No. 00-1656

In the Supreme Court of the United States

WENDA K. SHALTRY, BANKRUPTCY TRUSTEE FOR HOME AMERICA T.V.-APPLIANCE AUDIO, INC., J.G. BOYD T.V.-APPLIANCE AUDIO, INC., CHARLESTON T.V. & APPLIANCE CO., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSEN
Solicitor General
Counsel of Record

CLAIRE FALLON
Acting Assistant Attorney General

THOMAS J. CLARK
Attorney

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

QUESTION PRESENTED

Whether the relief sought in this suit is precluded by the two-year statute of limitations in 11 U.S.C. 549(d) for actions to avoid transfers of property of the debtor in a bankruptcy case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 00-1656

WENDA K. SHALTRY, BANKRUPTCY TRUSTEE FOR HOME AMERICA T.V.-APPLIANCE AUDIO, INC., J.G. BOYD T.V.-APPLIANCE AUDIO, INC., CHARLESTON T.V. & APPLIANCE CO., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A8-A26) is reported at 232 F.3d 1046. The opinion of the district court (Pet. App. A55) and the opinion of the bankruptcy court (Pet. App. A31-A54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2000. The petition for rehearing was denied on January 22, 2001. Pet. App. A29. The petition for a writ of certiorari was filed on April 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In early 1989, Maryland Investments, Inc., acquired the stock of Home America T.V.-Appliance Audio, Inc. (Home America) and thereby became the common parent of a consolidated group consisting of itself, Home America and the two subsidiaries of Home America. Pet App. A13; see 26 U.S.C. 1504(a). On September 6, 1989, the creditors of Home America filed an involuntary petition in bankruptcy against that corporation. Pet. App. A14. The subsidiaries of Home America were later included in these proceedings by order of the bankruptcy court. Home America and its subsidiaries are therefore referred to collectively as the "debtors." *Ibid*.

On September 14, 1989, prior to the appointment of a trustee or the issuance of an order for relief, Maryland Investments, Inc.—which was not itself a debtor in the bankruptcy case—filed a consolidated tax return with the Internal Revenue Service for itself and the debtors. Pet. App. A14. This return was filed during the period in which Home America was permitted to operate its business as debtor-in-possession under 11 U.S.C. 303(f). The debtors expressly consented to the filing of the consolidated return under 26 U.S.C. 1501. Pet. App. A14. The return, which included the items of income and deductions of the debtors for the period from April 1, 1989 to June 30, 1989, reported a net operating loss of $2.2 million. All of this loss was attributable to the operations of the debtors. *Ibid*.

2. a. During the years involved in this case, Section 172(b)(1)(A)-(B) of the Internal Revenue Code, 26 U.S.C. 172(b)(1)(A)-(B) (1988), allowed a net operating loss to be carried back as a deduction against income during the three years preceding the year of the loss

and, to the extent the loss was not fully absorbed by income in the carryback years, to be carried forward to each of the fifteen years following the year of the loss. 26 U.S.C. 172(b)(1)(A)-(B) (1988).[1] Under Section 172(b)(3) of the Internal Revenue Code, a taxpayer may, for any tax year, elect to relinquish the carryback period and instead only carry the net operating loss for that year forward. 26 U.S.C. 172(b)(3). Once made, that election is "irrevocable for such taxable year. *Ibid*.

b. On the consolidated return filed by Maryland Investments, Inc., the taxpayers elected under 26 U.S.C. 172(b)(3) to relinquish the carryback period for the net operating loss reported on that return. That loss was instead used in the computation of the tax liability of Maryland Investments, Inc., for the carry-forward periods ending December 31, 1989, and December 31, 1990.

3. On September 20, 1989, petitioner was appointed trustee of the Chapter 7 bankruptcy proceeding. Pet. App. A35. On May 24, 1991, petitioner filed an amended return on behalf of the debtors for the tax year ending June 30, 1989–-which included the period for which the debtors had joined in the consolidated return filed on September 14, 1989, by Maryland Investments, Inc. *Id*. at A14-A16. On the amended return, petitioner sought to carry back to 1986 and 1987 the net operating loss that the debtors had incurred during the year ending June 30, 1989. That net operating loss, however, had already been used by Maryland Investments, Inc., to offset its income for the taxable periods ending December 31, 1989 and December 31, 1990. The belated attempt of petitioner

---

[1] The carryback period is currently two years, and the carry-forward period is twenty years.

to carry back this net operating loss—and thereby to disavow the "irrevocable" election made by the debtors under Section 172(b)(3)—gave rise to a refund claim of more than $1.6 million for the 1986 and 1987 tax years of the debtors. Pet. App. A16, A35.

In submitting the amended return, petitioner contended that the consent of the debtors to be included in the consolidated return, and the election that they made under Section 172(b)(3) to forgo the carryback of their net operating loss, constituted an improper "transfer of property of the estate * * * after the commencement of the [bankruptcy] case" that should be voided under Section 549(a) of the Bankruptcy Code, 11 U.S.C. 549(a). Pet. App. A16 n.13, A35.[2] Petitioner requested an audit of the amended return under Section 505(b) of the Bankruptcy Code, 11 U.S.C. 505(b).[3] On September 17, 1991, the Internal Revenue

---

[2] Section 549(a) of the Bankruptcy Code authorizes the trustee to avoid a postpetition "transfer of property of the estate." 11 U.S.C. 549(a). Section 548(a)(1) of the Code similarly authorizes the trustee to avoid a "transfer of an interest of the debtor in property" that was made within one year before the date of the filing of the petition if the transfer was in fraud of the debtor's creditors. 11 U.S.C. 548(a)(1). The United States does not agree that an election under Section 172(b)(3) of the Internal Revenue Code to relinquish the carryback period for a net operating loss is a transfer of "an interest of the debtor in property" or of "property of the estate" within the scope of Sections 548 and 549. Two courts of appeals, however, have held to the contrary. See *In re Feiler*, 218 F.3d 948, 955-956 (9th Cir. 2000); *In re Russell*, 927 F.2d 413 (8th Cir. 1991). In the present case, the court of appeals did not reach this underlying issue because it concluded that the statute of limitations had run on petitioner's claim. See Pet. App. A19.

[3] Section 505(b) establishes deadlines for audits with respect to "any tax incurred during the administration of the case."

Service informed petitioner that "your return has been accepted as filed." Pet. App. A16.

4. On September 24, 1991, petitioner commenced an action in the bankruptcy case to avoid the debtors' consent to join in the consolidated return, to avoid their election to relinquish the carryback period and to recover $1.6 million of taxes from the United States. Pet. App. A20-A21. Petitioner also filed suit against Maryland Investments, Inc., to recover the tax benefits that the company obtained from its use of the loss carryforwards from the debtors' operations. *Id.* at A17. On December 12, 1991, petitioner settled its suit against Maryland Investments, Inc. *Ibid.*[4]

Petitioner filed a motion for summary judgment in the action against the government. Pet. App. A17. The government argued that the avoidance powers conferred upon trustees by the Bankruptcy Code do not empower trustees to avoid elections that are made irrevocable by the Internal Revenue Code. *Id.* at A44-A45; see also note 2, *supra*. The government also argued that the consent and election made by the debtors could not be voided because the two-year limitations period under Section 549(d)(1) expired ten days before petitioner commenced this adversary proceeding on September 14, 1991. Pet. App. A46-A47. The government also moved for dismissal because petitioner had failed to join an indispensable party to this case (Maryland Investments, Inc.). *Id.* at A17.

---

11 U.S.C. 505(b). That provision is inapplicable to this case because the tax years involved here predated the bankruptcy case.

[4] Maryland Investments, Inc., was a creditor of the debtors in the bankruptcy case. The settlement agreement entered into between the trustee and Maryland Investments, Inc., provided for Maryland Investments, Inc., to share in any proceeds from the tax refund claim of the debtors. Pet. App. A17.

The bankruptcy court granted petitioner's motion for summary judgment, but the district court reversed. Without reaching any other grounds, the district court held that Maryland Investments, Inc., was an indispensable party that must be joined in the action. Pet. App. A17-A18. On remand, petitioner filed an amended complaint that joined Maryland Investments, Inc., as a defendant. In the amended complaint, petitioner sought (i) a declaration voiding the debtors' consent to join in the consolidated returns with Maryland and voiding their election to forgo carrying back the net operating loss and (ii) a tax refund of $1.6 million from the United States. *Id.* at A20-A21.

The bankruptcy court granted petitioner's motion for summary judgment on the amended complaint. The court held that "the Trustee is entitled to the declaratory relief sought against Maryland Investments" and to the resulting tax refund sought from the United States. Pet. App. A32. The district court affirmed in a brief order that stated that it did not find the bankruptcy court's decision to be "clearly erroneous." *Id.* at A55.

5. The court of appeals reversed. Pet. App. A8-A26. The court emphasized that petitioner's action involves two distinct steps: first, petitioner seeks to avoid the debtors' consent to join in the consolidated return and Maryland's "irrevocable" election to relinquish the carryback period for the net operating loss; second, if successful in avoiding these prior actions of the debtors (and thereby revoking their "irrevocable" election), petitioner seeks a tax refund based on the carryback of the net operating losses. *Id.* at A20-A21. The court pointed out that "the claim for a refund is futile unless the Trustee is successful in her affirmative claim to avoid the transfer under § 549." Pet. App. A21. The

first claim, on which petitioner must succeed to pursue the second, is barred, however, because it was not commenced within two years from the date of the purported transfer, September 19, 1989. *Id.* at A22.[5] Because the trustee waited more than two years after the purported transfer to commence an action to exercise her avoidance powers, the court held that "the action is barred by the limitations period of § 549(d)." Pet. App. A22.

ARGUMENT

The narrow question presented in this case has arisen only twice in any litigation of which we are aware.[6] Although the two appellate decisions that have confronted this question have reached conflicting results, the conflict between these circuits is not yet irreconcilable.[7] In view of the narrowness of the question

---

[5] As discussed above, the "transfers" in question are (i) the debtors' consent to join with Maryland in filing a consolidated return and (ii) the taxpayers' election under 26 U.S.C. 172(b)(3) to relinquish the carryback period for the net operating losses reported on the return. The government maintained that these "transfers" were made on September 14, 1989—the date that the consolidated return was mailed to the Internal Revenue Service. See 26 U.S.C. 7502(a). Petitioner maintained, however, that the transfers were made on September 19, 1989, the date that the return was received by the Service. The court of appeals found it unnecessary to resolve that dispute because, under either view of the facts, petitioner's avoidance claim was untimely under Section 549(d)(1). Pet. App. A22 n.16.

[6] Aside from the present case and the Eighth Circuit's contrary decision in *In re Russell*, 927 F.2d 413 (1991), we are not aware of any other decision—by any court of appeals, district court or bankruptcy court—that has discussed or ruled on this narrow statute of limitations issue.

[7] In view of the dissenting opinion of Judge Gibson in *In re Russell*, 927 F.2d at 419, and the recent conflicting decision of the

presented, and the rarity of the cases in which it is presented, review by this Court does not appear warranted at this time.[8]

1. Section 549(d)(1) of the Bankruptcy Code specifies that an action to avoid a postpetition transfer must be commenced within two years from "the date of the transfer sought to be avoided." 11 U.S.C. 549(d)(1).[9] Petitioner sought in this action to avoid the debtors' consent to file a consolidated return and their election to relinquish the carryback period for the net operating loss reported on that return. While the tax return on which the consent and election were made was filed on September 14, 1989, petitioner did not commence this action until more than two years later—on September 24, 1991. The court of appeals thus correctly held that petitioner's action to avoid the consent and elections as unauthorized postpetition "transfers" of the debtors' property is barred by the plain text of Section 549(d)(1). Pet. App. A22. See also note 5, *supra*.

Ninth Circuit in this case, the Eighth Circuit may rehear the issue en banc if it is presented again in that circuit.

[8] The question presented in this case is not likely to recur with any frequency because trustees have two years to bring an avoidance action under Section 549(d)(1) and there is rarely any valid reason for a trustee to delay prompt compliance with this deadline.

[9] Petitioner contends (Pet. 22) that the two-year limitation period set forth in 11 U.S.C. 549(d) is not absolute, and is subject to equitable tolling. Petitioner has failed, however, to show any extraordinary circumstances that would justify tolling. To the contrary, it is clear, as the court of appeals concluded, that nothing prevented petitioner from filing a timely avoidance action under 11 U.S.C. 549(a) within the period of limitations. See Pet. App. A24-A25. This equitable tolling claim is, in any event, inherently factual, does not involve any conflict among the circuits, and does not warrant review by this Court.

Petitioner nonetheless contends (Pet. 14) that this action is not governed by the two-year limitations period in Section 549(d)(1) because this is a tax refund suit rather than a suit to avoid a postpetition transfer. As the court of appeals explained, however, petitioner actually and necessarily sought *two* forms of relief. First, she sought to avoid a "transfer" of estate property, pursuant to Section 549(a) of the Bankruptcy Code. Second, if that relief were obtained, she then sought a refund of income tax pursuant to 26 U.S.C. 7422(a). She is not entitled to the second form of relief (the tax refund) unless she is first able to avoid the "transfer" under Section 549(a). By the time that petitioner filed this action, however, she was barred from obtaining the first form of relief because the limitations period set forth in Section 549(d) had expired. Because petitioner did not file a timely action to avoid the transfer, she lacked any legal basis upon which to assert a claim for a tax refund. Pet. App. A21.

2. The Eighth Circuit reached a contrary result on an indistinguishable set of facts in *In re Russell*, 927 F.2d 413 (1991). In that case, the panel majority held that the tax refund statute of limitations was controlling because the trustee had filed a suit seeking a tax refund. *Id.* at 417. As the dissenting judge in that case explained, however, the panel majority in *In re Russell* failed to recognize that, before obtaining a tax refund, the trustee first needed to succeed in his avoidance action (*id.* at 419 (Gibson, J., dissenting)):

> The critical failing of the court's argument is that a necessary predicate for the tax refund suit is the trustee's attempt to avoid the taxpayer's election to carry forward net operating losses. Without avoidance of this election, there is no tax refund claim.

Because the trustee was barred by the statute of limitations from bringing an action to avoid the transfer under Section 549 of the Bankruptcy Code, he had no valid claim for a tax refund. *Ibid.*[10]

The same is true in the present case. Unless the consent of the debtors to participate in the consolidated return and their joint election to relinquish the carry-back period for the net operating loss reported on that return are avoided as improper "transfers" under Section 549(a), petitioner has no valid basis for asserting a cause of action for a refund of taxes. The statute of limitations for tax refund claims is thus immaterial to the present case: the trustee cannot prevail *on the merits* of the tax refund claim because the statute of limitations on avoidance actions precludes her effort to rescind the consents and elections that she challenges under Section 549.[11]

3. Petitioner belatedly argues (Pet. 24) that the filing of the consolidated return by Maryland Investments, Inc., after the commencement of the bankruptcy case violated the automatic stay and that the consents

---

[10] Petitioner contends (Pet. 17) that this approach will require a trustee in many instances to file two separate proceedings. Although this may be so in some cases, petitioner still is not entitled to a refund unless she succeeds in her avoidance action. The fact that a trustee may have to file two actions, first an avoidance action, and second a refund suit if the avoidance action is successful, only ensures that the refund claim will not go forward unless the trustee is entitled to avoid a debtor's election. Petitioner claims (Pet. 18-19) that this two-step process may be impossible because the avoidance action may be pending even as the period of limitation for refund claims expires. Petitioner, however, could file a protective refund claim.

[11] For the reasons we have explained, the fact that the panel majority in *Russell* reached a contrary result does not warrant review by this Court at this time. See page 7 & note 7, *supra*.

and elections set forth in that return are therefore void. That issue was first raised by petitioner in her petition for a writ of certiorari. It is therefore not properly before the Court. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, in the brief that petitioner filed in the court of appeals (Br. 26 n. 10), she took precisely the opposite position and stated that she was *not* asserting any violation of the automatic stay "because the debtor nominally joined in the tax return and elections voluntarily."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSEN
Solicitor General

CLAIRE FALLON
Acting Assistant Attorney General

THOMAS J. CLARK
Attorney

JUNE 2001