5th Cir. 2018) (noting that Section 7483's 90-day window is absolute, but when it runs is not; but mistakenly suggesting the filing deadline is jurisdictional based on a misreading of *Hamer* and *Bowles*).

CONCLUSION

Based on the foregoing, this Court has jurisdiction over the instant appeal.

//

Respectfully Submitted,

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2018.11.20 15:22:58 -05'00'

Joseph A. DiRuzzo, III
DiRuzzo & Company
401 East Las Olas Blvd., Suite 1400
Ft. Lauderdale, FL 33301
954.615.1676 (Office)
954.827.0340 (Fax)
jd@diruzzolaw.com

Dated: Nov. 20, 2019

Pro Bono Counsel for the Appellant

CERTIFICATION OF COMPLIANCE

Pursuant to this Court's November 14th order, the instant brief is 2,463 words in length. The brief has been prepared using Microsoft Word, Goudy Old Style font in 14 point.

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2018.11.20 15:23:22 -05'00'

Joseph A. DiRuzzo, III

CERTIFICATE OF SERVICE

This is to certify that a copy of the opening brief was served on counsel for the appellee, Janet A. Bradley, by filing it with the CM/ECF system on November 20, 2018, of which she is a member. This is to certify that a copy of the Appellant's opening brief was served on counsel for the amicus, Carlton M. Smith, by filing it with the CM/ECF system on November 20, 2018, of which he is a member. All counsel in the case are members of the CM/ECF system. Pursuant to Circuit Rule 31 eight paper copies of the Appellant's supplemental brief will be provided to the Court.

Pursuant to Circuit Rule 30 the Supplemental Joint Appendix was filed on Nov. 20, 2018, with the Clerk of Court via CM/ECF and seven paper copies of the Supplemental Joint Appendix will be provided to the Court; a paper copy of the Supplemental; Joint Appendix together with a paper copy of the Appellant's supplemental brief will be provided to counsel for the appellee, Janet A. Bradley via USPS priority mail.

/s/ Joseph A. DiRuzzo, III
Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2018.11.20 15:23:37 -05'00'
Joseph A. DiRuzzo, III