No. 03-1480

In the Supreme Court of the United States

DOMER L. ISHLER AND
20TH CENTURY MARKETING, INC., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

BRUCE R. ELLISEN
TERESA T. MILTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the judicial estoppel doctrine is applicable to the facts of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 03-1480

DOMER L. ISHLER AND
20TH CENTURY MARKETING, INC., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is *reprinted in* 88 Fed. Appx. 385. The opinion of the Tax Court (Pet. App. 20a-55a) is not published in the *Tax Court Reporter* but is *available in* 2002 WL 467216.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2003. On March 3, 2004, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 23, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ishler was the president and sole shareholder of petitioner 20th Century Marketing, Inc. (TCM), a corporation that acted as the sales representative for various electronics companies. Pet. App. 22a, 27a. In 1986, TCM sold small quantities of radio/cassette players for Nissei Sangyo America, Ltd. (NSA) to the Chrysler Corporation, earning a commission on each sale. *Id.* at 27a, 30a-31a.

In 1987, after Chrysler indicated that it would place a large order for the players, NSA drafted an agreement to govern its relationship with TCM with respect to these sales. Pet. App. 27a-28a. Ishler, however, asked NSA to name a shell corporation, Camaro Trading Co., Ltd. (Camaro), not TCM, as the sales representative on the account and to pay commissions to Camaro, even though Camaro had played no role in the sale of the players and NSA continued to treat TCM as its sales representative. *Id.* at 28a, 31a-32a.

Throughout 1987 and 1988, Ishler directed Camaro to make substantial payments to him or on his behalf. Pet. App. 32a-35a. Ishler did not disclose those payments to his accountant and did not report the Camaro funds on his or TCM's tax returns for 1987 and 1988. *Id.* at 36a. In addition, Ishler deposited checks payable to TCM directly into his personal bank account and used TCM's funds for the benefit of himself and his family. *Id.* at 30a-31a.

In March 1997, petitioners were indicted by a grand jury on several counts of tax evasion and tax fraud. Under a plea agreement with the United States, TCM pleaded guilty to filing a false tax return, and Ishler pleaded guilty to making a false statement in a loan application by failing to disclose a $100,000 loan that he

had received from Camaro. Pet. App. 37a; see 18 U.S.C. 1014. In anticipation of an action to recover unpaid taxes, the plea agreement provided that it "in no way applies to or limits any pending or prospective proceedings, related to the defendant's *tax liabilities*, if any." Pet. App. 9a.

2. The Commissioner of Internal Revenue audited petitioners and determined that TCM had understated its income in 1987 and 1988 by failing to report the commissions it had earned but diverted to Ishler and Camaro. Pet. App. 39a-40a. In addition, the Commissioner determined that Ishler had over $1 million of unreported income in 1987 and 1988 as a result of his receipt of funds from TCM and Camaro. *Id.* at 40a. Finally, the Commissioner concluded that Ishler was subject to a tax-fraud penalty for tax years 1987 and 1988 and that TCM was liable for that penalty for 1987.

3. The Tax Court upheld the Commissioner's determinations in substantial part. Pet. App. 20a-55a. After a trial, it found that Ishler had diverted TCM's funds for his personal use by directly depositing checks payable to TCM into his own account and re-directing sums TCM had earned to Camaro and then himself. *Id.* at 30a-35a. It further found that petitioners had understated their incomes by failing to account for those diverted funds. *Id.* at 39a-44a. The Tax Court concluded that Ishler had failed to report constructive dividends from TCM in the amount of $308,723.36 in 1987, and had failed to report his distributive share of TCM's unreported income of $1,421,217.97 in 1988. *Id.* at 44a. Ishler and TCM were liable for income tax deficiencies (*id.* at 56a-59a) in the aggregate amount of $513,087 and $117,638, respectively, and both owed additions on those taxes. Ishler was also found liable

for a tax penalty for fraud under then 26 U.S.C. 6653(b) (Supp. V 1987). Pet. App. 59a.

4. In a summary opinion, the court of appeals affirmed. Pet. App. 1a-2a. It concluded that "the Tax Court's findings are amply supported, and thus not clearly erroneous." *Id.* at 2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 3) that in characterizing the transfer of funds from Camaro to Ishler as the payment of income, rather than a loan, the lower courts "ignored" the judicial estoppel doctrine. Specifically, they claim that, under settled principles of judicial estoppel, respondent cannot argue that the transfers constituted income, because Ishler's 1997 plea agreement represented that Ishler had received a $100,000 loan from Camaro.[*] Pet. 4-6.

Petitioners fail to identify any conflict among the circuit courts over general principles of judicial estoppel. To the contrary, they seek to challenge only the fact-bound application of well-settled legal principles to this case. There is thus no disagreement among the circuit courts to warrant further review by this Court.

---

[*] The petition contains no argument concerning petitioner TCM's guilty plea, and TCM did not argue below that its plea agreement precludes the deficiency determined against it. TCM therefore may not challenge the lower court's decision with respect to it. *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("[i]n the ordinary course we do not decide questions neither raised nor resolved below"); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001) (declining to reach issue "because it was not raised or briefed below").

2. In any event, the decision below is correct. Judicial estoppel is inapplicable here because the plea agreement, by its terms, can have no preclusive effect in this proceeding. The plea agreement expressly provides that it will "in no way appl[y] to or limit[] any pending or prospective *forfeiture* or other civil or *administrative proceedings*." Pet. App. 9a. It further states that the agreement "in no way applies to or limits any pending or prospective proceedings, related to the defendant's *tax liabilities*, if any." *Ibid.* The obvious purpose and effect of these provisions is to preclude petitioners from asserting estoppel arguments based on the representations in the plea agreement.

3. In addition, even assuming *arguendo* that judicial estoppel may be available against the government, the facts of this case would not support the application of judicial estoppel. Judicial estoppel requires that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895). Respondent's position is not "clearly inconsistent" with the plea agreement, as judicial estoppel requires. *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001).

The plea agreement represented only that Ishler had "submitted false financial statements wherein he failed to disclose that he had a loan in the approximate amount of $100,000.00 outstanding to Camaro." Pet. App. 4a. This representation is not clearly inconsistent with the Tax Court's determination that "all of TCM's unreported income was constructive dividend income to petitioner [Ishler] because he caused NSA to divert

TCM's income to Camaro and he used some of the diverted funds for his own benefit." *Id.* at 43a. The decision of the Tax Court does not require that every transaction between Camaro and Ishler be characterized as the payment of income. Rather, it rests on the finding that Ishler caused the diversion of income from TCM to Camaro and diverted some of those funds for his own use. See *id.* at 30a-35a, 42a-43a. There is no inconsistency between those findings and Ishler's earlier admission in the plea agreement that he borrowed some money from Camaro, because the record does not show that Camaro's sole asset was this diverted income.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

BRUCE R. ELLISEN
TERESA T. MILTON
Attorneys

JUNE 2004